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Field

Briefs

Submitted

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1,067~~ 709 ~~1102~~ 155

ARTHUR PICKERING, CHARLES R. VICKERY, H. D. ATWOOD, EXECUTOR OF CHARLES R. ATWOOD, DECEASED, AND THE PHŒNIX MANUFACTURING COMPANY, APPELLANTS,

vs.

MICHAEL McCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBAUGH, AND H. E. DUBARRY, PARTNERS, AS McCULLOUGH, DALZELL & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED 8th JANUARY, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 1,067.

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vs.

MICHAEL McCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBAUGH, AND H. E. DUBARRY, PARTNERS, AS McCULLOUGH, DALZELL & CO.

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1 AMONG the rolls, records, and judicial proceedings of the Circuit Court of the United States in and for the western district of Pennsylvania, in an action in equity, wherein the Phœnix Manufacturing Company, a corporation under the laws of the State of Massachusetts, is complainant, and McCullough, Dalzell & Company are respondents, and entered at No. 53 of May Term, 1877, of said court, may be found the words and figures following:

EQUITY DOCKET ENTRIES.

ARTHUR PICKERING, CHARLES R. VICKERY, CHARLES R. ATWOOD, and THE PHŒNIX MANUFACTURING COMPANY, a corporation under the laws of the State of Massachusetts,

vs.

MICHAEL MCCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBERG, and H. E. DU BARRY, trading under the name of MCCULLOUGH, DALZELL & COMPANY.

1877, January 9.—Bill filed; subpœna issued same day; returnable first Monday of February next; also notice for a preliminary injunction, returnable Saturday, February 10, 1877, at 10 o'clock A. M.

1878, January 9.—Subpœna and notice served personally and by copy upon each of defendants; U. S. M., $20.

1877, February 10.—Motion for preliminary injunction in the above case argued in part, and motion withdrawn without prejudice.

1877, August 3.—Answer of respondents filed.

2 1877, September 10.—Replication of complainants filed.

1877, Oct. 9.—Depositions taken on part of respondents before James I. Kay, U. S. Commissioner, filed. 1877, December 6.—Depositions taken on part of complainants before James I. Kay, U. S. Commissioner, filed. Same day, depositions taken on part of complainant, before William Pintard, notary public, by agreement of counsel, at Jersey City, New Jersey, filed. Also, same day, depositions taken on part of complainants before Charles F. Sleeper, special examiner, numbered (1) (2) (3) (4) (5) (6), filed.

1877, Dec. 10.—The above cause came on to be heard, upon bill, answer, replication, and proofs, and was argued by counsel for complainants. 1877, Dec. 11.—Arguments of the counsel for the respective parties concluded, C. A. V. 1878, May 13.—Opinion of the court filed, allowing a decree to be entered dismissing the bill in the above case. Same day, decree, in accordance with the opinion of the court, filed. 1878, August 3.—Upon petition presented, and on motion of Rob't Robb, Esq., appeal of complainants from the decree of this court to the Supreme Court of the United States allowed. 1878, September 7.—On motion of complainants' counsel, the appeal

entered in the above case allowed to be, and the same is hereby, withdrawn as per order filed.

1878, September 21.—Bill setting forth the death of Charles
3 R. Atwood, one of the complainants in this case, the issuing of letters testamentary upon the will of said Charles R. Atwood to Henry D. Atwood, and praying that the above-entitled suit be revived and be in the same plight and condition as it was at the time of the abatement thereof, together with the waiver of the issuing of a subpœna thereon, filed. Same day, answer of respondents to said bill filed. Also same day, order granted allowing the above-entitled suit to be revived, with Henry D. Atwood, executor of Charles R. Atwood, as one of the complainants therein, as prayed for in said bill, filed. Same day, the decree heretofore entered in this suit vacated and set aside.

1878, September 23.—Cause came on to be heard, and after consideration by the court, decree allowed dismissing the bill in this case, with costs of suit to be taxed against the complainants herein. 1878, November 12.—Appeal from the decree herein to the Supreme Court of the United States allowed in open court.

4 In the Circuit Court of the United States for the Western District of Pennsylvania. In Equity.

Bill of Complaint.—Filed

To the Judges of the Circuit Court of the United States for the Western District of Pennsylvania.

Arthur Pickering, of Hull, in the State of Massachusetts, Charles R. Vickery and Charles R. Atwood, both of Taunton, in said State, and the Phœnix Manufacturing Company, a corporation duly established by the Commonwealth of Massachusetts, and having its principal place of business at said Taunton, all citizens of said State, bring this their bill of complaint against Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Dubarry, partners, and trading under the name and style of McCullough, Dalzell & Co.

And thereupon your orators complain and say, that heretofore and before the first day of August, 1865, George Nimmo was the original and first inventor of a certain new and useful improvement in moulding crucibles not known or used before, and not in public use or on sale for more than two years prior to his application for a patent therefor.

And your orators further show unto your honors, that the said Nimmo, so being the inventor of said improvement in moulding crucibles, made application to the proper department of the government of the United States for letters patent, in accordance with the then existing acts of Congress, and duly complied in all respects with the conditions and requirements of said acts, and that on the first day of August, 1865, letters patent of the United States, numbered 49,140, signed, sealed, and executed in due form of law for the said invention

or discovery, were issued to the said Nimmo, whereby there
5 were secured to him, his heirs, executors, administrators, or assigns, for the term of seventeen years from the first day of August, 1865, the full and exclusive right of making, using, and vending the said invention or discovery throughout the United States and the Territories thereof, all which, by the reissue of the said letters patent, or by a duly-certified copy thereof now in court produced and shown to your honors, will more fully appear.

And your orators further show unto your honors, that on or before the eighth day of December, 1874, by mesne assignments duly recorded in the United States Patent Office, all right, title, and interest in, to, and under said letters patent became vested in your orators, all which, by said assignments, with the certificate of the recording thereof thereto annexed, or by duly-certified copies thereof now in court produced and shown to your honors, will more fully appear.

And your orators further show unto your honors, that afterwards, to wit, before the eighth day of December, 1874, said letters patent were duly surrendered and cancelled on account of a defective specification in accordance with the statute, and that thereupon new letters patent, reissue No. 6,166, for the same invention, bearing date upon the day and year last above mentioned, were issued and delivered to your orators, whereby there were granted them, their heirs, administrators, and assigns, for the term of seventeen years from the first day of August, 1865, the exclusive right to make, use, and vend the said invention, all which, by said reissued letters patent, or by a duly-certified copy thereof now in court produced and shown to your honors, will more fully appear.

And your orators further show unto your honors, that on or about the fifteenth day of February, 1875, they filed their bill of complaint in the Circuit Court of the United States for the district of Massachusetts against W. H. Phillips, Artemas Briggs, and Daniel A. Trefethen, complaining that they had infringed said reissued letters patent No. 6166, and praying relief; that issue was joined by said Phillips, Briggs, and Trefethen, and evidence was taken by both parties, and that after final hearing upon the pleadings and proofs and argument of counsel for both parties, a decree was entered for the complainants on or about the seventh day of October, 1876, and the said re-
reissued letters patent No. 6,166 adjudged to be a good and
6 valid patent, a copy of which decree is hereto annexed, marked "A," which your orators pray may be taken as a part hereof, all which by the records of the honorable the Circuit Court of the United States for the said district of Massachusetts will more fully and at large appear.

And your orators further show unto your honors, that the exclusive right so vested in your orators is of very great value and importance, and that the said patented invention has been extensively used, and that the demand therefor is very large; yet, the defendants well knowing the premises and the rights secured to your orators as aforesaid by the letters patent reissue No. 6,166, dated De-

cember 8, 1874, and utterly disregarding the same, have, at Pittsburgh, in the said western district of Pennsylvania, and at divers other places in the United States, in violation of the rights secured by said letters patent, and ever since the eighth day of December, 1874, unlawfully used the said patented invention described in the said reissue No. 6,166, and still continue to do so, and the defendants have derived and are still deriving from such use of said invention large gains and profits, but to what amount your orators are ignorant and cannot set forth; and your orators are greatly damaged by such wrongful acts and doings of the defendants, to wit, in the sum of fifty thousand dollars. And your orators further show unto your honors that they will be subject to great and irreparable damage unless your honors will grant the relief hereby sought.

To the end therefor that the defendants may upon oath full, true, direct, and perfect answers make to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated, according to the best of their knowledge, information, and belief.

And that the defendants, and the attorneys, agents, servants, and workmen of the defendants may be enjoined perpetually and also during the pending of this suit by writs of injunction to be issued by this honorable court from making, using, or selling the invention patented in said letters patent reissue No. 6,166, or any material or substantial part thereof claimed therein as new; and that the defendants may be decreed to account for and pay over to your orators
7 all the gains which have accrued to the defendants from using said invention or any material and substantial part thereof, claimed in the said letters patent reissue No. 6,166 as new, and that the damages sustained by your orators may be assessed, and the defendants be decreed to pay over to your orators, in addition to such gains and profits, the damages your orators have sustained by such unlawful acts and doings, and for such other and further relief as to your honors may seem meet.

May it please your honors to grant unto your orators not only the writs of injunction conformable to the prayer of this bill, but also the writ of subpœna directed to said Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Dubarry, partners trading under the name and style of McCullough, Dalzell & Co., commanding them to appear and answer this bill of complaint, and to do and receive what to your honors seem meet; and your orators will ever pray, &c.

ARTHUR PICKERING.
C. R. VICKERY.
CHAS. R. ATWOOD.
C. R. VICKERY, *Pres't*,
PHŒNIX MFG. CO.

J. E. MAYNADIER, *of Counsel.*

STATE OF MASSACHUSETTS,
County of Bristol.

On the eighth day of December, 1876, personally appeared the above-named Charles R. Vickery and Charles R. Atwood, and severally made oath that all the statements in the above bill by them signed contained, were true, to the best of their knowledge, information, and belief. Before me, CHAS. A. REED,
[OFFICIAL SEAL.] *Notary Public.*

8 "A."

Circuit Court of the United States, District of Mass., May Term, 1876.

ARTHUR PICKERING *et al.*, Complainants,
vs.
WILLIAM H. PHILLIPS *et al.*, Defendants. } In Equity.

Decree for Perpetual Injunction and for Reference to a Master.

This cause came on to be heard at this present term upon the pleadings and proofs, and was argued by counsel for the respective parties.

And now, upon consideration thereof, to wit, Sept. 1st, 1876, it is *ordered, adjudged, and decreed* as follows, viz.: That the letters patent referred to in the complainants' bill being reissued letters patent of the United States, granted unto the complainants as assignees of one George Nimmo, dated December 8, 1874, numbered reissue 6,166, for an improvement in moulding crucibles, is a good and valid patent, and that the said George Nimmo was the original and first inventor of the improvement described and claimed therein. And that the said defendants have infringed the said patent, and upon the exclusive rights of the complainants under the same. And it is further *ordered, adjudged, and decreed* that the complainants recover of the defendants the profits which they have received or made, or which have accrued to them from said infringement by the manufacture, use, or sale of the improvement described and secured by said letters patent at any and all times since the eighth day of December, A. D. 1874, and also the damages which the complainants have sustained thereby. And it is further *ordered, adjudged, and decreed* that it be referred to John G. Stetson, Esq., a master of this court, to take and report to the court an account of the profits which the said defendants have received, or which have arisen or accrued to them from the manufacture, use, or sale of said improvement, or from said infringement, and to ascertain and report the damages which the com-
9 plainants have sustained thereby since the eighth day of December, A. D. 1874. And it is further *ordered, adjudged, and decreed* that a perpetual injunction be issued against the defendants, according to the prayer of the bill. And it is further ordered, ad-

judged, and decreed that the complainants recover of the defendants their costs of suit.

By the court: JOHN G. STETSON, *Clerk.*

A true copy. Attest:

[SEAL.] ALEX. H. TROWBRIDGE, *Deputy Clerk.*

10 *Subpœna.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania.

The United States of America to Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Du Barry, partners under the name of McCullough, Dalzell & Co., greeting:

We command you, and every of you, that you appear before our judges of our Circuit Court of the United States of America for the western district of Pennsylvania at the city of Pittsburgh, in said district, on the first Monday of February next, to answer the bill of complaint of Arthur Pickering, Charles R. Vickery, and Charles R. Atwood, citizens of the State of Massachusetts, and the Phœnix Manufacturing Company, a corporation of the State of Massachusetts, for infringement of letters patent this day filed in the clerk's office of said court, in the city of Pittsburgh, then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default. And this you are in nowise to omit, under such penalties as are inflicted by the laws of the United States.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of
11 Pittsburgh aforesaid, this 9th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st.

H. D. GAMBLE, *Clerk.*

Memorandum: The above-named defendants are required to enter an appearance in this suit in the clerk's office of said court on or before the day to which the above writ is returnable; otherwise the complaint will be taken against them as confessed, and a decree entered accordingly. H. D. GAMBLE, *Clerk.*

Endorsed: No. 53, May Term, 1877; Circuit Court United States; A. Pickering *et al. vs.* McCullough, Dalzell & Co.; Chancery Subpœna; Returnable to First Monday in February, A. D. 1877.

H. D. GAMBLE, *Clerk.*

ROBERT ROBB, *Complainant's Solicitor.*

Service: January 9, 1877, served the within writ, personally and by copy, upon M. McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Du Barry. JOHN HALL, *U. S. M.*

Per R. K. CAMPBELL, *Deputy.*

Notice for Injunction.

12 In the Circuit Court of the United States for the Western District of Pennsylvania.

PICKERING ET AL.
vs.
McCULLOUGH, DALZELL & Co. } No. 53. May Term, 1877.

And now, to wit, January 9th, 1877, on motion of counsel for complainant, a motion for preliminary injunction against the respondent above named, as prayed for in complainants' bill, will be heard before the said court, at Pittsburgh, Penna., on the 10th day of February, A. D. 1877, at 10 o'clock A. M.

[SEAL.] H. D. GAMBLE, *Clerk.*

Endorsed: No. 53, May Term, 1877; A. Pickering *et al. vs.* McCullough, Dalzell & Co.; Notice of Motion for a Preliminary Injunction. ROBERT ROBB, *Sol. for Compl't.*

Service: January 9, 1877, served the within notice, personally and by copy, upon M. McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Du Barry, composing the firm of McCullough, Dalzell & Co. JOHN HALL, *U. S. M.*,
Per R. K. CAMPBELL, *Deputy.*

Answer.

13 PICKERING *et al.*
vs.
McCULLOUGH, DALZELL & Co. }

To the Honorable the Judges of the Circuit Court of the United States in and for the Western District of Pennsylvania:

The joint and several answer of Michael McCullough, Jr., John H. Dalzell, C. C. Arensburg, and Henry E. Du Barry, respondents, to the bill of complaint of Arthur Pickering and others, complainants.

These respondents, now and at all times hereafter, saving and reserving unto themselves all and all manner of benefit and advantage of exception which may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereunto, or to so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say:

1st. That they are informed and believe, and therefore admit it to be true, that letters patent No. 49,140 were granted and issued to George Nimmo, for an alleged or pretended new and useful improvement in moulding crucibles, on the 1st day of August, 1865, but whether the same were duly assigned and transferred to the said complainants, these respondents are not informed, save by the complainants' said bill of complaint, and therefore demand proof of the same.

2d. That they are informed and believe that the said complainants

surrendered the said original letters patent No. 49,140 on the 8th day of December, 1874, and upon due application therefor obtained the reissued letters patent No. 6,166 in lieu thereof.

3d. That the said reissued letters patent so applied for and obtained by the said complainants are invalid and void, for the reason that
14 they are not for the same invention as the said original letters patent, but are for another and entirely different invention, wherefore the said reissued patent is of no avail to secure any exclusive rights to the said complainants.

4th. That the said reissued letters patent contains new and material matter in the specification and claim thereof, relating to a method or operation not shown or described in the said original letters patent, and which the machine shown, described, and claimed in the said original patent is not competent or suitable to perform, wherefore the said reissued letters patent are null and void, and of no avail to secure any exclusive rights to the said complainants.

5th. That the said alleged new invention claimed in the said reissued letters patent No. 6,166 was patented, shown, and described in certain letters patent of the United States long prior to the alleged invention thereof by the said George Nimmo, to wit:

Letters patent No. 9,437, granted to Jacob Wise and Freeman Wise, on November 30, 1852, for a new and useful improvement in the manufacture of stone and earthenware.

Letters patent No. 40,506, granted to William Smith, on November 3, 1863, for a new and useful apparatus for making plumbago crucibles.

Wherefore the said reissued letters patent are null and void, and of no effect to secure any exclusive rights to the said complainants.

6th. That the said alleged new invention claimed in the said reissued letters patent was described long prior to the pretended invention thereof by the said George Nimmo, in a certain printed publication entitled "Lecons de Ceramique," published by A. Salvetat, in the city of Paris, France, in the year 1857, in vol. 2, pp. 118 to 124 inclusive; wherefore the said reissued letters patent are null and void, and of no effect to secure any exclusive rights to the said complainants.

7th. That the said alleged new invention claimed in the said reissued letters patent was invented, known, and used by others prior to the pretended invention thereof by the said George Nimmo, to wit:

At the works of Samuel M. Kier, on Stevenson street, in the city of Pittsburgh, Pennsylvania, in the year A. D. 1864, and several years thereafter; by the said Samuel M. Kier, (now deceased,)
15 Joseph Winkle, now residing at , in the State of Missouri; William L. Winkle, now residing at Bolivar, in the State of Pennsylvania; Frank Wright and Thomas M. Kier, now residing at Pittsburgh, in the State of Pennsylvania, and many others.

At the works of William Smith, in the city of Pittsburgh, aforesaid, in the years A. D. 1862, 1863, and thereafter, and such use was

known to the said William Smith, Roland H. Smith, and many others, all now residing in the city of Pittsburgh aforesaid, and James Park, Jr., of Allegheny City, in the State of Pennsylvania aforesaid.

Wherefore the said reissued letters patent are null and void, and of no effect to secure any exclusive rights to the said complainants.

8th. And these respondents, further answering, say that they have not and are not now infringing upon the complainants' rights under the said reissued letters patent.

These respondents therefore pray to be hence dismissed with their reasonable costs, in this behalf most wrongfully sustained.

BAKEWELL & KERR,
Solicitors for Respondents.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

Before me, the subscriber, personally appeared Michael McCullough, Jr., John H. Dalzell, and C. C. Arensburg, three of the above-named respondents, who, being duly sworn according to law, do depose and say that they have read or heard read the foregoing answer, and that the facts set forth, so far as they are of their own knowledge, are true, and so far as they are stated on knowledge derived from others, they believe them to be true.

MICHAEL McCULLOUGH, JR.
JOHN H. DALZELL.
C. C. ARENSBURG.

Sworn and subscribed this 13th day of March, A. D. 1877.
JAMES I. KAY, *U. S. Commissioner.*

Filed August 3d, 1877.

16 *Replication.—Filed*

The replication of Arthur Pickering, Charles R. Vickery, and Charles R. Atwood and the Phœnix Manufacturing Company, repliants, to the answer of Michael McCullough, Jr., John W. Dalzell, C. C. Arensberg, and Henry E. Dubarry, respondents.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of said defendants, for replication thereunto, say that they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, conferred, and avoided to averred or denied is true, all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court

Int. 12. Please compare the models marked "Complainants' Exhibit Defendants' Machine," and "Exhibit Defendants' Model," with the machine described in the Nimmo reissue, and state whether they are substantially the same or substantially different, giving your reasons for your opinion. In making this comparison, assume that the moulds used are like those in Exhibit Defendants' Model.

[*It is now agreed by counsel in the above-entitled suit, that the defendants manufactured and used in the manufacture of crucibles, before the filing of the bill of complaint against them, machines in all substantial respects the same as the moded marked "Complainants' Exhibit Defendants' Machine," except that the moulds used by defendants are divided vertically into two parts or halves, which when in use are fastened together and secured in the hollow headed chuck by a clamping ring around the narrow mouth above the bilge; and that they still use such machines in the manufacture of crucibles, and that the machines used by them are in all respects like the model now produced by defendants and marked "Exhibit Defendants' Model."*]

JAMES I. KAY, *Examiner.*

A. I consider them substantially the same for the following reasons: There is a rib described in the Nimmo reissue, and a revolving mould and means for guiding the rib from and toward the axis of revolution, as also a stop to prevent the rib from going beyond the desired point.

I find a rib in the same way in the defendants' model, a revolving mould, means for guiding the rib from and toward the axis of revolution, and a stop to prevent the rib from going below the desired point.

Int. 13. Please state with what crucible the market has been supplied since 1865.

A. It has been mainly supplied with machine-made crucibles. From 1865 to 1867 the machines were adopted by the old concerns in the business, and subsequently by new concerns as fast as they started.

21 [Complainants' counsel here gives notice that he will use at the argument the opinion of the court delivered in the suit brought by these complainants in the district of Massachusetts against Phillips *et al.*]

Int. 14. What relation are to you to Charles R. Atwood, one of the complainants in this suit?

A. I am his son.

Cross-examined by T. B. Kerr, Esq., of counsel for defendants:

Cross-int. 14. Please point out any differences you may see between the model Exhibit Nimmo Machine and the drawing of the reissued patent?

A. I see two differences. One is, that the stop extends across from guide to guide, and it is not so shown in the drawing. The other is, that the inverted form of the crucible is not shown in the drawing.

known to the said William Smith, Roland H. Smith, and many others, all now residing in the city of Pittsburgh aforesaid, and James Park, Jr., of Allegheny City, in the State of Pennsylvania aforesaid.

Wherefore the said reissued letters patent are null and void, and of no effect to secure any exclusive rights to the said complainants.

8th. And these respondents, further answering, say that they have not and are not now infringing upon the complainants' rights under the said reissued letters patent.

These respondents therefore pray to be hence dismissed with their reasonable costs, in this behalf most wrongfully sustained.

BAKEWELL & KERR,
Solicitors for Respondents.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

Before me, the subscriber, personally appeared Michael McCullough, Jr., John H. Dalzell, and C. C. Arensburg, three of the above-named respondents, who, being duly sworn according to law, do depose and say that they have read or heard read the foregoing answer, and that the facts set forth, so far as they are of their own knowledge, are true, and so far as they are stated on knowledge derived from others, they believe them to be true.

MICHAEL McCULLOUGH, JR.
JOHN H. DALZELL.
C. C. ARENSBURG.

Sworn and subscribed this 13th day of March, A. D. 1877.
JAMES I. KAY, *U. S. Commissioner.*

Filed August 3d, 1877.

16 *Replication.—Filed*

The replication of Arthur Pickering, Charles R. Vickery, and Charles R. Atwood and the Phœnix Manufacturing Company, repliants, to the answer of Michael McCullough, Jr., John W. Dalzell, C. C. Arensberg, and Henry E. Dubarry, respondents.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of said defendants, for replication thereunto, say that they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, conferred, and avoided to averred or denied is true, all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court

Int. 12. Please compare the models marked "Complainants' Exhibit Defendants' Machine," and "Exhibit Defendants' Model," with the machine described in the Nimmo reissue, and state whether they are substantially the same or substantially different, giving your reasons for your opinion. In making this comparison, assume that the moulds used are like those in Exhibit Defendants' Model.

[*It is now agreed by counsel in the above-entitled suit, that the defendants manufactured and used in the manufacture of crucibles, before the filing of the bill of complaint against them, machines in all substantial respects the same as the moded marked "Complainants' Exhibit Defendants' Machine," except that the moulds used by defendants are divided vertically into two parts or halves, which when in use are fastened together and secured in the hollow headed chuck by a clamping ring around the narrow mouth above the bilge; and that they still use such machines in the manufacture of crucibles, and that the machines used by them are in all respects like the model now produced by defendants and marked "Exhibit Defendants' Model."*]

JAMES I. KAY, *Examiner.*

A. I consider them substantially the same for the following reasons: There is a rib described in the Nimmo reissue, and a revolving mould and means for guiding the rib from and toward the axis of revolution, as also a stop to prevent the rib from going beyond the desired point.

I find a rib in the same way in the defendants' model, a revolving mould, means for guiding the rib from and toward the axis of revolution, and a stop to prevent the rib from going below the desired point.

Int. 13. Please state with what crucible the market has been supplied since 1865.

A. It has been mainly supplied with machine-made crucibles. From 1865 to 1867 the machines were adopted by the old concerns in the business, and subsequently by new concerns as fast as they started.

21 [Complainants' counsel here gives notice that he will use at the argument the opinion of the court delivered in the suit brought by these complainants in the district of Massachusetts against Phillips *et al.*]

Int. 14. What relation are to you to Charles R. Atwood, one of the complainants in this suit?

A. I am his son.

Cross-examined by T. B. Kerr, Esq., of counsel for defendants:

Cross-int. 14. Please point out any differences you may see between the model Exhibit Nimmo Machine and the drawing of the reissued patent?

A. I see two differences. One is, that the stop extends across from guide to guide, and it is not so shown in the drawing. The other is, that the inverted form of the crucible is not shown in the drawing.

Cross-int. 15. Explain what you mean by the inverted form of the crucible?

A. The mouth or top of the crucible shown in the drawing seems to be of as large or larger diameter than any other part.

Cross-int. 16. What about the construction of the mould,—is there any difference there?

A. The mould likewise has the largest diameter at the top. There is no difference, except the shape.

Cross-int. 17. Then you understand the mould shown in the reissue to be a two-part mould?

A. Yes.

Cross-int. 18. Will you please point out in the specification and in the drawings of the reissue the matter upon which you base this opinion?

A. I find nothing the specification, nor in the drawing, that would enable me conclusively to say that the mould was partable, if I did not know that it was so. There seems to have been no attempt to show it.

Cross-int. 19. How do you know that the orginal Nimmo model and invention contained a partable mould?

A. I don't think it did.

Cross-int. 20. When was the two-part mould introduced to the Nimmo machine, to your knowledge?

A. In 1865 or 1866.

Cross-int. 21. How is the crucible removed from the mould
22 of machines like Exhibit Nimmo Machine?

A. The moulds being partable, are withdrawn sideways from the sides of the crucibles.

Cross-int. 22. How soon is this done after the formation of the crucible?

A. Generally the next day. It can be done immediately, unless the moulds from long use become wet. They are withdrawn the next day for convenience.

Cross-int. 23. Then in moulds like those in Nimmo model, it is not necessary to wait for the shrinkage of the crucible in order to remove it from the moulds?

A. No.

Cross-int. 24. How great is the shrinkage in diameter of the ordinary size of steel crucible after being moulded and before drying in the oven?

A. It is not very great. I can't tell exactly. I should say from a quarter to a half an inch. I don't think it reaches one-half an inch.

Cross-int. 25. What is the height and diameter of the crucible on which you made the estimate in your last answer?

A. I can't give it. It was based upon No. 40, steel crucibles. It is somewhere near fourteen inches high and nine inches diameter.

Cross-int. 26. What amount of 'bilge' is there in a crucible of that size?

crucible, thereby forming a sharp point at the extreme end. Now, what would be the effect of that point upon the bottom of the crucible, when the rib is canted as you have just described? Would it make a flat bottom, or would it cut the crucible in the middle of the bottom, so as to make it thinner at that point than at the edges of the bottom nearest the sides?

A. It would cut it, and it would be thinner at the center than anywhere else in the bottom.

Cross-int. 44. Would that be desirable?

A. No.

Cross-int. 45. If the rib shown in the reissue was fixed in the position mentioned by you, could it be used with the mould therein shown in making a crucible?

A. It could be, but we should not so use it. In connection with this mould we should use the rib as nearly as possible in the position shown in the drawing.

Cross-int. 46. Do you mean it could be used with that mould for the purpose of making a bilged crucible?

A. We shouldn't use it with this mould for the purpose of making a bilged crucible. We could use it for that purpose with this mould.

Cross-int. 47. What would be the relative thicknesses of the sides of the crucible at or near the bottom, and also near the top?

A. About the same, I should judge.

26 Cross-int. 48. You will notice that the rib *n* stands parallel with the sides of the mould. In order to make a bilged crucible in that mould, would it not be necessary to throw the lower end of the rib nearer the sides of the crucible than it at present stands?

A. I don't think that it would.

Cross-int. 49. How would it be possible to make a bilged crucible in that mould unless you secured the upper end of the rib nearer to the handle *m*, and arranged the rib so that the lower end would be farther away from the axis of revolution of the mould?

A. We should raise the rib higher up, put it in a higher position and nearer the handle. The lower end would occupy about the same position it does now at the point.

Cross-int. 50. Do you mean to say that the crucible produced upon the machine shown in the Nimmo patent, with the rib arranged as mentioned in your last answer, would have sides of equal thickness throughout?

A. No.

Cross-int. 51. Do you wish to be understood as saying that with the rib arranged as mentioned in your answer to cross-interrogatory 49, and with the mould shown in the drawing of the Nimmo patent, a bilged crucible could be made upon the machine shown in the reissued patent?

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A. No.

Cross-int. 51. Do you wish to be understood as saying that with the rib arranged as mentioned in your answer to cross-interrogatory 49, and with the mould shown in the drawing of the Nimmo patent, a bilged crucible could be made upon the machine shown in the reissued patent?

A. I mean to say that we could make a crucible the diameter of

hose top between the walls would be smaller than the largest diameter of the interior.

Cross-int. 52. What would be the comparative thicknesses, as near as you can state them, in connection with the drawing of the sides of such a crucible at the top and at or near the bottom?

A. The change in thickness would correspond with the change made in the position of the rib, and the top would be somewhat the thickest, I think. I can't tell how much thicker.

Cross-int. 53. Which part of the crucible, if any, should be the thickest?

A. Commonly the bottom, and from the junction of the sides and bottom gradually sloping up, gradually thinning towards the top.

27 Cross-int. 54. Would a crucible thin at the bottom and sides below the bilge, and thick at the sides of the mouth, be a marketable or salable crucible for the purposes for which crucibles are now used?

A. It would depend upon the degree of thickness and thinness somewhat. If the bottom and sides were thick enough, any extra thickness of the top might be an objection, although crucibles are used in gas furnaces with thickened tops, thicker than they would be made for work in holes.

Cross-int. 55. Taking the same amount of material which is required to form a No. 50 crucible and moulding it into a No. 50 crucible of the shape mentioned in the last question, that is, with thin bottom and sides and thick top, would it be a merchantable crucible?

[Objected to as too vague to admit of an intelligible answer, as the crucible described may be one with the top walls a thousandth part of an inch thicker than at the bottom, or the difference in thickness vastly more or even less than this.]

A. I don't know that I understand the question.

Cross-int. 56. You said that the rib of the machine shown in the Nimmo patent could be so attached to the lever as to make a crucible the diameter of whose top between the walls would be smaller than the largest diameter of the interior, and that this change in the position of the rib would make the top thicker than the bottom. Now, please state whether a crucible of that shape made in the machine shown in the Nimmo patent without any change in the mould, with the rib so arranged from a ball of the size required for forming a No. 50 crucible, would be a marketable or salable crucible?

A. We could not make a crucible with the same amount of material and have it perfect. It would necessarily require more.

Cross-int. 57. Are you acquainted with the uses to which crucibles are put?

A. Somewhat.

Cross-int. 58. What are those uses?

A. They are used for melting metals.

Cross-int. 59. What metals?

A. Brass, copper, German silver, steel, and the precious metals.

Cross-int. 60. How many heats does a crucible stand melting brass?

28 A. An ordinary size, from thirty-six to forty-eight heats. That is, first-class running, good quality.

Cross-int. 61. With copper?

A. From twenty to twenty-five, and then they put them on lighter work afterwards, for economy.

Cross-int. 62. With German silver?

A. About eight or ten, formerly; now nearer double.

Cross-int. 63. Do you know how many crucibles are used for these three purposes annually throughout the United States?

A. I do not.

Cross-int. 64. Can you estimate it from your knowledge of the smaller business and your extensive experience?

A. I cannot. The sizes used are so various that I cannot form any approximate estimate.

Cross-int. 65. Do you know their proportionate amount in value of the whole crucible manufacture of the United States, or can you estimate it?

A. I should estimate the product of steel crucibles as at least ten times that of the brass and other crucibles.

Re-direct examination:

Int. 66. How many heats do steel crucibles ordinarily run, and what are the regular sizes?

A. The regular sizes are Nos. 40 and 50. They would run from four to five heats in the anthracite coal holes, at least, and six heats in gas furnaces, at least, according to the best of my knowledge.

Int. 67. Are they always made with a bilge? What has been the actual experience of your companies as to this?

A. They are not always made with a bilge, but usually. By far the greater part are made with a bilge. I don't know that there has been any difference in their durability whether made with or without a bilge.

Int. 68. Are any crucibles made without a bilge; and if so, how long have such crucibles been manufactured?

A. Yes, they are. I don't know how long they have been made; ever since I have had any knowledge of it.

29 Int. 69. With what kind of tongs are these crucibles handled?

A. With tongs adapted to the shape of very much the same general appearance as tongs for bilged crucibles. In brass furnaces some of the tongs used are formed of a ring with arms extending from it to be taken up by two men. The crucible is placed within the ring, and the tongs lifted up until the ring catches on the crucible. All the tongs are not that way, but it is a very common form. They could not get them out of the furnace with that kind of tongs.

HENRY D. ATWOOD

Evidence for Complainant in Reply.

Testimony and other evidence in reply, taken, on part of complainants, before James I. Kay, U. S. commissioner for said district, at the office of Messrs. Bakewell & Kerr, No. 94 Diamond street, Pittsburg, Pennsylvania, on Saturday the 15th day of September, 1877, by agreement of counsel.

Present: James E. Maynadier, Esq., counsel for complainants, and T. B. Kerr, Esq., of counsel for defendants.

DEPOSITION OF JAMES GLOVER.

JAMES GLOVER, called on part of complainants, and being duly sworn, deposes as follows:

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is James Glover. I am within a few weeks of eighty-one years of age. Sometimes I live in Pittsburg, and sometimes I am away. I live with my children and relatives, and as I am doing nothing, visit them at different places.

Int. 2. Were you ever engaged in the manufacture of crucibles?

A. I was for some time.

Int. 3. Who was asssociated with you in that business?

30 A. I think, to the best of my recollection, I was engaged with Mr. S. M. Kier. Mr. Mitchell was also a partner at that time. I am speaking to the best of my recollection.

Int. 4. Where did you carry on this business?

A. First began on Second avenue, and then moved to Stevenson street, Pittsburg. I continued in as a partner until Winkle could not attend to his business to perfection.

Int. 5. Why did you leave this business? Please explain fully.

A. For the mismanagement of Mr. Winkle, having the charge. I left because of his mismanagement, and I was losing money by it.

Int. 6. What success did you have in the manufacture of crucibles?

A. No success at all, because Winkle couldn't get them up in a style that they could be used in the market.

Int. 7. Did Winkle try to make them by machinery?

[Objected to as incompetent.]

A. Yes, sir; but didn't succeed. That was the cause of my leaving.

Int. 8. What was your loss at the time that you left?

A. Seventeen thousand dollars. I give up all the concern, and that was what was paid by me, to the best of my recollection, to get clear.

Int. 9. When did you leave?

A. It was some time in 1863 or 1864, to the best of my recollection.

[Counsel for defendants objects to the testimony of the foregoing witness as incompetent, and cross-examines *de bene esse.*]

Cross-interrogatory 10. Were any of the crucibles sold to the steel manufacturers?

A. A few—and they wouldn't buy any more, because they wouldn't go up to their point; that is, they didn't stand with the crucibles that came from the Jerseys.

Cross-int. 11. Can you give the names of any of the steel manufacturers who purchased these crucibles?

A. No; I couldn't give the names of any of them at present, because Kier kept the books at that time.

JAMES GLOVER.

31 DEPOSITION OF JOHN STEWART.

JOHN STEWART, called on part of complainants, and being duly sworn, deposes as follows:

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is John Stewart; I am fifty years old; I reside in Pittsburg; I am an agent for the sale of fire-clay and fire-brick.

Int. 2. Were you ever in the employ of Mr. S. M. Kier, or any firm of which he was a member? If so, from what time to what time?

A. I was in the employ of Glover, Kier and Jones, in the first place. Then the firm changed to Glover, Kier & Mitchell afterwards. After the death of Mitchell, it became Glover, Kier & Company. It then became Kier, Glover & Company; and another firm was Kier & Glover. It was in Beaver county that firm had its works. I then done business for S. M. Kier & Company; but that was an oil firm; and I attended to the private business of S. M. Kier. I went to the first firm in September, 1851, and remained with them, with the exception of short intervals, until about the first of June, 1872. I would be away for six months, and then come back again and do some more business for them.

Int. 3. When did Mr. Kier or his firm commence the manufacture of crucibles, as near as you can now state?

A. Well, Winkle was employed about the first of July, 1862, but I don't think they commenced making crucibles until that fall. I went to Bolivar, Pennsylvania, and settled up the business of Glover, Kier & Mitchell at that time.

Int. 4. How did they shape the crucibles before they got a machine?

A. They had to make plaster molds. The molds were the exact size and shape inside of the outside of the crucibles. The material was then put inside of the mold. The mold with the material in it was then placed in a jigger, I call it. This mold is in two pieces, with a hole in the top of the upper piece. The jigger is then put in motion by a belt, and the man places his hand inside while the mold and all is running, and while it is running he keeps his hand in the material and molds it up to fit the inside of the mold. He then takes a sponge and sponges and smooths off the crucible in the inside.

Int. 5. How long since you saw one of those crucible molds?

32 A. I can't answer that. I saw some of them lying around the works within the last two years. They were sold and broken up, but I don't know what they used it for?

Int. 6. Look at the mold now shown you, marked Defendants' Exhibit Kier Mold, and say whether you recognize it or not, and how it differs, if at all, from the molds which were used as described in the last answer?

A. I see no difference. It exactly corresponds with what I tried to describe.

Int. 7. Was any other way of making crucibles tried there? If so, please describe it as well as you now recollect it.

A. There was a machine used for making crucibles instead of the hand. In the first place, the mold was changed from time to time from the first attempt that was made. The little thing that went in to take the place of the hand was a piece of wood; iron could be used, but this was wood that I saw. The curve was made to fit just exactly the shape of the inside of the mold, but smaller than the mold, to allow room for the material to make the crucible out of. The material was put in first, and *it* was then lowered into the mold this thing I have just described. Previous to this the mold had been placed on the jigger head. The jigger head and mold were then put in motion by the belt.

The thing described does not do anything but stand there permanently, and as the mold goes around, of course it fixes the material against the sides of the mold and forms the crucible.

Int. 8. What held this piece that went inside the mold to form the inside of the crucible, as well as you now recollect?

A. I know, but I can't describe it to you. This stick is fastened to a cross piece at the top of the crucible. As well as I recollect, this cross piece was attached to a kind of frame-work; two side pieces went down from the cross piece, to hold it steady.

Int. 9. Can you describe this cross piece a little more fully,—was it wood or metal, made of one piece, or several pieces fastened together?

A. It was wood, what I saw, and composed of several pieces.

Int. 10. Please look at the drawing now shown you, marked "Defendants' Exhibit Kier Machine," and state whether that is
33 anything like your present recollection of the machine you have just spoken of.

A. This is exactly what I was trying to describe. I don't know where you got it.

Int. 11. What was the trouble with this machine?

[Objected to because it don't appear that there was any trouble with that machine.]

Question withdrawn.

Int. 12. What was the trouble with this machine, if any?

A. The trouble was in getting that thing out that I was trying to describe, after the crucible was formed.

Int. 13. State whether the part that went inside the mold was held steady enough, or whether it was shaky and too weak?

[Objected to as leading.]

A. It was troublesome to keep in order, from being too weak.

Int. 14. What change, if any, was made in this machine?

A. Instead of using this cross piece, there was a screw working straight up and down, used to lower and raise this piece that formed the crucible inside.

Int. 15. Was the same piece used inside with the screw that was used with the cross piece. If not, how did it differ?

A. It was similar in appearance, but had a joint about the middle.

Int. 16. Have you had a drawing made under your superintendence of that second machine. If so, please produce it?

A. Yes, sir; here it is.

[Said drawing offered in evidence, and marked complainants' Exhibit Stewart No. 1, James I. Kay, Examiner.]

[Objected to as incompetent.]

Int. 17. About how long was this first machine used before it was altered as shown by your drawing, and why was it altered?

A. I do not exactly know how long it was in use; but it was troublesome to manage all the time it was in use, and hence the change.

Int. 18. When the altered machine was first put in use did it differ at all from your drawing; and if so, how?

34 A. In no way that I can think of. This is as near as I can recollect.

Int. 19. Did you ever see a machine with two of those jointed pieces inside the pot instead of one, as in your drawing?

A. I did; but I think it was in the first machine those two pieces were.

Int. 20. Did Mr. Glover quit the business of making crucibles?

A. Yes, sir.

Int. 21. Did you hear or know at the time why it was?

A. It was owing to money being lost in the business.

Int. 22. About when, as near as you can recollect, did they stop manufacturing crucibles at the place on Stevenson street, and if you recollect any circumstance which would fix the date, please state it?

A. I could not exactly state the time they quit; but it was about the time of heavy losses or heavy reductions in sales that were made, namely, one to Park Bro. & Co. My entries in the books would show, but I have not got the books.

Int. 23. Do you know about what percentage on the face of the bill this reduction amounted to?

A. On that of Park Bro. & Co.'s it was somewhere about forty-three or forty-four hundred dollars, and they took eighteen hundred and some dollars off it in settlement.

Int. 24. Were you book-keeper there at that time?

A. I was chief business man before I took hold of the books and

settled all the bills, and I don't recollect whether I had charge of the books then, or whether I just collected and settled the bills.

Int. 25. What was done with this machine when they quit making crucibles?

A. I only can answer from hearsay.

Int. 26. Where was this machine when it was used; in what part of the building, that is?

A. On the second and third floors.

Int. 27. Do you know when it was moved?

A. I do not.

Int. 28. What was the year, as near as you can give, when they quit making crucibles at Stevenson street?

A. I think it must have been in 1865.

35 Int. 29. Did the crucibles they manufactured there give satisfaction to the customers?

A. A few at different times did, but a large majority did not.

Int. 30. Do you recollect seeing a quantity of crucibles broken up and used for making some other articles. If so, what articles, and where was it?

A. Well, they were broken up around the place on Stevenson street; towards the last, very little account was taken of them. I don't recollect what was made out of them. I believe they made stove polish out of them.

[Counsel for defendants cross-examines without waiving, but specially reserving, his objections.]

Cross-int. 31. Who operated the machine represented by the drawing Exhibit Kier Machine?

A. Joseph Winkle was the one I saw using it, and others, but he was the principal one.

Cross-int. 32. How often did you see Joseph Winkle operate the machine, or at work using it?

A. I couldn't answer it. I have seen it so often. I saw it every day I was there. I was back sometimes every day in the week. I might not have seen it every day I was there.

Cross-int. 33. Do you know how many crucibles were made a day on that machine?

A. I do not.

Cross-int. 34. Did you ever stand beside it and see it make a crucible?

A. I did.

Cross-int. 35. Have you any recollection of how long it took to mold one with it?

A. Well, I couldn't exactly say, but he could make one in half a minute, and less perhaps. It was quick, I know.

Cross-int. 36. Did you ever see the crucibles taken out of the mold that was used on this machine, (Defendants' Exhibit Kier Machine)?

A. I did.

Cross-int. 37. Please describe the operation of taking the crucible out of the mold.

36 A. The mould is lifted from the jigger and taken to shelves; the top part is then taken off, and after some time when it gets a little dry it is taken out of the bottom part.

Cross-int. 38. Why was the top part of the mould taken off first?

A. I don't know why it was. I suppose it was the most convenient. That was the way the potters done their work. I never heard it explained and never thought of it before.

Cross-int. 39. Wasn't it because the mouth of the mold was too small to take the pot out of, unless you did take the top part off first?

A. They couldn't get it out through the hole in the top.

Cross-int. 40. Did you ever examine the pots that came out of the mold?

A. I did.

Cross-int. 41. Was there any number of them around?

A. Oh, yes; large quantities.

Cross-int. 42. Was it the crucibles that were made on this machine, "Defendants' Exhibit Kier Machine," that was sold to Park Brother & Company, and for which you had an allowance made in the settlement?

A. I do not know. I suppose it was. My impression is that it was.

Cross-int. 43. Had those crucibles made in the Defendants' Exhibit Kier Machine the proper shape?

A. Yes, sir.

Cross-int. 44. Were they smooth when finished?

A. Yes, sir.

Cross-int. 45. Were they as smooth when they came out of the mold, when made by Defendants' Exhibit Kier Machine, as those which were molded by hand before they began to use the machine?

A. I should say they were. I know of no difference in appearance.

Cross-int. 46. Did you do the purchasing for the firm of crucible material?

A. No, I did not; it was always one of the firm done that; either Mr. Kier or Mr. Foster.

Cross-int. 47. Do you know anything about the prices paid for crucible material?

37 A. I don't exactly recollect. I had to handle all the bills and make the entries, but I can't recollect now.

Cross-int. 48. Do you know the grade of materials that Mr. Kier purchased for use in making crucibles?

A. In all cases the best that could be had. He cared nothing for price.

Cross-int. 49. Do you think that Mr. Joseph Winkle understood thoroughly the art of mixing the materials for making crucibles?

[Objected to as wholly immaterial, even on cross-examination.]

A. Our impression was that he did not.

Cross-int. 50. That was the complaint against him, was it not?

A. We could think of no other reason but that. We gave him the best material that could be got, and everything was done that could be to have them good that we knew of or could think of.

Cross-int. 51. The crucibles were properly burned or baked, were they not?

A. I don't understand the manufacture of them; I could not answer that very well. We thought they were all right,—I mean everything in the manufacture.

Cross-int. 52. The steel men who bought these crucibles thought so too, did they not, when they were purchasing them, and before they used them?

A. They did think they were all right.

Cross-int. 53. What was their complaint against them after they used them?

A. Not standing long enough,—not standing enough of heats. At that time we had to guarantee three heats or no pay.

Cross-int. 54. Were sales of crucibles, made on this machine, "Defendants' Exhibit Kier Machine," made to any other steel manufacturers besides Park Brother & Company?

A. I think so. We were selling at the time to other parties, and I suppose they were made on the machine. Anderson, Cook & Company, Singer, Winnick & Company, got from us at that time. I don't recollect whether it was just at that time; I think it was the same time, though. Then towards the last we had to sell to Miller, Barr & Parkin at their own prices, to get them to use them up,—to get rid of them. Mr. Kier was a partner there.

38 Cross-int. 55. Do you know the date when this machine, Complainants' Exhibit Stewart No. 1, was made?

A. I do not. I couldn't give dates.

Cross-int. 56. How was the rib gotten out of the crucible in the machine Complainants' Exhibit Stewart No. 1?

A. There was a wheel at the top of the spindle, and by turning this spindle it raised this piece out of the crucible.

Cross-int. 57. And you don't know where that machine was made?

A. No; I do not. Winkle was making changes and working from time to time, and I don't know how long he was working at this one.

Cross-int. 58. Did you ever see Winkle try to make a crucible in this machine, Complainants' Exhibit Stewart No. 1?

A. I presume I did; for he showed me everything he was doing. I presume I saw him make some.

Cross-int. 59. Your recollection is not entirely clear, then, on that point?

A. From the fact of my being a confidante of his in all these things, I presume I saw him make them.

Cross-int. 60. You don't seem to me to be positive in your recol-

lection that you saw him making crucibles in the machine, Complainants' Exhibit Stewart No. 1. Am I right?

A. You are right; though I feel satisfied in my own mind that I did, though I could not fix the time.

[Adjourned to meet at same place Monday, September 17, 1877, at 9.30 o'clock A. M.]

MONDAY, September 17, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

JOHN STEWART—examination continued.

Re-direct examination:

Int. 61. You have been questioned as to the quality of the material and the proper mixing of it. Please state what you know as to any sample lots of crucibles that gave satisfaction.

39 [Objected to as not proper re-direct examination.]

A. Well, from time to time, when the crucibles would fail to give satisfaction, the members of the firm would become dissatisfied with Winkle. Through his representation of something being wrong somewhere they would give him a chance to make a lot of sample crucibles, so as to be satisfied that he knew how to do it. These that he made in that way, I believe, always gave satisfaction. It seems to me, in every case.

Int. 62. Were these sample lots that you have just spoken of made on the machine or by hand?

A. I know the greater part were made by hand. There might be some made on the machine, but the greater part were made by hand.

Re-cross examination by defendants' counsel without waiving objections:

Cross-int. 63. Were you always present when these sample lots were made?

A. Not always; but I was always back and forward encouraging Winkle to get them right so as to be a success, and knew what he was doing, and he would always tell me how he made them, though I couldn't say he made none on the machine, though I know he made the greater part by hand; he told me so.

Cross-int. 64. During the times you were back and forth encouraging Winkle, did you ever see the machine "Defendants' Exhibit Kier Machine" in operation?

A. I rather think that was out of date at the time; that was out of use, I think, long before the difficulty occurred about the crucibles. I think any of these samples that may have been made on the machine were not made on this machine, Exhibit Kier Machine, as I think it wasn't in use at that time. I think this machine was in use at the time the difficulty occurred, but it was after this time that the

sample crucibles were made in order to let Winkle redeem himself. That is about the idea of it.

Cross-int. 65. You are not very positive about that, are you?

A. Well, about what I am not sure what the question is, about the question.

40 Cross-int. 66. About whether the machine was in operation at that time?

[Objected, as it doesn't appear which machine is inquired about.]

A. I don't know.

Cross-int. 67. Do you know how many of these sample crucibles were made by Winkle?

A. I do not.

Cross-int. 68. Were there more than one lot of them?

A. Yes, sir.

Cross-int. 69. How many?

A. Four, at least; I guess about five or six.

Cross-int. 70. Were there as many as a hundred in each lot?

A. No, sir.

Cross-int. 71. About how many do you think?

A. About from six to ten or twelve, or may be fifteen.

Cross-int. 72. Do you know who bought and used these sample crucibles?

A. I don't think they were often sold. They were given away as trials, I think, mostly.

Cross-int. 73. During what period of time were these sample lots made?

A. It seems to me it might run over a year, perhaps more, from time to time. It might be a great deal longer. I haven't the books to show when it was a long time.

JOHN STEWART.

41 *Evidence for Complainants.*

Taken in pursuance of the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me.

CHAS. F. SLEEPER, *Special Examiner.*

Present: James E. Maynadier, Esq., of counsel for complainants; Thomas B. Kerr, Esq., of counsel for defendants.

TAUNTON, *Oct.* 11th, 1877.

The complainants' counsel here puts in evidence a large machine, which is marked "Complainants' Exhibit Compt's Smith Machine, C. F. S., Spl. Exr.;" also portions of vessels made of crucible mixtures, marked respectively, "S. 1; S. 5; and S. 6; C. F. S., Spl. Exr."

DEPOSITION OF WILLIAM T. MACFARLANE.

Direct examination by James E. Maynadier, Esq., of counsel for complainants:

BOSTON, *October* 12, 1877.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. Wiliam T. Macfarlane; 23; Jersey City, New Jersey; superintendent of the Jersey City Crucible Manufacturing Co.

Int. 2. How long have you had anything to do with the manufacture of crucibles?

A. About three years and a half.

Int. 3. Please look at the patent now shown you, granted to William Smith, No. 40,106, dated November 3, 1863, put in evidence by the defendants, and state whether you have examined the patent or not, and whether you are familiar with the thing described in it.

A. I have examined the patent, and am familiar with the machine described in it.

42 Int. 4. Please state whether the former shown in that patent, or any other former which "revolves x x x by contact with the plumbago batch," is practically operative or not. State also how confident you are, and on what your opinion is based.

[Objected to as immaterial.]

A. I do not think that the former shown in this drawing, revolving by contact with the plumbago, or any former revolving by similar means, is practically operative. I am very confident it is not. The reason for its not being operative is this: The clay pressed by the former adheres to the surface of the former and cannot produce a smooth surface upon the clay forming the inside of the crucible, being torn away by the suction or adhesion to the former.

Int. 5. How often have you seen attempts made to manufacture crucibles with a former of this kind; and when and where?

A. I have seen attempts to manufacture crucibles with a former of this kind at four different times: three times at the works of the Phœnix Manufacturing Co., at Taunton, Mass., and once at the works of Hussey & Co., at Pittsburg, Pa. All these attempts were in the last four months.

Int. 6. What were the results of these attempts? And state in particular what was the condition of the former, and of the walls of the crucibles, when the crucible was completed so far as it could be with that kind of former.

[Objected to as incompetent and immaterial, because it does not appear what kind of a machine was referred to; second, because the question at issue is not as to the operation of a revolving former *per se;* and third, because there is no evidence of the circumstances under which the said former was tried, nor the material with which it was tried, nor the combination in which the former was operated.]

[Question withdrawn.]

Int. 7. State on which of these occasions, if on any, you used the

machine now before you marked Exhibit Compts. Smith Machine, and state what moulds were used on the other occasions, and how the revolving formers were mounted and how moved.

A. The machine marked Compts. Smith Machine was used on all four of these occasions. On one of these occasions another machine was used, too. Iron moulds were used with the Smith ma-
43 chine; a plaster mould was used with the other machine. The revolving former of the Smith machine was mounted on a bracket, as is shown in the drawing of the Smith machine; the other was similarly mounted. The formers were revolved by contact with the plumbago inside of the mould. The motions of the first were as in the Smith machine in all respects; the other former was moved as shown in the Wise patent.

Int. 8. How many revolving formers in all were used; and of what material?

[Objection continued.]

A. Two formers were used, both of which were of wood.

Int. 9. What was the main difference between them?

A. The former of the Smith machine was of much larger diameter than that of the Wise.

Int. 10. How were the moulds revolved?

A. The first three times I saw the Smith machine in operation, the mould was revolved by gearing run by hand power; the last time it was run by a machine belt and pulley; the other machine was run by belt and pulley, I think.

Int. 11. Did the jigger head and plaster mold used with the smaller revolving former moved as described in the Wise patent, differ in any way from those in use on the Nimmo machines at the works of the Phœnix Manufacturing Co.?

A. I cannot remember that they did differ in any way; the jigger head and mould were the same used on the Nimmo machine.

Int. 12. Now, please answer interrogatory No. 6.

[Objection to said interrogatory is continued to this interrogatory on the second ground.]

A. These result of each one of these attempts was an absolute failure; not a single perfect crucible, nor one approaching perfection, was made; not a whole crucible was made on the Smith machine. In each case the former was coated with material of which the crucible was made, to the depth of about half an inch. The walls of the inside of the crucible were uneven and ridged, and the whole surface of the inside of the crucible was rough, spongy, and
44 torn by the action of the former. In some cases the whole side of the crucible was pulled from the mould by the adhesion of the former. With the other machine a whole crucible was made, but the condition of the former and the walls of the crucible were the same as those made with the Smith machine.

[Noon recess.]

Int. 13. What was the material used in these attempts?

A. The same material commonly used on the Nimmo machine, except that in some trials it was softer and in some stiffer than the regular grade.

Int. 14. Did you keep any memoranda or notes on any of these occasions? If so, on which? And state briefly from your notes the details of the several trials.

A. I did keep memoranda of the last trial. I saw five attempts made to make crucibles. The first pot, clay stiff enough to be turned by hand, which is stiffer than commonly used; inside of the mould wet and dusted with fine lead; former was dry; ball made as usual; the pot was formed by pressing the former into the clay until the under edge of the bracket touched the top of the mould, and by sliding the former until it touched the flange of the top of the mould. When the crucible was made, and the former withdrawn from the mould, it (the former) was coated with clay to the depth of over a quarter of an inch over its whole surface, except a few inches of bottom of the former. There was so much clay on the former that it rubbed or scaped on the top of the crucible on being withdrawn. The rib was cleaned off, clay thrown back in the pot, and the former again inserted; when withdrawn again it was as badly coated with clay as before, which it had torn from the inside of the crucible. The inside of the crucible was ridged, uneven, and badly torn; the attempt to lift the top half of the iron mould resulted in breaking the crucible in two, horizontally; the portion of the crucible remaining in the lower half of the mould was forced from the mould with difficulty and was pressed out of shape. This was marked S. 1.

The second pot was made of the regular grade of material, rather softer than the first; ball made as usual, the inside of the mould oiled, the former wet with water. In forming the crucible the former was moved very slowly and carefully. The first time the
45 former was lifted from the mould it raised the clay from the bottom of the mould. When the crucible was finished the results were the same as in No. 1, and in addition the bottom of the crucible was torn away from the rest of the crucible in trying to remove it from the mould.

The third pot, ball same as last, inside of mould moistened with water, and dusted with fine lead, or pure plumbago, the former moisted with water and moved as quickly as possible. Results same as in No. 2. The material or clay that collected on the former was weighed; there was over thirty-one ounces of it.

Fourth crucible. This was made out of brass pot mixing, being the material used for making crucibles used in making brass. The inside of the mould was oiled, dusted with finely-ground plumbago. The former was dry. The pressure was so great at this trial as to entirely unscrew the iron mould, and chuck from the shaft on which it was fixed. The crucible was finally made with the same result as the second and third.

Fifth crucible. The ball was made with the same clay used in No. 4, worked over and made stiffer; mould oiled and dusted with

finely-ground plumbago, former wet with water. After making the crucible, the clay adhering to the former was weighed, and it was found to be thirty-one ounces. This crucible, like all the others, broke in two when the upper half of the mould was lifted off, but the lower half of the crucible was got out of the mould whole, although considerably out of shape. This was marked S. 5.

In all of these experiments the greatest care was used by the workmen.

Int. 15. Who were present, and how long did these experiments occupy?

A. There were present, besides myself, Messrs. A. K. Spencer, William Driscoll, George Brammer, Frank Paine; part of the time H. D. Atwood, also J. E. Maynadier. These experiments took about four hours and a half; from eight o'clock to nearly half-past twelve.

Int. 16. Please state whether the machine described in the Smith patent is practically operative or not, giving your reasons, if any, in addition to what you have said of a former revolved by the batch.

46 [Objected to on the ground that it is not in the province of the witness to pronounce upon the practicability of the machine, but only to express his opinion upon the same.]

A. I think the machine shown and described in the Smith patent not practically operative, for the following reasons: First, the absence of stops other than the top and flange of the mould for determining the thickness of the bottom and sides of the crucible, is a great defect; for if the mould is not held perfectly secure these portions of the mould are worthless as stops. In the Smith machine the mould is held so insecurely as be liable to be displaced and to have a wobbling motion, and hence may occur a great variation in the thickness of the sides of the crucible, and also in the thickness of the bottom.

Second, there is no proper support for the iron mould; it is held by a flange and two set screws: the mould being of an oval form and fitting into a chuck of the same shape, the set screws tend to force the mould out of the chuck, the face of the screw not being at right angles to the side of the mould. This support of the mould being so slight, the pressure of the former upon the clay and the side of the mould tends to give a wobbling motion to the mould, and practically destroys the operation of the machine.

Third, there are no handles or lifts to either half of the mould. Being of iron, they are smooth and heavy, and it is a matter of great difficulty to lift the upper half of the mould off of the lower half, and at the same time from the upper half of the crucible, and it is even more difficult to lift the lower half of the mould, containing the whole crucible, from the chuck and carry it away.

Fourth, the iron moulds are not practical, first, on account of the greater expense, as many more of them would be required than of plaster moulds, and each in itself is far more expensive than the plaster mould; second, on account of the difficulty of drying the

crucibles, they would dry only from the inside of the crucible, and the tendency being to dry unevenly and to warp the crucible, no water being absorbed by the mould as in the case where the plaster mould is used.

Fifth, the top of the former coming only to the lower flange of the mould, is a great objection to the practical operation of this
47 machine. This gives the workman no opportunity to cut off the surplus clay rising from the crucible between the former and mould, which lodges upon the top of the former, and is thrown back into the crucible. If not enough clay is used to leave a surplus, the top of the crucible will be spongy and imperfectly formed.

Sixth, the size of the former. This is so large that a workman cannot get his hand inside of the crucible while it is in motion, and is thus prevented from either cleaning the former or of taking out the surplus material thrown back.

Seventh, the machine is awkward and heavy, and has no levers or handles to make the bracket *q* work easily on the slide *r*.

Int. 17. Do you see any differences of any importance whatever between the complainants' Smith machine and the machine described and shown in the Smith patent? If so, please describe them, and state the practical effects of them.

A. I only know of two differences between complainants' Smith machine and the machine described in the Smith patent. One was the manner in which the mould sat in the chuck. This portion of the mould was not oval, but perpendicular,—made so for the safety of the workman, the one described in the patent being unsafe to operate. The other difference was in the former. This was made higher than the lower portion of the flange, and enabled the workman to cut off the surplus clay rising from the mould.

Int. 18. Can you explain why it is that the clay sticks to and collects upon the revolving former, and does not on the working face of the Nimmo rib?

[Objected to as being incompetent and immaterial, the question of the comparative utility of the Nimmo and Smith formers being entirely foreign to the issue in this case.]

A. In the case of the Nimmo machine, the clay is forced into position by the face of the rib, which remains stationary while the clay moves rapidly past it. This motion leaves a smooth surface.

In the case of the Smith machine, where the former is revolved by contact with the clay, an adhesion exists between the clay and the surface of the former. When the former presses the clay, its motion continually tears itself away from the clay, causing portions of the clay to adhere to its surface, and making the wall of
48 the crucible rough and spongy, and sometimes even pulling the wall of the crucible from the mould. In the one case, there is no adhesion between the rib and the wall of the crucible while the mould was revolving; and in the case of the Smith former, there is a continual adhesion between it and the wall of the crucible while the mould and former are revolving.

Cross-examination by Thomas B. Kerr, Esq., of counsel for defendants:

Cross-interrogatory 19. Please state whether the Jersey City Crucible Manufacturing Co. are in any way connected with the complainants in this case?

Answer. They are virtually connected with the complainants.

Cross-int. 20. You have been actively employed in the collection of evidence, notices to the defendants, attendance at the hearings before the examiner in this case, have you not?

A. Yes, I have.

Cross-int. 21. In the exhibit Complainants' Smith Machine is there a revolving mould; and did that mould revolve when you saw it used?

A. There is a revolving mould. Yes, it did revolve.

Cross-int. 22. When the former was inserted into the mould, was it moved to the side of the mould to form the material into the shape of the crucible?

A. The former was inserted into the mould until the bracket touched the rim of the mould; then it was moved sidewise until it touched the flange of the mould.

Cross-int. 23. When in that position, can it be raised directly out of the mould without breaking the upper edge of the mould?

A. It cannot, unless by breaking the former itself.

Cross-int. 24. In order to remove it from the mould, what did you do with the former when using that machine?

A. It was withdrawn from the side of the crucible and then moved out, being the reverse of the motions forming the crucible.

Cross-int. 25. That is to say, it was caused to approach the center or axis of revolution of the mould, was it not?

49 A. It was.

Cross-int. 26. And the mechanism by which it was withdrawn from the side of the mould guided it to the said axis of revolution of the mould, did it not?

A. It did.

Cross-int. 27. Suppose a rib such as is shown in the Nimmo patent in the Salvetot work, or in the Defendant Exhibit Kier Machine, to be substituted in the Complainants' Smith Machine for the revolving former, the mould being made to correspond to the shape of the former substituted, would the operation of the mechanism by which the rib would be guided toward the axis of revolution of the mould as it would be withdrawn, be the same as it now is in said machine?

A. I see no reason why it shouldn't be the same.

Cross-int. 28. Wouldn't it be exactly the same?

A. I think it would.

Cross-int. 29. Do you think that if such a rib was substituted for the revolving former in Complainants' Smith Machine, it would make a crucible smooth on the inside?

A. I think a rib such as is used in the Nimmo machine would; about the others, I can't say.

Cross-int. 30. Look at the rib shown in the Nimmo patent, and state if you ever saw such a rib as that in a machine.

A. I've seen ribs similar to that in a machine, set rather different on the shaft.

Cross-int. 31. How are they set?

A. They are fastened with bolts, I think.

Cross-int. 32. Please state whether you ever saw a rib having the curve and the shape of end shown in the Nimmo patent, in a machine.

A. I can't state positively, because the curves vary. The ends are usually slightly rounded.

Cross-int. 33. Then your objection to the Smith machine, in as far as the former is concerned, is that it revolves. Is that so?

A. I think that is only one of three objections, if I remember rightly, that there are against the former of the Smith machine.

Cross-int. 34. State the others, briefly.

A. Too large for a workman to get his hand in the mould
50 while the crucible is being made, and it is not high enough to admit of cutting off the surplus material, leaving it to fall back into the mould.

Cross-int. 35. Referring to the second ground, this objection would not hold good against the Wise former, would it?

A. Not to so great an extent, though I should consider it dangerous for a workman to put his hand inside of a mould while the clay and former were both in motion.

Cross-int. 36. Why should he do so at all?

A. I can only answer that in connection with the Nimmo machine. To remove the little mass of clay that collects upon the lower end of the former.

Cross-int. 37. In connection with the Nimmo machine, is the hand inserted into the mould, while it is in motion, for any other purpose?

A. It is, usually, to sponge the inside of the crucible.

Cross-int. 38. That sponging finishes the inside of the crucible, does it not?

A. It does.

Cross-int. 39. Did you sponge the inside of the crucibles made on the Complainants' Smith Machine?

A. We did not. They were in so rough a state as to be liable to tear the sponges if we had attempted it.

Cross-int. 40. The fact remains, however, that you did not attempt to finish up the inside of the crucible which were of the soft material described by you, by the sponging operation which you find necessary to practice in the manufacture of crucibles, does it not?

A. We did not sponge the inside of the Smith crucibles made on the Smith machine, but I don't think the sponging operation is absolutely necessary in crucibles made on Nimmo machine. It is only to smooth the inside and give it a finished appearance.

Cross-int. 41. Sponge finishing would have smoothed the inside of the Smith crucibles, would it not?

A. It might have put a smoother surface upon the inside of the crucible, but it would have been impossible to have taken out the ridges of the crucible with a sponge, or to have rendered the wall of the crucible thick enough at the bilge, where the clay adhered so thickly to the former. This could only have been done by an
51 operation equivalent to bringing the crucible up inside of the mould, or forming it by hand.

Cross-int. 42. If the crucible made on the Complainants' Smith Machine had been moulded by a revolving former to the shape of the mould, and the former did not collect more than a slight film of material, would the sponge-finishing operation have finished the inside in the same sense as it finishes the inside of the crucibles made by the Phœnix Co. upon what they call the Nimmo machine?

A. I can't answer that question, as I have seen no crucible made on the Complainants' Smith Machine that did not collect a large quantity of clay upon the former, and cannot tell how much the walls of the crucible would be damaged or torn by the adhesion of the former.

[Recess.]

Cross-int. 43. Suppose the amount of material collected upon the former to be but a thin film not sufficient to materially or injuriously diminish the thickness of the walls. Please answer the last question under such condition.

A. I should think the sponge would finish the crucible in the same manner as one made on the Nimmo machine, if the wall of the crucible was left comparatively smooth by the former and was not torn by it nor drawn from the side of the mould by it.

Cross-int. 44. My question excludes the existence of the tearing and drawing operation mentioned in the last part of your answer. Please answer it categorically.

A. If I do not know in what condition you suppose the wall of the crucible to be left, I cannot make a definite answer as to how sponging would affect the inside of a crucible.

Cross-int. 45. How do you suppose the walls would be left by the former if the latter collects only a thin film of the material?

A. That I don't know positively. The walls might be left comparatively smooth if only a thin film should collect on the former or the walls of the crucible might be torn or displaced. As I have never seen the Smith machine operate when only a thin film collected on the former, I cannot state positively how that would be. I should think it possible that a thin film might collect on the
52 former and still tear the wall of the crucible or withdraw it from the side of the mould.

Cross-int. 46. What do you understand by a thin film?

A. A slight layer or deposit of matter on the surface.

Cross-int. 47. Do you understand it to be an even deposit?

A. Yes, I should think it was even, or nearly so.

Cross-int. 48. If such an even slight deposit or layer be taken from

the inner surface of the crucible, would it not leave the crucible even, or nearly so?

A. In my answer to cross-interrogatory 45 I have stated my opinions on this point.

Cross-int. 49. Suppose the wall of the crucible is not withdrawn from the side of the mould, how could it be torn and still leave an even thin film or deposit on the former?

A. A portion of the wall of the crucible might be partially torn away, leaving rough, spongy surface and staining the walls of the crucible, and still not collect upon the former, I should think.

Cross-int. 50. I suppose you would think that the portion thus torn away would have to go to some place, should you not?

A. I did not mean to be understood that the portions thus displaced were entirely separated from the wall of the crucible, only in part, forming a very uneven, ragged surface, not torn away enough to adhere to the former.

Cross-int. 51. And yet leave the soft layer upon the former smooth and even?

A. If the layer is only a film, it cannot be very uneven nor very rough.

Cross-int. 52. Reverting to your answer to cross-interrogatory 35: why do you suppose it necessary for a workman to put his hand into the mould of a machine having a revolving former? From your experience with the Nimmo machine alone? Your attention is called to your answers 35, 36, and 37.

A. In my answer to cross-interrogatory 40, I say that I do not think the sponging operation absolutely necessary in the crucibles made on the Nimmo machine. I should think it would assist in the making of a crucible on the Smith machine if a workman could safely put his hand inside of the mould and collect the pieces
53 of surplus clay falling from the top of the former. It is not from my experience with the Nimmo machine that I hold this opinion regarding the Smith machine, but from my knowledge of the construction and operation of the Smith machine.

Cross-int. 53. You mean the machine which the complainants have constructed and put in this case as complainants' Smith machine, and the operations to which you have testified upon the so-called Smith machine, do you not?

A. I do in part, and partly from inspection of the drawing of the Smith patent. The machine exhibited, marked complainants' Smith machine, partly obviates the difficulty, by having a longer former than one shown in the Smith patent.

Cross-int. 54. How much longer is it?

A. From half an inch to an inch longer, as near as I can tell.

Cross-int. 55. Do you mean to say that it is from half an inch to an inch longer than the drawing of the former of the Smith patent filed in this case, which is about three inches long, apparently?

A. The former shown in the drawing of the Smith patent is the same length as the inside of the crucible formed. By saying that the

former of the complainants' Smith machine was a little longer than the one shown in the Smith patent, I meant to be understood that it was a little longer than the crucible formed.

Cross-int. 56. Please tell me why you supposed that the former of the Smith patent is not longer than the crucible to be formed?

A. Because in the description of the Smith patent it says: "The length of the former *l* is equal to the inside height of the crucible;" which is also shown in the drawing, I think.

Cross-int. 57. If it was shorter, it wouldn't form the crucible, would it?

A. I shouldn't think it would.

Cross-int. 58. If it was equal to the inside height of the crucible, it would be long enough to form the crucible, would it not?

A. I don't think it would, as there would be no way of removing the surplus clay from the top of the former, except by its falling back into the crucible, which would prevent the crucible from being made.

54 Cross-int. 59. But suppose there to be no surplus stock.

A. It would be long enough to remove that objection, I should think.

Cross-int. 60. That objection being now removed, please state whether if the former is as long as the inside height of the crucible, it would be long enough to give the required form to the said inside of the crucible?

A. I should think it would.

Cross-int. 61. Can't you say yes or no to that question?

A. I think I can answer it by saying yes.

Cross-int. 62. It is necessary according to the Smith patent that the former be at least equal in length to the inside height of the crucible, is it not?

A. According to the Smith patent it is necessary that the former be the exact height of the inside of the crucible. Any change would be a variation from the patent.

Cross-int. 63. Will you please tell me what forms the upper edge of the crucible in the Smith patent?

A. In the description of the Smith patent, it says: "* * The top of the mould which projects inwards towards the center, * * * * extending beyond the inner surface of the mould, a distance equal to the thickness of the crucible at top." From this, I suppose that the width of the under part of the flange determines the thickness of the crucible at the top.

Cross-int. 64. The crucible is formed by the pressure of the surface of the revolving former against the batch, is it not?

A. If it were possible to form a crucible on this machine, the surface of the former pressing on the batch would give shape to the inside of the crucible; the inside of the mould would give shape to the outside of the crucible.

Cross-int. 65. If the length of the former is the same as the inside

height of the crucible when it would be turned over to the side of the mould, it would go under the flange *o*, would it not?

A. I hardly think it would. It would be apt to strike the rim or edge of the flange, unless constructed with great nicety, and unless the iron mould worked perfectly true, which I think would
55 be rarely the case. The material forming the crucible would also prevent its going under the flange.

Cross-int. 66. The two things being equal, as you say they must be, if one can go under the other can, can it not?

A. What two things?

Cross-int. 67. You say in the 62d answer that "according to the Smith patent it is necessary that the former be the exact height of the inside of the crucible." Now, I ask you that if the side of the crucible will go under the flange *o*, will not the former do likewise, they being exactly of the same height, according to your construction of the Smith patent?

A. If the former was made with great accuracy, and the mould was perfectly true, it might be possible to force the former under the flange, if there was no clay inside of the mould, and if both were perfectly clean. I do not think it could be so forced under when there was clay enough in the mould to form a crucible.

Cross-int. 68. Suppose there was no clay in the mould, would not the former go under?

A. As machines are commonly constructed I should hardly think it likely that it would. But as I have before said it might be possible to make the former so true that it could go under the flange.

Cross-int. 69. Supposing the machine to be perfectly and accurately constructed, would not the former, if made as you state it must be made, go under the flange?

A. It might if there was no clay in the mould and the mould and former were perfectly true. If the former should be forced under the flange while the mould was in motion, the slightest variation in the under surface of the flange or of the top of the former would result in the breaking of the mould or the former, and would be a dangerous operation.

Cross-int. 70. I left the clay out of the mould some time ago. The question supposes the machine to be perfectly and accurately constructed. Now, please state whether the former would go under the flange or not.

A. I presume that it could, but think there would be friction between the upper portion of the former and the under surface of the flange.

56 Cross-int. 71. Will you please answer the question yes or no?

A. I don't know that I can answer it any more definitely than I have. I think I can say yes with the reservations I have made. I have not seen a machine made as accurately as you describe.

Cross-int. 72. Will you please answer yes or no to my question

70? And if you will, please indicate which answer you are willing to make, an affirmative or negative one to said question.

A. I am willing to answer your question, but not having seen a machine constructed as you describe, I am unwilling to make a more positive assertion than I have.

Cross-int. 73. Then you don't know whether if one thing of a certain size will fit into a cavity of a certain dimension, that another thing of the same size will also fit in that cavity?

A. In this case the materials are so dissimilar, one being soft and easily pressed into the cavity, the other being hard, is the reason of my former answer.

Cross-int. 74. Please answer my proposition.

A. I presume it will.

Cross-int. 75. The question is, do you know, or don't you know: which?

A. I think I do know. I presume it will.

Cross-int. 76. If you know, please answer the question categorically.

A. It will.

Cross-int. 77. The batch being in the Smith mould, between the former and the sides of the mould, how can the former be caused to approach the side?

A. By the mechanism for moving the former described in the Smith patent.

Cross-int. 78. In order to approach the side it must pass through the soft batch or press it out of the way, must it not?

A. I think it would usually press the batch out of the way, by pressing it up the side of the mould.

Cross-int. 79. And if there is too much batch, it will exude out of the top of the mould as long as the former moves towards the side, will it not?

A. It will.

57 Cross-int. 80. And if there is nothing to stop the movement of the former toward the side of the mould, and the operator continues to move it over, it will in time encounter the side of the mould forcing the batch which is soft out of its way, will it not?

A. I think the clay would prevent the former moving under the flange of the mould; the space is so small it would be apt to bind and wrench the mould or the former.

Cross-int. 81. I said nothing about flange in my question. Please answer it without reference to any flange.

A. If there was no flange on the mould, I should think there would be nothing to stop the former from moving to the side of the mould, except that the portions of clay rising from the mould and thrown back from the top of the former might, by the accumulation, prevent the former from touching the side of the mould.

Cross-int. 82. They would be thrown in the rear of the former, would they not?

A. They would be thrown into the mould opposite, or nearly so, that portion of the former which forced them into the mould.

Cross-int. 83. In the meanwhile the former would have approached nearer to the side of the mould, would it not?

A. It would if it had been pressed nearer the mould.

Cross-int. 84. My former question provided for the continuous movement of the former to the side of the mould. When the batch which you say will be thrown back has come around to the former again, would it be able to force the former back against the screw, which being continuously applied by the operator not only holds it up to the position it has already gained, but causes it to advance against the plastic batch, between it and the side of the mould?

A. I don't think the batch would be able to force the former backward unless the screw was very weak. If the pressure on the former was continued by the operator it might result in the formation of a wedge of the clay, at and near the point of contact of the clay and former, which would result in stopping the motion of the mould, as occurred in the experiment of crucible No. 4, described by me in answer to interrogatory No. 14, and might cause some breakage of the machinery and injury to the workman.

[Adjourned.]

58 BOSTON, *October* 13, 1877.

Cross-int. 85. It would certainly result in the former coming against the side of the mould, would it not?

A. I don't think it would.

Cross-int. 86. Why not?

A. I think the revolution both of the mould and of the former would be stopped by the action of this batch of clay, as was the case in experiment crucible No. 4, described by me; and without these motions of the former and mould, it would be practically impossible to force the former through the wedge of clay against the side of the mould. It could not be done without straining the machine and perhaps breaking it.

Cross-int. 87. In answer 78, you say the former would press the batch out of the way up the side of the mould; in answer 84 you've got it in a wedge in front of the former; and in your last answer you seem to have got it between the former and the side of the mould. Now, please state, in such a way that I can depend on the position of the batch which the former forces out of its way, where you think it will go.

A. In the formation of a crucible, the former pressing against a batch would press it up the side of the mould. This would continue until the space between the former and mould became filled with clay. If then the pressure was continued the clay would rise up over the former. If this clay rising over the former could be removed, this process of pushing the former towards the side of the mould could be continued until the former touched the side of the mould, if there was no stop or flange on the mould to prevent. This would result in gradually thinning the walls of the crucible, until there

would be no wall able to sustain its own weight, and nearly the whole mass of clay would be pressed up out of the mould. But in the Smith machine there is no provision for removing the clay that is pressed out of the mould. This would lodge on the top of the former and be thrown by its motion back into the mould. If the pressure was still applied and the walls squeezed thinner than the batch of clay would warrant, larger and larger masses would rise over the former and fall back in such quantities that the former could
59 not press them into the narrow space between itself and mould. But they would form a wedge and choke the former, and prevent the revolution of the mould and former, and breakage of the machine would probably result.

Cross-int. 88. How hard is the crucible material at the time of moulding?

A. It varies somewhat. I hardly know how to express the hardness of it.

Cross-int. 89. Can you push your fingers through the side of the newly-moulded cushion?

A. You can, quite easily.

Cross-int. 90. Suppose the rib of the machine which you call the Nimmo machine had sufficient range of motion to come against the side of the mould, is the material soft enough to permit the rib to be forced through the freshly-moulded crucible while the mould is stationary?

A. I should think it could be forced through, or nearly so, usually.

Cross-int. 91. Don't you know it could?

A. I never tried the experiment. It could surely be pushed nearly through; but if the mould was stationary and the wall of the crucible thick, there might be resistance enough to prevent actual contact between the rib and the mould.

Cross-int. 92. Did you ever try to push your finger through it?

A. I have, several times.

Cross-int. 93. If the mould was revolving and the rib was forced into the newly-formed crucible as above described, it would cut and force its way right through the crucible, would it not?

A. I don't think it would. It might be forced up to the side of the mould, by pressing the clay up the side of the mould and out of the crucible. In the Nimmo machine this clay is easily removed, and does not fall back into the crucible. The rib might be forced to the side of the mould by forcing the clay out of the mould, but not being forced through the wall of the crucible.

Cross-int. 94. Do you mean to say, that with the material as soft as you have described it, the hard, rigid rib would not cut
60 through the side of the crucible against the inner face of the mould? Please answer yes or no.

A. No; it would not. The hard, rigid rib would force the soft, plastic clay up out of the crucible, but would not go through it.

Cross-int. 95. Then that which is so soft that you can put your

finger through it, forms an impassable barrier, preventing the rib from coming against the side of the mould?

A. I have not said that this clay forms an impassable barrier to the passage of the rib to the mould. On the contrary, with the mould and clay revolving at the rate of about two hundred revolutions per minute, the passage of the rib to the side of the mould would be comparatively easy, but it would be accomplished not by being forced through the clay forming the crucible, but by pressing this clay up the side of the mould and out of it. The softness of the material would allow this to occur.

Cross-int. 96. Is it safe to conclude from your answers that the soft material cannot resist or prevent the advance of the harder rib? Please answer yes or no.

A. I cannot answer yes or no. If there is a chance for the soft material to escape, there would not be a great amount of hindrance to the advance of the rib. I have already explained what I think would be the result if the soft material forced up by the former fell back into the mould.

Cross-int. 97. What is there in that machine to prevent the escape of the soft material from the path of the rib when the latter is forced toward the side of the mould?

A. Do you mean the Nimmo machine?

Cross-int. 98. In these questions I have referred to the so-called Nimmo machine alone. I now ask you to please consider the questions in your answer, so as to save the continued repetitions of conditions and questions, which you have heretofore frequently made necessary by bringing in irrelevant matters to your answers.

A. In my answer to cross-int. 93 I say that "in the Nimmo machine this clay is easily removed, and does not fall back into the crucible."

Cross-int. 99. Then there is nothing in that machine to prevent the escape of the soft material from the path of the rib?

61 A. There is not. It rises from between the mould and the rib, and is easily removed by the workman.

Cross-int. 100. That being the case, there is nothing to prevent your answering cross-interrogatory 96 in the affirmative, is there?

A. Referring to the Nimmo machine exclusively, it is safe to conclude that it cannot prevent the advance of the rib toward the side of the mould. When you asked in cross-interrogatory 96 if it was safe to conclude from my answers, &c., I supposed you were referring to my answers to questions relating to the Smith machine as well as to the Nimmo machine, as you did not specify which answers you referred to.

Cross-int. 101. Can you now answer yes to that interrogatory?

A. I can answer yes.

Cross-int. 102. Why was complainants' Smith machine made with a spindle exposed between the top of the former and the under side of the bracket? Or, in other words, why does not the top of the for-

mer come close up to the bracket instead of having a space between them?

A. The description of the patent says: "The length of the former *l* is equal to the inside height of the crucible." The inside height of the crucible is determined by the under edge or surface of the flange. The top of the flange or mould acts as a stop to the bracket *q*. Of course the bracket can get no lower than the top of the mould; and if the former is only of the length of the inside of the crucible, there must be a space of exposed spindle between the top of the former and the portion of the bracket *q*, to which the spindle is attached. This space, if the machine was constructed according to the patent, would be equal to the thickness of the flange, I should think.

Cross-int. 103. The machine was made in that way in accordance with that construction of the portion of the specification to which you have referred, was it not?

A. That I cannot answer. I did not order the construction of the machine and did not oversee it, and knew nothing about its construction until it was done.

Cross-int. 104. Yet you think that the spindle ought to be exposed a length equal to the thickness of the flange *o*?

62 A. I don't see how it could be otherwise, in a machine constructed in accordance with the patent. I draw this conclusion from the description and drawing of the patent.

Cross-int. 105. Please point out in the drawing where the spindle is shown exposed.

A. Only the upper portion of the spindle is shown in the drawing. None of it is shown throughout the thickness of the bracket. It is not shown to be connected to the former at all. The exposed portion of the spindle, as well as the part running through the bracket, is hidden by the sliding-face plate *t*, which is a portion of the bracket *q*, and is not indicated by dotted lines or by separate drawing. In a similar manner is hidden that portion of the screw *w* by the bracket; and other portions of the machine are similarly hidden.

Cross-int. 106. But the specification says that the screw is there, and does not say that the spindle is exposed. Isn't that so?

A. The specification says that the screw is there; and while it does not say that the spindle is wholly or partly exposed, it does not say that it is wholly or partly hidden or covered up, or inside of the face plate *t* of the sliding bracket *q*. It says: "The spindle *u*, to which the former *l* is attached, and on which it revolves, is rigidly attached to the face plate of the sliding bracket *q*."

Cross-int. 107. Then it is your own deduction that the spindle should be made exposed, and this deduction is made from the language of the specification in regard to the length of the former?

A. I draw that conclusion both from the description of the length of the former and from the fact that the top of the flange of the mould acts as a stop to the bracket *q*.

Cross-int. 108. The drawing shows the former *l* to be apparently resting on the bottom of the plate of the mould, does it not?

[Objected to, witness not being an expert draughtsman.]

[Respondents' counsel notes that the witness has been called to testify as to the Smith patent, has construed the same, and has referred to the drawings and specifications of the same in support of his reasons and arguments; and counsel insists on his right to examine him in the capacity in which he has been offered, and which he has assumed.]

A. I do not think it does.

63 Cross-int. 109. The drawing shows the bracket *q* and the mandril *l* apparently at the limit of their downward movement, does it not?

A. I should think not.

Cross-int. 110. Don't you think the slide *t* is resting on the flange *o*?

A. Not necessarily; no more than the revolving plate *c* looks as though it was resting on the bracket *d*.

Cross-int. 111. Doesn't the flange *o*, in the sectional part of the view, look as though it was touching the side of the former *l*?

A. The lines certainly come together in the drawing, but I do not think that actual contact is intended to be represented.

Cross-int. 112. Question repeated.

A. To me, it does not look as though the flange touched the former. I have said that the lines of the drawing come together, but think it is merely the result of perspective.

Cross-int. 113. Did you not say, in continuation of your last answer, "just as the other side of the mould appears to extend over"?

A. I made that remark, not intending it to be a portion of my answer, however; still I will add it, if you wish, to that answer.

Cross-int. 114. What do you mean by the seventh objection to the Smith machine, which is in the following words: "The machine is awkward and heavy"?

A. By being awkward and heavy, I mean that it is not handled and worked easily. It takes at least two workmen, and sometimes more, according to the stiffness of the clay to be worked, to pull down the bracket *q* and force the former to the bottom of the crucible being formed. Any wearing of the v slides, *r r*, would result in binding the bracket *q*, or in making it more unevenly, which would require more power to bring it into position. Then, the moulds are unhandy, and handled with difficulty.

Cross-int. 115. Do I understand that one of the objections to the complainants' Smith machine is that the bracket is too heavy?

A. I think that the weight of the bracket is an objection to the practical working of the machine; but I don't think that the bracket of the complainants' Smith machine is heavier than is necessary to conform with the description and drawing of the patent.

64 Cross-int. 116. Where do you find in the Smith patent any description or drawing which would justify the complainants

in making a machine for the purposes of evidence in this case with a bracket so heavy as, by your own testimony, constitutes an objection and hindrance to the practical working of the machine?

A. The Smith patent describes a machine said to be for making crucibles. It describes the various parts of this machine, which must be strong enough, as in any machine, to do the work assigned them. The relative dimensions of these parts are indicated, I presume, in the drawing. I suppose the bracket was made in the same dimensions that the drawing and description indicate, and of a material suitable to withstand the great pressure upon the spindle *u* when the former is in contact with the clay. If it was not made strong enough to form a firm bearing for the spindle, the machine would not work at all.

[Noon recess.]

Cross-int. 117. Do you find any such description in that patent?

A. I find in the drawing what I should consider to be the relative dimensions of the various parts of the machine. The material out of which the bracket *q* should be constructed is not specified in the description of the patent, but I should think it would have to be made of iron, as wood would be apt to warp and get out of shape, and would not be strong enough to hold the screw *w*.

Cross-int. 118. The plain parts of the screw spindle *w* being the only parts necessarily bearing upon the bracket, could not a wooden bracket, provided with metallic bearings such as is common in many varieties of operative machinery, be used, as far as that objection is concerned?

A. Undoubtedly a wooden bracket provided with metallic bearings for the screw *w* could be constructed, but I do not think that such a bearing would be practical, for the slightest warping of the bracket would throw the bearings out of their true position.

Cross-int. 119. I suppose, on the same principle, that you have made all your so-called Nimmo machines with a heavy iron lever *l*, the Nimmo patent being equally silent on the question of material forming the parts of the machine?

65 A. The lever *l* in the Nimmo machine is made of wood. Where wood or iron would work equally as well, wood is usually preferred, being cheaper and lighter and easier to work. I don't know that iron would work as well as wood in this lever. As far as slides and stocks are concerned, the wooden lever is as good as an iron one in the Nimmo machine.

Cross-int. 120. Being lighter and easier to work, a wooden lever is necessarily less awkward to handle than an iron one, is it not?

A. It is.

Cross-int. 121. If the wooden lever in your machines should warp, it would affect the manufacture of the crucible injuriously, by reason of throwing the rib more or less out of its proper position, would it not?

A. It would.

Cross-int. 122. Do you mean to say that the heavy casting of complainants' Smith machine is not heavier than is necessary to support the former in its action in moulding a crucible in the revolving mould?

A. I don't know how that is. What I said was, "I do not think that the bracket of the complainants' Smith machine is heavier than is necessary to conform with the description and drawing of the patent." This was in answer to cross-interrogatory No. 115.

Cross-int. 123. Do you mean to say that you think that the bracket of the complainants' Smith machine would not be strong enough if made of a lighter casting?

A. I do not know how that would be, but should not think it ought to be reduced in weight materially.

Cross-int. 124. How much power does a man exert on the lever of the Nimmo machine to form a crucible?

A. I don't know; I never reckoned it up. I know one man does the work very easily.

Cross-int. 125. And with one hand, and that the left?

A. I never saw a crucible made that way.

Cross-int. 126. Which hand have you seen used?

A. The operation of the machine requires the use of both hands. I mean by this that the workman usually uses both hands. It might be possible to do it with one hand.

66 Cross-int. 127. How many hands does the workman use in applying the power to the lever to make a crucible?

A. Sometimes one hand, sometimes both hands, sometimes the foot by means of a stirrup.

Cross-int. 128. How many hands did the operator of the Smith machine use in turning the wheel to force over the former?

A. I did not notice particularly, but I think one hand until the crucible was nearly formed; then he used both.

Cross-int. 129. Please look at the drawing of the Smith patent, and state whether the former *l* does not appear to be nearer one side of the mould than the other.

A. I think not. I think it appears to be in the center of the mould?

Cross-int. 130. Please state who was present at the trial of complainants' Smith machine at Hussey & Company's works?

A. Besides myself, there were present Henry D. Atwood, J. E. Maynadier, Mr. Dravo, of Hussey & Company, William Wallace, also of Hussey & Company, and two or three workmen, also in the employ of Hussey & Company.

Cross-int. 131. Please state how it was possible for the pressure of the former, in the making of the fourth crucible, to unscrew the iron mould and chuck from the shaft on which it was fixed.

A. The clay formed a wedge between the former and the mould, and stopped the revolution of the mould and former; also of the chuck of the mould. The belt and pulley revolving the chuck was unscrewed from the shaft.

Cross-int. 132. Would this have happened if the screw had run the other way?

A. I think not. I think the mould would have been torn from the chuck if the belt had not broken or slipped.

Cross-int. 133. Are the complainants' Nimmo machines made with the screws running with or against the direction of the motion of the revolution of the mould?

A. I don't know. I never examined the screw upon any Nimmo machine?

Cross-int. 134. If you were building one, how would you build it in that particular?

67 A. I don't know. I should ask some mechanic, which would be the most secure, and then build it in that way.

Cross-int. 135. Please point out the matter in the Smith patent which directed the complainants to make their Smith machine so that the chuck was liable to be unscrewed by the revolution of the shaft.

A. I don't see anything in the Smith patent pointing out whether the screw should run with or against the direction of the motion of the revolving mould.

Cross-int. 136. State whether the machinery that you are familiar with, especially the crucible machines in your works, are so constructed as to fly to pieces upon being operated.

A. Our machines are all suitable for the purposes for which they were intended, and are all practically operative. They do not fly to pieces.

Cross-int. 137. Please state whether the chuck which contains the mould in your Nimmo machines are screwed on to the spindle. I mean the machines at your works and at the Phœnix Company's works.

A. I believe they are.

Cross-int. 138. Suppose the direction in which the spindle revolves in those machines be changed and the rib reversed, what would be the effect of the rotation of the spindle upon the mould, when the rib is pressing the clay against the side of the mould?

A. I don't know, for I have never examined the screw upon our Nimmo machines, and don't know whether the screw runs with or against the direction of the motion of the revolving mould.

Cross-int. 139. You speak of the mould of complainants' Nimmo machine being made loose in the chuck. Why was it made loose in the chuck?

A. I did not speak of the mould of complainants' Nimmo machine being made loose in the chuck. I think I said it was loose in the chuck and wobbled.

Cross-int. 140. Please state how the expense of an article can interfere or affect in any sense its practicability.

A. I think it is plain to any one that the expense of an article might make its use impracticable.

68 Cross-int. 141. Do you regard the Nimmo machine as practicable?

A. I do.

Cross-int. 142. It would work just as well if it cost a million dollars, would it not?

A. I suppose it would work as well, but it would be an impracticable machine to use at the present price of crucibles. It would be far preferable to make crucibles by turning them by hand, as they were always made before Nimmo's invention.

Cross-int. 143. When a crucible dries in a still atmosphere, will it warp?

A. It depends upon where the crucible is placed to dry, somewhat.

Cross-int. 144. Suppose a perfectly-formed crucible to be inside of an iron mould, such as the Smith mould or the Wise mould, and the mould to be placed in a still atmosphere of even temperature, would it not in drying dry evenly; and as you have already stated that it would not dry on the outside but would warp, would it not warp evenly, owing to its peculiar form, being circular in cross section and oval in vertical section?

A. I do not think it would dry evenly or warp evenly. I should be afraid that it would not.

Cross-int. 145. Please state whether the workman sponge-finishes the crucible on the Nimmo machine when the rib is in it.

A. I think partly when the rib is in it, and partly after the rib is taken out.

Cross-int. 146. You are not sure about it, then?

A. I know the workman always puts his hand in the crucible during its formation, and I think that part of the sponging is done then.

Cross-int. 147. Question repeated.

A. I am quite positive that it was done as I have described it.

Cross-int. 148. Are you sure of it?

A. Yes, I am quite sure of it.

Cross-int. 149. So far as the sponging operation, which is performed after the rib is removed, is concerned, it can be done equally as well in the Smith machine after the removal of the revolving former, can it not?

69 A. I suppose it can.

Cross-int. 150. How many revolutions per minute did the mould of the complainants' Smith machine make when it was revolved by hand power?

A. I don't know. I made no estimate. I should think from fifty to seventy-five revolutions per minute.

Cross-int. 151. How many revolutions did it make on Thursday morning, when you tried it at the Phœnix works, which I understand was the four hours and a half trial?

A. About two hundred and sixty revolutions per minute?

Cross-int. 152. What was the speed of the shaft from which the power was taken?

A. I don't know.

Cross-int. 153. What was the size of the pulley on the main shaft?

A. That I don't know.

Cross-int. 154. How much of the four hours and a half was employed in the actual operation of the machine, when working upon the crucibles, from the time the stuff was put in until the crucibles were taken out of the moulds?

A. I can't tell exactly; perhaps an hour, averaging at least twelve minutes apiece. It might have been longer.

Cross-int. 155. How soon did you attempt to remove the crucible from the mould?

A. Immediately after their formation.

Cross-int. 156. Did you take the crucible out of the lower section of the mould immediately after the formation of the crucible?

A. We attempted to, but succeeded only in two instances.

Cross-int. 157. In your manufacture of crucibles, do you take them out of the mould right away?

A. We do not.

Cross-int. 158. How long do you leave them in the mould?

A. About twenty-four hours.

Cross-int. 159. That is the ordinary custom in the crucible works with which you are familiar, is it not?

A. I am only familiar with the works of the Jersey City Crucible Manufacturing Company and the Phœnix Manufacturing Company. That is the custom there.

70 Cross-int. 160. Did the batch overflow the top of the mould in all of these trials of the complainants' Smith machine?

A. It did, I think; part of the clay forced up, however, went back into the crucible?

Cross-int. 161. Will you please tell me why this excess of material was invariably put into the mould? Was it for the purpose of having it fall back into the crucible and spoil it?

A. It was not for the purpose of spoiling the crucible. Without a slight surplus of material, a perfect top could not be formed.

Cross-int. 162. Smith's patent refers to that excess as a possible contingency only, does it not?

[Objected to, because the patent is the best evidence.]

A. I think the Smith patent refers to this excess as usually existing. It says, "When the surface of the former comes in contact with the projecting rim *o* of the mould, the overflow of the plumbago batch is thereby cut off and the crucible is finished."

Cross-int. 163. Had the workman who operated the complainants' Smith machine ever operated a machine like that before?

A. I think the workman who operated that machine was the first man who operated a Smith machine. The machine has been built about four months, and during that time he has operated occasionally.

I don't know how often. I don't think he operated one before this was built. I have seen him operate it on three occasions.

Cross-int. 164. Were you present when the complainants' Smith machine was operated in my presence at the Phœnix works in the afternoon of October eleventh, and when a machine similar to the Wise machine was also operated?

A. I was not.

W. T. MACFARLANE.

71 DEPOSITION OF ALBERT H. SPENCER.

Direct examination by James E. Maynadier, Esq., of counsel for complainants.

BOSTON, *October* 12, 1877.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. Albert H. Spencer; 40; Boston; solicitor of patents and mechanical expert.

Int. 2. What experience have you had as expert in patent cases?

A. During the past three years, I have frequently been called to testify concerning questions of novelty and infringement in the trial of patent cases in the United States courts, devoting a large part of my time to this business. Prior to 1875, I had testified in a number of such cases, and had been much occupied in the preparation of evidence in patent suits during a period of seven or eight years. Concerning the questions now at issue, I testified in the cause of Pickering *et al. v.* Philips *et al.*, tried in this district.

Int. 3. Mr. McIntire states, on page 48 of the record, that a mode of operation of the Nimmo machine is described in the reissue which is impossible in that machine. Please state your opinion on this point, giving your reasons.

A. Mr. McIntire's criticism, or the fatal inconsistency which he attempts to point out, is based on the assumption that the portion of the description that he quotes from the reissue demands that the lever and rib shall be drawn towards the operator in a horizontal plane, until the end of the lever clears the part *q*. The reissue does not so state, nor is there any reason why it should be withdrawn in a direction strictly horizontal. In practice, and as a matter of plain common sense, the operator would naturally lift the handle *m* of the lever slightly, as the first operation in withdrawing the rib, and particularly if a movement strictly horizontal should result in bringing the point of the rib against the inside of the finished crucible.

The movements of withdrawing the rib are the reverse of those employed in forming the crucible, and that being the case, the first step of withdrawal is such as I have just described; then the lever and rib are moved towards the operator far enough to release
72 the notched end *o* from the part *q*, and permit the lever and rib to be raised out of the pot, and sustained by the counterbalance.

If it were true that the language of the reissue required the strictly horizontal movement to which Mr. McIntire refers, his point would

seem to be that the lever is shown a trifle too long in the drawing, where it projects beyond the notch *o*, for this initial horizontal movement. No sane man building the Nimmo machine would prolong the lever beyond the notch *o* to such an extent as, in its removal, to cause the rib to mar the interior of the vessel.

There is nothing inconsistent with the original Nimmo patent in that portion of the reissue quoted by Mr. McIntire on pp. 48–49 of the record. The description found in the original patent, page 125 of the record, sets forth the construction and mode of operation of the machine, but does not describe with exactness the manner of removing the rib. How Nimmo would have described it, had he deemed it necessary to explain it at all, I can't say, but I am confident he would not have described such a proceeding as should ruin the crucible. He would have described only such steps as were adapted to perfect one vessel and to make another. This and this only has been done in that part of the reissue referred to. The machine described in the original has all the capacities ascribed to it in the reissue, and will clearly operate in the manner set forth in the reissue.

Int. 4. Have you examined, and are you familiar with the patent to J. & F. Wise, dated November 30, 1852, and the patent to William Smith, dated November 3, 1863? If so, please compare the things described in those patents with the machine described in the Nimmo reissue, as to their substantial identity or difference, giving the reason for any opinions you may express; and state in the course of your answer what you consider to be the essential features of the invention described in the Nimmo reissue.

A. I have examined the Wise and Smith patents, and am familiar with their contents.

The invention described in the Wise patent is stated to be a new and useful machine for making earthen or stone ware, being an improved potter's wheel; and the Smith patent is an apparatus for making plumbago crucibles. In order to compare the inventions therein described with that set forth in the Nimmo reissue, I
73 wish first to state what I understand the Nimmo invention to be.

The Nimmo patent describes an "improvement in moulding crucibles," adapted to the formation of bilged vessels by machinery. The essential features of this mechanism appear to me to be these: First, a revolving mould in which the plastic material is placed; second, a rib properly shaped and located to give the correct internal shape, and the proper internal finish to the crucible,—this feature including suitable stops on the frame of the machine, regulating the position of the rib with relation to the sides and bottom of the mould, so as to form a crucible of proper thickness in its walls and bottom; third, suitable mechanism for guiding the rib toward the axis of revolution of the mould as it is withdrawn. The combination of these parts and the process of manufacturing crucibles therewith comprise Nimmo's invention.

Comparing the Wise apparatus with the essential mechanism of Nimmo's patent as above stated, I find that Wise describes a machine destitute of the rib, and also destitute of proper stops for the rib, if one had been provided. This machine embodies a rotary mould in which the ware is to be shaped, and a rotary former intended to give the internal form to the vessel; also means of bringing the rotary former back to the axis of the mould, that it may be withdrawn upwards. This machine could never make a bilged crucible by any possibility. The principal of the rotary former or plunger, driven by contact with the revolving clay, is radically wrong; the nature of the material operated upon is not adapted to such a mode of treatment. The inevitable result of an attempt to shape the plastic interior of the plumbago crucible by this rolling process, is to pull off and tear away parts of the interior surface instead of compressing and finishing it; hence the revolving plunger in the Wise machine is not the rib of the Nimmo machine nor the equivalent of it. The Wise machine has no stop regulating the thickness of the walls of the vessel being shaped in the mould, except a flange turned inwardly at the top of the mould, against which the upper part of the plunger impinges, according to the theory of the patent, while both mould and plunger are revolving rapidly. Such a stop is practically inoperative, as I shall show in the course of this deposition. There
74 would be no certainty or accuracy in its operation; and the attempt to use it as a gauge of the thickness of the walls would be a failure, for several reasons. The specification mentions a stop to determine the thickness of the bottom of the crucible, but it is placed at one end of the long lever which raises and lowers the heavy plunger. It could not define with exactness the precise point at which the depression of the plunger should cease. Hence I think I am justified in saying there are no stops which are the same as or the equivalents of those in the Nimmo patent.

The machine described in the Smith patent varies from that described in the Nimmo reissue in about the same manner and degree as does the Wise machine. There is a similarity in the construction and operation of the Wise and Smith machines. Like the Wise, the Smith machine has a revolving mould, and purports to shape the plastic mass within it by a revolving former, having a motion also towards and from the inner wall of the mould, and means of elevating the former after it is returned to the axis of the mould. An inward flange at the top of the mould is also relied on as a gauge of the thickness of the walls. No other lateral stop is provided, and there is no stop whatever regulating the descent of the plunger, until the cross-head strikes the top of the mould.

The Smith machine, therefore, has not the essential elements of the Nimmo invention, since it has not the rib, nor any equivalent for it, and also because it has not the Nimmo stops, nor any equivalent for them. It is not practically operative to form the crucible, for the same reasons mentioned by me in considering the Wise patent.

[Adjourned.]

BOSTON, *October* 13, 1877.

Int. 5. Please consider the Wise and Smith patents with especial reference to the question whether the machines described in them are practically operative or not, stating your opinion, and giving your reasons.

A. Neither of the machines described in the Wise and Smith patents is practically operative, in my opinion, for several reasons. I have already referred to the utter impracticability of a machine for making crucibles by a revolving mould, and revolving former
75 driven by friction on the plastic mass. This feature, which is the only principle of the machines described in these two patents, whereby the walls of the vessel are to be formed, is totally impracticable. The mode of operation thus set forth is just what it ought not to be. It is a prime necessity, recognized in the working of clay in potteries from the earliest history, that in building up the walls of a vessel when the plastic mass is in rotation, friction upon the surface of the revolving mass must be given; in other words, the material must be carried by the surface which forms it by a sliding movement. With the simplest potter's wheel the material is revolved with friction past the hands of the operator, and the vessel can only be smoothed and shaped properly by such sliding movement. The nature of moist clay, and of the plastic compounds used in the construction of pottery, is such that treatment by friction is absolutely necessary to perfection of result; hence the rolling operation set forth in the Wise and Smith patents proceeds upon a principle at war with the nature of the material. That which ought to be done was omitted, and that which should not be done is prescribed instead. When the former in these machines is driven merely by contact with the revolving clay, there is a constant tendency of the material to stick to the former in its revolution, and be torn from the inner surface of the vessel being formed, and this tendency being inherent in the nature of the material, will manifest itself in any machine employing a revolving former, driven by contact with the material. So long as the surface of the former moves at the same speed as does the inner surface of the plastic material against which it is pressed, there will be suction (instead of sliding-friction) between them, and that suction will cause the surface to flake off and appear rough and unfinished. If the mould revolves, this suction will tend to draw the plastic wall of the vessel away from the inner wall of the mould, admitting air between them and otherwise tending to impair the walls. If the speed is sufficiently great to overcome this tendency by the intervention of centrifugal action, there will be such speed of the former as to cause it to throw off in a tangent the material it has by suction drawn from the walls, and cause an accumulation of the material in the bottom of the vessel to be again worked over.

Another practical difficulty with the revolving former, in
76 the construction of bilged crucibles, shown clearly in the drawing of the Smith patent, is that such former is in the operator's way, and prevents him from seeing or getting his hand within

the vessel to observe the condition of his work or to remove surplus material; and this is because the former extends equally on all sides of its axis, and must project into the interior of the mould according to the bilge which the vessel is to have. If the bilge is great and the mouth small, there can be no access to the interior, and but slight opportunity to note the progress of the work. A vessel above a certain bilge, or having contracted mouth, cannot be made with the rotary former, owing to the impossibility of removing the former through the narrow mouth.

An inspection of the Smith drawings will make my meaning clear. The drawings annexed to the Wise patent represents a mould adapted to form a large-mouthed vessel, and the former delineated in that drawing would produce in that mould a vessel very much thicker at the top than at the bottom of the walls, which probably is accounted for by inaccuracy in the drawing; the outlines of the former and the mould do not properly conform to each other. This machine being represented as fitted to form a large-mouthed vessel, permits the axis of the former to approach closely to the side of the vessel, and hence a much smaller former may be used. A better opportunity of inspection is had in the Wise machine than in the Smith, for this reason; but the same fatal objection exists in both cases, viz., the former revolves.

Another fatal objection to both those machines is that the mould is not properly secured in either case. The means provided for this purpose in the Wise patent embrace, first, a circular block of wood "about one-fourth of an inch in thickness and secured to the head piece by three or more screws," &c., around which the bottom of the mould extends, and over which it is held by gravitation; and, second, a rod rising from the revolving table, and described as follows in the patent: "The mould is attached to the head piece by an iron rod *i*, (see figure,) which passes through the head piece near its outer edge and is secured by a screw nut underneath. The rod rising perpendicularly to the head piece passes through the hinges of the mould, forming the axis on which they turn. The mould may be re-
77 moved from the head piece by simply lifting it up off the rod, when the two parts, having no longer any axis to their hinges, will separate." There is no head or nut at the top of this rod, and nothing but gravitation and a very slight friction to hold the mould down upon the revolving table until the plunger begins to operate. If the mould should rise in its rotation one-fourth of an inch, it would lose its anchorage on the head block *d*, and be thrown from its positions, since it would be impossible to center the plastic mass accurately before commencing work. After the plunger was fully depressed, there is no adequate provision in the means described to resist the lateral pressure exerted by the former upon the clay in the mould. The construction shown would be very unsafe for the operator; the mould and its contents would inevitably be wrenched from their position on the rotary head *c*.

In the Smith machine the devices for securing the mould in posi-

tion are equally defective. They are described in the patent as follows: "Near the circumference of the wheel *c* is a circular flange *g* which serves to hold in place centrally on the wheel the lower section of the iron mould *h*, by means of the set screws *s*. One set screw only is seen in the drawing, the other being diametrically opposite to it." The iron mould *h* is shown of oval form vertically, and the set screws described bear against this oval surface very near to the bottom of the mould. Their tendency would be, when placed as shown and described, to raise the mould from its seat on the rotary head, and they would be totally insufficient to secure the mould in its proper position, when exposed to the extreme lateral pressure required in shaping the crucible. It would be almost impossible to hold the mould under such pressure by such means; and this machine would be equally dangerous and impracticable, in this respect, with the Wise machine.

Both these machines are also defective and impracticable for successful use, because not provided with suitable stops upon the frame to regulate the thickness of the bottom and sides of the vessel. I have alluded to this difficulty in the Wise and Smith machines in a former answer, but will restate it here. The Wise specification de-
scribes a stop on the post *n* to limit the downward movement
78 of the lever and former, but there can be no uniformity or
exactness in its action, because the lever is required to slide up and down on the post *n*. The description of this feature is as follows: "The mandrel lever *o* projects from the post *n* (see figure) at right angles to it, and is attached to the post by means of two holes through which the post passes sufficiently loose to permit of the lever being readily slipped up and down the post, and yet tight enough to keep it steady. It is prevented from sliding too far down by a pin in the post *n*, or by a collar and screw." Now, if the lever worked upon the post with sufficient freedom to enable the operator to raise and lower the plunger by hand, as no other means are provided, there would be such a degree of play to the mechanism as to make a very unreliable stop. With this exception, however, there is no stop upon the frame of either machine. In place of proper stops upon the frames, reliance is placed upon bringing some portion of the mechanism to bear upon the revolving mould. In the Wise machine, the lateral stop, or gauge of thickness of the side of the walls of the vessel, is the flange turned inwardly at the top of the mould.

[Noon recess.]

In the Smith machine, a similar flange performs a similar function. The upper part of the rotary plunger in each case meets the rotary flange, both being in motion, and hence entirely unfitted to serve as an accurate stop. Pressure of these parts upon each other tends to throw the mould out of position and causes the former and mould to wear upon each other.

There is no stop in the Smith machine, regulating the thickness of the bottom of the crucible, except as the cross head which carries the

revolving former as it is depressed comes in contact with the top of the mould, which is also revolving and in no proper condition to serve as a stop. These rotary stops have not the same action as have the rigid substantial stops upon the Nimmo frame, because the part cannot be brought into that firm contact which is necessary for accurate work, and also because they require extreme watchfulness on the part of the workman, to avoid such a degree of pressure between the parts as shall seriously injure the machine or the workman.

These two machines are extremely awkward and inconvenient to operate, for several reasons, the Smith machine in particular. The plunger is so large and so flat at the bottom as to require a
79 great deal of power to depress it, particularly if the plastic material is a stiff compound. There are no handles to take hold of the cross head by, in raising or lowering; nor are there any upon the heavy iron mould; and hence the workmen cannot employ their strength to advantage; in lifting off the upper half of the mould, for instance, there is nothing to grasp, but it is like lifting one-half of the globe by its convex surface.

Another awkward and inconvenient feature of the Smith machine, as shown and described, is, that while the former and the plunger must be brought back to the center of the mould, in order to withdraw it therefrom, there is not then room to lift the upper half of the mould from the formed crucible, until the plunger is moved far to one side by the hand wheel, requiring it to be again moved to the center of the next mould.

Another serious fault of the Smith machine is, that the excess of material will be forced, by the action of the rotary former and the flange at the top of the mould, over and upon the upper part of the former, from whence it will be thrown by the movement of the former back again into the partly-formed vessel, or between the top of the mould and the bottom of the cross head carrying the former. Now, since it is impossible to insert the hand and remove this surplus material, it will remain in the plastic vessel an excrescence,—being continually forced out from and dropped again into the mould; or when thrown between the mould and cross head, it will so bind and cramp the machine as to require an excess of power to overcome the obstacle, or will stop the machine.

These criticisms upon the Smith machine have been forced upon me by an examination of the patent, and of a machine constructed in accordance therewith, marked Comp'ts Exhibit Smith Machine, which machine I saw in operation last Thursday, October 11th, at the works of the complainant corporation at Taunton, Mass., on which occasion three very intelligent practical potters worked from 8 A. M. until nearly 3 P. M., except an hour at noon, under my eye, using every effort to produce a crucible from this machine, but without avail. It was impossible to make a single crucible that could be got from the mould without destroying the pot. The absolute impracticability of the rotary former as a means of shaping the interior of the
80 vessel, was then and there demonstrated to my complete

satisfaction. It is absolutely impossible to make a single crucible in a rotary mould with a rotary former driven by contact with the inner surface of the material and having the same surface speed. During our experiments, at one time the mould was actually stopped in its rotation, by the wedging of the clay between the mould and the cross head. The inefficiency of the rotary stops was clearly demonstrated, and the various objections I have referred to were made most apparent. But one material change had been made from that described in the patent, and that was to make the machine safe to be used, by making the flange on the rotary head *c* vertical and forming it upon the lower part of the mould a corresponding vertical neck, against which these set screws in the vertical flange impinged.

Complainants' Exhibit Smith Machine is a full-sized machine, constructed in a thorough, workmanlike manner, and would work perfectly if the principles embodied in it were correct. The former revolves at the speed of about 260 turns a minute. The material used was the ordinary stock used by the Phœnix Manufacturing Company in making their crucibles. The mould was of iron, carefully finished and polished, and the rotary former of wood, both according to the directions of the Smith patent.

In the first experiment, the mould was wiped dry and dusted with fine black-lead, and the wooden former was dry; the batch weighed 39 lbs., which was placed carefully in the mould, and after giving proper speed to the mould, the former was depressed therein until checked by contact of the cross head with the revolving mould; than by the hand wheel, the former was pressed towards the side of the mould until the corner of the former and flange met. A peculiar sound was heard during this process, caused by the suction between the clay and the former, or by the tearing of the one from the other. The material was forced up in the mould by the pressure until a small portion of it overflowed, which the workmen removed as thoroughly as possible to prevent its falling into the mould again. Considerable clay had also gathered upon the former, which was then withdrawn from the mould, cleaned and wet, and then returned to compress the rough and unfinished vessel remaining in the mould. Under this pressure more of the material worked out at the top
81 of the mould; the suction sound continued, and by throwing a ray of light within the revolving mould by a small mirror I could see the particles of clay flying in a lively storm from the surface of the former across to the other side of the plastic vessel. The former, on removal from the mould, was found coated, from one-fourth to one-half an inch in thickness, with the plastic material. The interior surface of the vessel was very rough. The attempt to remove the upper half of the mould resulted in tearing the vessel in two at the middle. The upper part of the vessel was destroyed in separating it from the mould; the lower part was preserved and marked by me S. 1. Fifteen minutes were consumed between the time when the mould was first set in motion and the time when the part S. 1 was taken from the mould.

In our second experiment the interior of the mould was oiled thoroughly, and the former was cleaned and wet. The ball was 37½ lbs. of the usual steel mixture. In pressing the former to its place at the side of the vessel, the same suction sound was heard, and some four pounds of the material overflowed, and was taken or thrown off the top of the mould. After removing the former, the men cut the material free from beneath the flange of the mould by a thin knife to facilitate removal of the upper half of the mould, but the attempt to take the crucible from the mould was a failure; it tore in two in the middle as before, and the lower part of the wall remained in the mould, the bottom being forced up through it in the attempt at removal, leaving the bottom of the would-be crucible standing without walls.

The third experiment was with the same stock, the mould dusted and the former wet. I timed the bare operation of shaping the vessel by rotation, and found it two minutes, the workman being instructed to turn the hand wheel slowly. On removing the former, it was heavily coated as before to a thickness exceeding one-fourth of an inch. I weighed the clay removed from this former and found it to be 1 lb. and 15 oz. The pot was fractured in removal as the others had been, notwithstanding the utmost care, and the bottom part collapsed as in the last trial.

Experiment No. 4 was with a "brass pot mixture" weighing 37½ lbs., mould carefully oiled and subsequently dusted with fine
82 lead, former dry and polished. After a slight lateral movement of the former in the pot it was returned to the center.

[Recess.]

It was then withdrawn and the adhering clay removed and found to weigh 4½ oz. The former was then cleaned and wet, and being replaced in the mould was pressed towards the side of the mould until the stops nearly met, when a quantity of the batch overflowed, gathered under the cross heads, nearly stopped the machine, and finally unscrewed the chuck from the top of the mould spindle, the mould revolving from right to left, to better accommodate the position of the machine and its driving mechanism. The plastic ball in the mould was wound around the former, and pulled away from the walls of the mould. The pot was, of course, a shapeless mass.

The fifth experiment was tried with the same ball, worked over and made stiffer than a hand-turner mould use, the mould oiled and dusted as before, and the former wet. We attempted this time to make a crucible as speedily as possible, and shaped it up in about one and a half minutes from beginning to end of the rotation. A thick belt of clay was formed upon the former, covering it completely, excepting a narrow ring at top and bottom. This adhering material was removed from the former, and weighed precisely the same as on a previous trial, namely, 31 oz. The workmen were extremely careful in attempting to remove the mould and save the pot entire, but it parted in the center as before. The lower portion of it was preserved, however, and marked by me S. 5.

Experiment No. 6 was with the mould oiled, the former wet, and a batch of 35½ lbs. steel mixture. The operation proceeded about as in the previous trial; the clay adhering to the former weighed 1 lb. 11 oz. The crucible was torn asunder in the attempt to remove the mould from it, as in all the other trials. The lower part of the pot was preserved, and marked by me S. 6. This trial was made Thursday afternoon, in the presence of the defendants' counsel and the examiner; the previous trials, having consumed all the forenoon, were witnessed by Mr. J. E. Maynadier and W. T. Macfarlane. The parts of crucibles which we were able to obtain in all these
83 trials were rough, blistered, imperfect specimens of moulding, not merchantable or passable, had they been removed without fracture.

Becoming convinced of the impossibility of making a single pot upon this machine, the cross head, weights, and pulleys were removed, and a swing frame substituted, supporting a somewhat smaller rotary former, so mounted in its bearings as not to revolve freely. With the machine thus altered, we proceeded to try experiment No. 7, using the same mixture as before, 35½ lbs. in weight, to which was added about 2 or 3 lbs. more when it became apparent there was not quite enough of the original batch. With slight lateral pressure, the former would revolve readily; but when the pressure was sufficiently severe to properly compact the walls, the former would bind in its bearings and be retarded in its revolutions somewhat. As a consequence, there was but a thin plastic coating upon the former, its slow speed at times having wiped any adhering masses from it. The pot appeared very rough inside, with several holes. The attempt to remove the moulds resulted in a central fracture of the vessel, as had every previous attempt. The lower portion of this pot was marked by me S, 7.

We determined to make one more trial. We oiled the mould and dusted it very thoroughly with fine lead, and wet the former; the batch weighed 40 lbs., and there were subsequently added about 2 lbs. Lateral pressure of the former upon the mass to build up the walls resulted, as before, in a partial stoppage of rotation of the former, and thus cleared it largely of adhering material, leaving but a thin film thereon; except at the lower end, where 2 or 3 oz. adhered as a result of displacing a "tit" formed in the center of the pot. With the greatest care the workman managed to remove the mould from this crucible, but its surface was blistered and cracked, and its walls not properly compacted, and it was not a merchantable or passable pot. The fact that we were able to give it the semblance of a crucible, I attribute to the fact that the former did not rotate with a surface speed equal to that of the material in the mould, so that in some degree the former acted in a manner approximating a fixed or non-rotating plunger of the same shape.

This pot, representing the net result of some eight hours' earnest effort, I marked S. 8.

84 Int. 6. Have you examined the drawing marked "Exhibit Kier Machine," and the testimony of William Winkle describing it, and do you understand the construction and the alleged mode of operation of the machine represented by it? If so, state whether the machine will operate or not, giving your reasons.

A. I have examined the drawing and read the Winkle testimony. I think I understand the machine shown and described, and its alleged mode of operation.

A machine constructed in the manner shown and described could not last an hour. I don't believe it could make a single marketable pot. It is rickety in the extreme, and has the fatal objection that it is devoid of any proper stops upon the frame. The only stops are such as are shown in the Smith patent, viz., the rotary top and flange of the mould with which the lever and the former comes in contact. Such stops would be particularly unreliable in a machine otherwise constructed as is this Kier machine. The lever to which the former is attached is pivoted upon the post *p*, but is in no way fastened to the post *n*, the latter post serving only to prevent the lever from being carried too far to the left by the friction of the revolving mass upon the rib. The lever is in two parts, attached to each other by a long, slender hinge, which, according to the size of the parts of the lever, as stated by Mr. Winkle, must have been about seven inches long by 1¼ or 1½ inches broad. The outer part of the lever, bearing the handle, being attached to the other part of this frail hinge, has to bear the excessive strains due to the building up and compressions of the crucible in the mould, which would inevitably rack and twist the lever and cause the rib to quiver and jump under the pressure until something gave way. The weakest point of the whole machine, as I look at, is the attachment of the rib *e* to to the lever *d*, by the single bolt shown. According to Mr. Winkle's dart on the defendant's model, and the majority of his answers describing which way the mould revolved, the direction was from left to right, as to that part of the mould next to the operator, which would tend to force the rib *e* from lever *d*, since all the strains coming upon it bring a powerful leverage to bear upon that part of the rib in contact with the clay,—the fulcrum being the single bolt, and the short arm of the lever being merely that part of the rib extending from the bolt to the top of the rib. If tne friction of the
85 revolving clay upon the rib did not wrench the rib from its position, pressure of that rib towards the wall of the mould would split the ends of the rib where it is penetrated by the square part of the bolt. In any event, this rib, insecurely attached to a rickety lever, and regulated in its action by no fixed stops, would be utterly insufficient to shape a crucible even passably decent. Such a machine could not by any possibility be practically operative for the construction of plumbago crucibles.

[Adjourned.]

BOSTON, *October* 23, 1877.

Int. 7. Are you familiar with the extract from the Salvetat work, published on pages 106–9 of the defendants' record, and to the testimony of Mr. McIntire in regard to it? If so, please state which of the figures show the apparatus referred to in the reissue as "the apparatus described in Salvetat's work"; and state also whether you differ from or agree with the statements of the reissue in regard to the material difference between that apparatus and the Nimmo apparatus, and the respective modes of manufacture spoken of in the reissue. Also point out wherein you differ from Mr. McIntire, if at all, in regard to this Salvetat extract.

A. I am familiar with the extract from the Salvetat work as published in the record, and with Mr. McIntire's testimony concerning it, in his answers to interrogatories 12 and 13.

The second paragraph of the Nimmo reissue describes as old a mode of manufacture of certain articles of pottery by means of apparatus consisting of a revolving mould and an inside shaping rib. This mode of manufacture and this apparatus he (Nimmo) expressly disclaims in the paragraph immediately preceding the claim; and he also disclaims the mode and the apparatus of Salvetat which is described in the third paragraph of the reissue, beginning with "another mode," and describing apparatus consisting of a potter's wheel upon which the vessel was to be shaped outwardly by the workman's hand and inwardly by a rib which "was guided so as to cause it to approach the axis of the pot where it was necessary that it should do so in order to prevent injury to the pot." This is "the apparatus described in Salvetat's work," referred to in the reis-
86 sue, and it is clearly shown in the figures 238, 239, 240, and 241 of the plates accompanying the extract. The full description of these figures, contained in the extract, is as follows:

"Messrs. Bougou and Chalot have arranged the rib in a very ingenious manner for hollowing out hollow ware with the rib itself. The rib (figs. 238, 239) is festooned upon an upright, H, jointed at G. The joints H and G execute all the necessary movements for hollowing or pressing out the vessel. Figs. 240 and 241 show the rib in the position which it occupies when the vessel is revolved by the motion imparted by the lathe A. The vessel is supported by the wheel D."

I entirely agree with the statement of the reissue, as to the material differences between the apparatus thus described and the Nimmo apparatus, as well as between the respective modes of manufacture. The wheel D and lathe A above referred to are simply a potter's wheel and its spindles, and they served to build up the vessel in the potter's hands, as such wheels have done for ages, with this exception: that instead of forming the inside of the vessel with his hands, or with a rib that could not be moved toward the axis of the vessel in withdrawing it, the workman used a rib and lever mounted upon a jointed standard, thus forming the interior of the vessel by mechanism so constructed that it could approach the axis in removal, but forming the outside by hand manipulation only. Undoubtedly, nar-

row mouthed bilged vessels could be built by such means, but in an imperfect and variable manner, due to the fact that there is no lateral stop for the rib and no guide for the workman's hands; consequently there could be no exactness in his work; the thickness of wall would depend on the position and degree of pressure of his hands, guided only by his eye. Nimmo supplemented and completed this apparatus by providing a revolving mould to shape the outside of the vessel, a rib to shape its inner surface, and connecting means, which embraced not only vertical and lateral stops, regulating the thickness of bottom and walls, but also guiding means, serving to conduct the rib toward the axis of the mould in removal. The addition of the mould and the lateral stop for the rib transforms the incomplete apparatus of Salvetat into apparatus adapted to produce vessels of uniform compactness and thickness of wall, depending not upon the hand and eye of the workman, but upon unvarying mechan-
87 ism. The mode of manufacture, therefore, differs very materially in the two cases under comparison, both as to quantity and quality of work of which the apparatus compared is capable, because the mode of Salvetat is essentially hand-work and the Nimmo mode is machine-work. The product of the one would be variable and inexact; of the other, uniform and precise.

I agree with Mr. McIntire in the last sentence of his 13th answer, but with little else therein. In speaking of the Salvetat apparatus, arranged by pivoted lever and jointed standard, so that the rib could be brought to the axis of the pot for removal, Mr. McIntire says: "It is most clearly illustrated at figures 238, 239, 240, and 241 of the plates." True, those figures do *very* clearly illustrate it, as I have heretofore pointed out; and taken in connection with the paragraph I have quoted from the extract, I think they will justify Mr. McIntire in designating this apparatus as "the fully shown and described construction and operation of the mechanism in Salvetat."

Now, what do these figures and their description illustrate? Clearly and unmistakably they illustrate the fact that, with this apparatus for forming bilged vessels and removing the rib, there was no revolving mould. Not a word in the description, (which I have quoted in full,) nor a line in the figures to which the quotation refers, in any manner indicates the presence of a mould. Its absence is very evident; but, curiously enough, this fact seems to have been overlooked by Mr. McIntire. That deficiency was the first thing about those figures that I noticed, probably for the reason that the Nimmo reissue directly, explicitly, and repeatedly mentions the mould as an essential feature of the apparatus claimed, and also points out that the Salvetat apparatus is destitute of it. The reissue expressly "disclaims any and all modes of manufacture which can be carried on by any apparatus which lacks either the mechanism for guiding the rib in the manner above described, or the vessel for presenting and supporting the ball as above described, said Nimmo's invention residing wholly in the combined use of both these features."

Hence, while I agree with Mr. McIntire that the Salvetat appa-

ratus is clearly described in figures 238–241, I differ radically from him as to what that apparatus is, if he is understood to intimate that it embodies the combination of elements constituting Nimmo's invention, as limited in the disclaimer above quoted, and especially referred to in the reissue claim.

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The other figures of the Salvetat drawing, and the matter descriptive thereof in the extract, relate to the common apparatus used in the manufacture of flat or wide-mouthed articles of pottery—not bilged—such apparatus is referred to in the second paragraph of the reissue as having long been used; "but this mode of manufacture was not applicable in the manufacture of crucibles, because the apparatus was such that the crucible would be injured or destroyed in removing the rib by the end of the rib striking the upper part of the crucible," etc.

There are then in Salvetat two *distinct* modes of manufacture described and shown: one having the mould and former adapted to the production of shallow or wide-mouthed articles only, and not requiring or exhibiting the apparatus necessary to the manufacture of bilged vessels; the other adapted to form the interior of a bilged vessel by a rib, but having no outer mould. Both these modes of manufacture are recognized in the reissue as existing before Nimmo's invention, when he says: "Indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat, so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to, so far as presenting the ball to and supporting it under the action of the rib is concerned." Neither of these separate modes embodied the Nimmo machine or process, said "Nimmo's invention residing wholly in the combined use of both these features."

[Adjourned.]

BOSTON, *October* 26, 1877.

Int. 8. How do the models, "Defendants' Exhibit Wise Model," and "Defendants' Exhibit Smith Model," differ, if at all, from the machines described in the Wise and Smith patents?

A. Considering first the "Wise model," I find it radically different from the machines described in the Wise patent. In the first place the mould is all wrong. The patent describes it as "attached to the head piece by an iron rod *i*, which passes through the head piece near its outer edge," and "through the hinges of the mould, forming the axis on which they turn. The mould may be removed from the head piece by simply lifting it up off the rod, when the two parts, having no longer any axis to their hinges, will separate." There is nothing whatever corresponding to this in the model; the axis of the hinge is not prolonged at all, and if it were it would strike far outside of the head piece c. Instead of this mode of securing the mould, the head block d is beveled sharply inward from its upward edge, (instead of being vertical, as shown in drawings,) and a corresponding groove around the inner surface of the mould, near the bottom, is provided to fit upon the beveled head

89

block. This construction prevents lifting the mould off the head piece as above described, and renders the action altogether different, for it would prevent the removal of the formed vessel from the machine in the mould; it being necessary to open the mould before it can be released from the head block. The head block is described in the patent as being made of wood about one-quarter of an inch thick; in the model it is made of metal of the thickness stated, but out of all proportion in that respect to the other parts.

The mandrel or plunger also differs radically from what is described in the patent, both in its construction and mode of attachment to the operating lever. The description is: "The mandrel or plunger is made to revolve freely on its axis, (which is parallel to the axis of the mould,) and is attached to the lever by being placed in a groove and fastened with a pin, so as to be removable with pleasure." Instead of this, the model shows the former made as a sleeve revolving about an independent spindle, and secured to it at the bottom by a fixed button which does not revolve, the spindle being adjusted up and down in the lever frame by a screw-thread formed upon it and a nut. This spindle passes entirely through the upper and lower members of the lever, instead of being placed in a groove and fastened with a pin, as described in the above quotation. The nut shown above the lever frame, screwed upon the upper end of the spindle, is interpolated without any authority for it in the patent. An additional cross brace in the lever frame, between its upper and lower members, has been introduced into the model without authority for it in the patent; and the proportions of the parts of
90 the lever frame, as to length, breadth, and height, have been materially changed in a manner tending to stiffen the frame and enable it better to resist the strains coming upon it. The machine represented by the model is, on account of these several changes, materially and substantially different from the machine described in the Wise patent.

The Exhibit Smith Model also differs widely from the machine described in the Smith patent. The mould and former are principally at fault. In the drawing of the patent, the upper and lower halves of the mould are of the same shape outwardly, the mould having the general form of a barrel,—tapering in curved lines each way from the center. These curves of the lower half of the mould have not been reproduced in the model, which has the appearance of having been altered in this respect since its original construction, by the addition of new material at the bottom; making its lower edge more than double its original thickness; thus providing a vertical neck for the set screws in the flange g to bear against. Such a change would be necessary to make the Smith machines safe to operate, because the construction shown in the drawing would not hold the mould in place, as I have heretofore pointed out; but nevertheless it is a change not justified by anything in the patent. Three set screws are provided in this model, passing through flange g, and pressing upon the neck of the mould, while his patent calls for two

in these words: "One set screw is only seen in the drawing, the other being diametrically opposite to it." The construction of the model in these respects gives to the mould a stability, or fixedness of position, impossible to attain with that shown and described in the patent.

The former shown in the model is altogether too small in diameter to conform to the mould. It does not cover the center of the bottom of the mould when moved sidewise far enough to form the walls of a crucible, and consequently there would be formed in the bottom of every such vessel a tit, which would be displaced in returning the former to the center of the mould preparatory to withdrawal, but could not by the machine be incorporated into the walls. In the drawing, the former is shown centrally in the mould, but nearly filling the same, and the only limitation to it in the specification is, "but its diameter is less than that of the cavity of the crucible, so that it may be drawn up out of the mould when the crucible is finished.
91 The length of the former *l* is equal to the inside height of the crucible." The drawing shows the former of as great diameter as could enter the mouth of the mould, while in the model the one is less than half the other. Not only is the diameter of the former much too small, but its length is too great; instead of being "equal to the inside height of the crucible," it is lengthened by the thickness of the flange *o* at the top, so that the upper end of the rotary former bears against the under side of the cross head *g* instead of having a broad, flat surface between them, as shown in the drawing. The specification states "this former is made of wood," but in the model it is of polished metal. The exhibit "Smith Model" is, as a machine, substantially and materially different from the machine described in the Smith patent, for the reasons I have pointed out.

[Adjourned.]

BOSTON, *October* 27, 1877.

Interrogatory 9. Please compare complainants' exhibit "Deft's Machine," and deft's exhibit "Deft's Model," with the machine described in the Nimmo reissue, as to their substantial identity or difference; and state also wherein you agree with or differ from the McIntire's testimony in answer to the 20th interrogatory.

Answer. The two exhibits referred to in the question are alike in the respects in which a comparison with the Nimmo machine is necessary, and hence they may be considered together. They have the revolving mould and the stationary rib adapted to the formation of crucibles, together with the vertical and lateral stops for the rib which regulate the thickness of the bottom and the walls of the vessel and mechanism, for guiding the rib toward the axis of the mould as it is withdrawn therefrom. The stops for the rib are located on the frame, and are entirely independent of the revolving mould. These features constitute the vital essential elements of the machine described in the Nimmo reissue, as I understand it. The revolving mould is essential to give the outward form to the vessel; the stationary or non-rotat-

ing rib is essential to give it the proper form inwardly; and the guiding mechanism and stops act together to bring the mould and rib into proper relation to each other, to shape the vessel, and to prevent its disfigurement or destruction afterwards. These three elements are essential in the manufacture of crucibles in the
92 mode contemplated in the Nimmo reissue, as carefully distinguished in the specification from the modes previously adopted; and the same three elements are found in the exhibits under consideration, as the essentials of their operation. Were either of these elements omitted, or changed materially in character, it would be fatal to the result desired, namely, the construction of the perfect vessel smaller at the mouth than at some portion of its interior.

These views lead me unhesitatingly to the opinion, that the machines shown in the exhibits are substantially identical with the machine described in the Nimmo reissue, so far as their essential features are concerned. They have the same characteristic features, connected together, and co-operating in the same way, and produce the same result. The machines differ only in unimportant details, which do not affect the relation which the essential parts bear to each other, nor the process or mode of operation by which a crucible is formed, nor the perfection of the result.

I differ very widely from the views expressed by Mr. McIntire in his 20th answer, and particularly in the view, which appears also in other parts of his deposition, that the machine described in the Nimmo reissue is not "adapted to form up or shape a bilged vessel." This view seems to be based upon the idea that the reissue drawing exhibits the only form in which the several parts of the Nimmo machine can be made. It assumes that because the drawing exhibits a mould and rib, shaped for the production of a wide-mouthed crucible, that the machine described in the patent is therefore limited to the production of this class of crucibles. My view is this: the reissue drawing shows one form of crucible which the machine described in the patent may make, but by no means the only form, nor the most difficult form, nor does it justify the inference that bilged crucibles could not be made in the machine. The specification contemplates the manufacture, by this machine, of the various forms of crucibles, and it describes a machine adapted to that end, and so constructed that vessels of a less diameter at the mouth than at the middle of their interior may be formed readily and finished without injury. The whole theory of the patent relates to such an apparatus and mode of manufacture as would permit the construction of bilged vessels. Following the description of the apparatus, and the steps taken
93 in shaping a crucible, is this language: "The rib must then be withdrawn, and, to prevent its marring the interior of the crucible, it must be so guided that it will travel in a path materially different from that of the rib in the apparatus first above described, and substantially the same as that of the rib in Salvetat's apparatus. For this purpose the lever *l* is hung, by the chain *i*, between two up-

rights *g g*, so that when it is drawn outward until its end clears the cross piece *q* it may be readily lifted bodily, and guided, by the cross piece *q* and the uprights *g g*, in such a way that the rib will not strike against the interior of the crucible." Now, if the crucible was not bilged, the rib might be arranged to be "lifted bodily," without being previously "drawn outward" further than to release the notched end of the lever. The movement, "substantially the same as that of the rib in Salvetat's apparatus," is a movement of the rib toward the center of the vessel, so that it may be withdrawn from the vessel without striking it. And such movement towards the center would not be necessary, except in the manufacture of a bilged vessel or one having vertical walls. The apparatus described in the patent is capable of making not only the form of pot shown in the drawing, but also narrow-mouthed vessels; in other words, there is described apparatus having capacity beyond that required to form a vessel such as is represented in the drawing. There is nothing in the specification limiting the invention to the construction of vessels not bilged, but the contrary is true; the apparatus is specifically adapted for bilged crucibles.

I am by no means disposed to limit the third element of the combination composing the Nimmo invention to the precise devices shown and described in the reissue; but, for the purposes of this case, Mr. McIntire's catalogue of parts composing the "mechanism by which the rib is guided," etc., may be admitted as substantially correct. Assuming this ground, I assert that the exhibits "Defendants' Machine" and "Defendants' Model" show the same devices, or equivalent devices, in every detail. Mr. McIntire's list of parts composing the "third element" is "the hand lever *l*, supporting chain *i*, uprights *g g*, cross piece *q*, and stops or bearing surfaces *o* and *p*." The two models show the same things almost identically, having "the hand lever" for operating the rib and pressing it toward the
94 revolving mould to shape the crucible, the "supporting chain" by which the lever and rib are raised and lowered by means of the counter-balance, the "uprights" and "cross piece" represented by the vertical standards of the models, upon which the lever and rib are raised and lowered, and by which they are kept in the proper position with relation to the mould, and finally the "stops or bearing surfaces" which constitute the vertical and lateral stops upon the standard and horizontal arm of the exhibits. Here are all the parts named by Mr. McIntire in this connection, and they perform the same functions as do the corresponding parts in the Nimmo machine, differing only in arrangement or in proportion. The several parts are mounted upon a suitable frame, and so arranged and connected together as to adapt the machines to perform the same work and in the same manner as in the Nimmo machine. The rotary mould and the non-rotary rib are combined with the connecting means and stops upon the frame of these machines in the same manner and with the same results, or capacity for the same results, as in the Nimmo machine. Hence, I am decidedly of the opinion that the machine rep-

resented in the two exhibits "Defendants' Machine" and "Defendants' Model" are substantially identical in construction and mode of operation with the machine described in the Nimmo reissue, both embracing "the rib, the revolving mould, and the mechanism by which the rib is guided toward the axis of revolution of the mould as it is withdrawn, as set forth" in the reissue.

I differ from Mr. McIntire also upon the point referred to in the latter part of his 20th answer, pages 64–5 of defendants' record. He assumes that there has been shown as old the combination of "first the rib, second the revolving mould, and third the mechanism for guiding the rib, shown and described in the patent," or equivalents of the latter mechanism. As I understand the testimony adduced and the operation of the mechanism referred to in machines prior to the date of the Nimmo invention, this combination has not been embodied in any such machines. The Wise and the Smith machines did not embody it, because they had no stationary rib, but in lieu thereof a revolving plunger, entirely different in its mode of operation from the Nimmo rib, and consequently not the same as that rib or the equivalent of it; and also because those machines have
95 not the vertical and lateral stops on the frame which are an essential feature of the Nimmo invention. The apparatus described in Salvetat's work did not anticipate this invention, because neither class of machines therein described embraced the three elements essential to the combination described in the reissue. The Kier machine did not embrace the combination of Nimmo, because destitute of either vertical or lateral stops upon the frame of the machine, having only those formed by the top of the rotary mould, and also because the machine as described could not have been practically operative in the manufacture of crucibles, because of its inherent weakness.

BOSTON, *Oct.* 30, 1877.

Int. 10. Have you lately seen attempts made to use a revolving former in the manufacture of crucibles? If so, when, where, and with what results? And in the course of your answer, state particularly whether the chuck in the complainants' (Smith) machine revolved in the same direction as in the former trials, and what difference it makes, if any, whether the mould revolves in one direction or the other.

A. I have recently seen attempts made to manufacture crucibles with a revolving mould and former. These experiments took place at the works of the Phœnix Manufacturing Co., at Taunton, Mass., on October 24th, 1877, and I will say at the outset that in these experiments the mould revolved in a direction causing any point in it to pass the operator from left to right, which is the reverse of the direction of its rotation in the earlier experiments which I have narrated. The direction of rotation is altogether immaterial; it makes not a particle of difference in the action of the machine in forming a crucible, nor has it any other or different effect whatever upon the material in the one case than in the other. The plastic material in

the mould is subjected to the same pressure between the mould and former, and it adheres in like manner to both, since its nature is the same in the two cases.

In my account of the first experiments at Taunton with the Smith machine, I mentioned the fact that in one of the trials the material overflowing from the mould became so packed in or jammed between the cross head and the revolving mould as to stop the motion of the latter, and that, as the pulley upon the spindle kept revolv-
96 ing, the mould was unscrewed from the top of the spindle. In these later experiments, the direction of rotation being reversed, such an occurrence could not take place from the same cause; but the mould might be unscrewed accidentally by a sudden stoppage of the rotation of the spindle, while the mould with its contents kept revolving by its momentum, and this is equally true of any similar machine. Had not the mould unscrewed upon the former trial, something would necessarily have been broken, and great injury might have done.

The experiments made on October 24th were conducted upon the same machine, Exhibit Smith Machine, as were the former one, except that during the first six trials made that day we used a lever and former constructed in accordance with the description in the Wise patent, except that the lever frame was made much stronger than appears in the drawing of that patent, in its proportions. This lever and the former borne upon it were mounted upon the frame substantially as shown in the Wise patent. The workmen present were Paine, Brammer, and Driscoll, as before. The first trial was with a regular steel-pot mixture, weighing 35 lbs., the mould being well oiled, and the former a wooden one, as small in diameter as it was possible to make it and use it with that mould. During the building up of the crucible in the mould, the lateral pressure of the former on the material created such friction of the former in its bearings that, although constantly lubricated and drenched with oil, it smoked and was actually burnt with the heat thereby produced. Notwithstanding this, the former stopped its rotation three or four times, owing to its being pressed so forcibly against the plastic material. When the former was returned to the center and withdrawn from the mould, its surface was coated with clay, which adhered largely in spots, and the inside of the crucible formed in the mould was consequently rough, with several holes of considerable depth. The utmost care was taken in the attempt to remove the mould from the crucible, but the vessel was torn in two at the middle, as in the former experiments. In the center of the bottom of the pot a "tit" was formed, because the bottom of the former was not sufficiently broad to cover the center of the vessel; and when the former was pressing the plastic mass against the side walls of the mould, while there was nothing to resist the
97 rising of the material in the center of the bottom, this "tit" was naturally thrown up. Now, when the former was returned to the center, it struck and displaced this "tit," but had no power to incorporate that portion of the material into the bottom or walls of

the vessel. The lower part of the vessel was preserved by me, and marked W. 1. This experiment demonstrated the fact that the lever frame of the Wise patent is not properly constructed to resist the severe wrenching strains that must come upon it in this manufacture, because of the twist or spring of the materials, and the consequent binding of the bearings of the mandrel, and the coating of the mandrel, throwing its axis from the vertical line, although, as I have said, the frame was made much stronger in this machine than the proportions shown in the drawing would make it.

The second experiment was tried under the same conditions, with the same weight of ball and the same details of operation. There was no proper compacting of the material, although all possible pressure was applied consistent with rotation of the former; the experiment was, in every respect, a fair one, and if crucibles could be made by the process and mechanism described in the Wise patent we should have succeeded; as it was, it was impossible to separate the mould and crucible, but the latter was torn in two as before. The amount of clay adhering to the former was 5½ oz.

In the third experiment, a 34lb. batch was placed in the mould and the former pressed rapidly and forcibly to the sides of the mould, so as to build up the crucible in thirty seconds. The pressure was so great that the former did not revolve at all during its lateral movement from the center of the mould, but acted as a fixed rib. As a consequence of this change in the action of the former, the crucible was finished very well inside, and was readily removed from the mould, when it appeared not well done on the outer surface. The upper edge of the crucible was marred somewhat by the workmen inserting their fingers beneath the flange in lifting off the top half of the mould. Aside from this we produced a very fair crucible, and this result was undoubtedly due to the fact that the former did not revolve. It was satisfactory evidence to me that there is a totally different action between a stationary and revolving former;
98 it being impossible to mould a crucible by the latter method. [This pot I marked W. 3.]

We now substituted an iron former of similar shape and weighing 45 lbs. in place of the wooden one, and placed in the mould the same amount of material as before. Proceeding in the usual way, the pot was built up in the mould by rotation of the mould and former, but the resulting vessel was full of holes inside and cracks outside, and was torn half in two in removal from the mould. There was upon the former a plastic belt nearly an eighth of an inch thick, which upon being removed I found weighed 4 oz. I marked this pot W. 4.

The fifth experiment was with the same weight of material, the mould oiled as before, and the iron former washed clean and wet. On removing the former after shaping the crucible to the best of our ability, there was upon the former 7½ oz. of the material; the pot was fractured in removing the mould, and was very rough inside, though quite smooth outside. I marked this fragment W. 5.

In the next trial, under the same conditions, the former revolved

intermittently, that is, sometimes turning and sometimes not, while pressed against the material in the mould. There was a thick plastic coat upon the former when it was removed from the mould, but I did not weigh it; it had blistered or flaked off from the inside, which was consequently rough and unfinished. By my direction one of the workmen cut out a segment of the wall and bottom of this vessel to exhibit the edge in section. It seemed to me to be fairly compacted, though not in my judgment perfectly made in this respect. This I marked W. 6.

[Adjourned.]

BOSTON, *Oct.* 31, 1877.

After the experiments above narrated were completed, the Wise lever frame and mandrel was removed and the machine reconstructed in accordance with the Smith patent, the direction of rotation being from left to right as with the Wise former, being the reverse of the motion of this machine when I first saw it used. The mould was thoroughly oiled, the wooden former wiped dry, and a batch of 31 lbs. was placed in the mould. This was the exact amount necessary to fill the mould so that none overflowed; the former was kept
99 in constant revolution, and on its withdrawal from the mould it had a thick plastic belt upon it, which on removal weighed 17 oz. It was impossible to remove the mould from the vessel, but the vessel was torn in two in the attempt. The bottom of the lower half was smoothly finished inside, showing in this respect a marked improvement over the corresponding part of the vessels made with the Wise former. This vessel having sagged somewhat we reversed it to dry, and to save the lower edge from flaking off by reason of shrinking about the head block on which it would otherwise have stood. This fragment I marked S. 9.

The next experiment was tried under the same conditions as the last, except that the former was wet. A crucible was formed in the mould in the usual way; and it was smooth in the bottom, and for nearly three inches above the bottom on the inner walls, and from thence upward it was very rough from suction of the clay by the revolving former. The appearance of the former corresponded therewith, since it was smooth and clean on the bottom and above the bottom for about three inches, and from that point upward nearly to the top it was heavily coated with the plastic material which on removal I found weighed 26½ oz. This plastic belt began abruptly at the point I have indicated, and there was a decided shoulder corresponding to this abrupt edge of the belt formed in the crucible. In attempting to remove the mould the vessel was ruptured, as in nearly every former trial; the lower half was preserved, reversed to dry, and marked by me "S. 10."

In the next trial the mould and former were in the same conditions as in the last two. The vessel was shaped in forty seconds, but on removing the former it was thickly coated as before—an amount of material weighing 21 oz. The interior of the vessel was

consequently left rough, it being impossible to finish it smoothly with a rotary former.

Having had such poor success in attempting to remove the mould, we left this vessel in the mould to dry. I marked it on the inside "S. 11."

We now substituted a plaster mould for the iron one previously used, and proceeded in the usual way. The material in the mould clung to the former in its rotation, and drew away from the walls of the mould, throwing out a large amount of the clay in all
100 directions. Finally, the sides of the crucible clung to and wrapped around the rotary former as it was being moved back towards the center of the mould, thereby utterly destroying the crucible, making it a shapeless mass. There was nothing to be marked and preserved.

We made another trial under the same conditions, in which the material clung to the former much as it did before, and was largely thown out by centrifugal force. The walls of the crucible seemed to wave back and forth, as though undecided which to cling to, the mould or the former. The rotation was rapid, and this movement was very quick, but still was clearly perceptible. The walls of the crucible were made thin at the top by the quantity of material torn from them and thrown out, and the upper part of the vessel was broken in the mould. The plastic belt on the former weighed 28½ oz. The remnant of this vessel I marked "S. P."

The final experiment tried that day was with the Smith former as before, the same plaster mould and the regular compound, the ball weighing 35 lbs. The waving of the walls referred to in the last trial was again very apparent; the adhesion to the rotary former being apparently equal to the centrifugal force due to the rotation of the mould and the adhesion to the mould combined. Between these two forces the walls of the crucible were unsteady and wavering, causing folds or laps to appear in them, which were to some extent visible after removal of the former. The material overflowed considerably in this trial also, and the vessel was consequently rough inside. The weight of the belt upon the former was 20 oz. I marked this crucible inside "S. P. 3," and it was set aside in the mould to dry.

Thus, after a second day's experiments in the attempt to mould crucibles in a rotary mould by a rotary former, having seen all the usual expedients adopted, and the machines used under various circumstances, it is obvious to my mind that it is utterly impracticable with such machines to construct vessels of this character from such plastic material as is employed in their manufacture. The mechanism is not adapted to the material employed; the process is not a proper one for accomplishing the desired result; the nature of the material is at war with the mechanism and process by which it is to be manipu-
lated. So long as wet clay is adhesive, just so long a rolling
101 action will be the wrong action by which to mould it into vessels in which a smooth surface is desired. The rotary motion

of the former is precisely the motion that it ought not to have, and such a former lacks the essential qualities fitting it to act on the interior of a vessel in which a smooth finish is necessary.

I have said before that a sliding friction upon the clay is the necessary action, but in these rotary former machines there is no such action, and consequently no desired result can be obtained.

[Adjourned.]

Cross-examination by Wm. Bakewell, Esq., of counsel for defendants:

BOSTON, *Nov.* 10, 1877.

Cross-int. 11. Are you familiar with the original letters patent to George Nimmo, for improvement in moulding crucibles and pots, No. 49,140, of August 1st, 1865, of which the patent in suit is a reissue; and do you understand the same?

A. Yes.

Cross-int. 12. Please say what you understand in that specification to be the difficulty designed to be overcome, and the nature of the invention involved therein.

A. The difficulty stated in the specification of the original Nimmo patent was "in removing these crucibles from the mould, in consequence of the adhesive nature of the black-lead compound or mixture employed for such crucibles. The amount of water, also, that is required to make the mixture sufficiently plastic, causes the material frequently to crack and break in shrinking as it dries."

There is no other difficulty set forth in the patent, that I see. The invention set forth in the patent is not limited to the obviation of that difficulty, but appears to embrace other points as set forth in the body of the specification and claims. The particular means which Nimmo proposes to employ to overcome the adhesiveness of the plastic compound, and permit proper absorption of water from the finished crucible, was the manufacture of crucibles in a plaster mould, which he appears to have regarded as original with him.

102 Cross-int. 13. What, if anything, is stated in the specification of the original patent as to the making of bilged crucibles, as distinguished from wide-mouthed crucibles or pots, such as is shown in the drawing of that patent?

A. I think the specification does not employ the term "bilged," or refer to the various forms of crucibles.

Cross-int. 14. What is stated in that original specification as to any difficulty in removing the curved rib or former from the crucible; and what, if any, peculiarity of construction or operation is referred to therein as being adapted to overcome any such difficulty?

A. The specification appears to be silent in regard to the points referred to in the question.

Cross-int. 15. In the state of the art as it existed prior to Nimmo's original patent, the use of revolving plaster moulds for similar purposes was old, was it not?

A. I understand so.

Cross-int. 16. And the use of a stationary rib or former, for shaping and smoothing the interior of such vessels when formed on a revolving chuck or jigger, together with such plaster moulds, was also old, was it not?

A. I understand that prior to Nimmo's invention, it was common to use, in the construction of shallow or wide mouthed vessels, the revolving chuck or a plaster mould, with a stationary rib for shaping the interior of such vessels.

Cross-int. 17. Was it not also old, prior to Nimmo's patent, to attach the rib or former to a hinged lever, which hinged lever slid in slots in the frame for the purpose of facilitating the manipulation?

A. Such an arrangement was not old for the purpose of facilitating the manipulation of the lever with relation to a revolving mould or a plastic vessel formed in such mould. A lever and rib so arranged, without regard to a mould for shaping the outside of the vessel, may have been old.

Cross-int. 18. Why do you say *may* have been old? Do you not think it was old at that time?

A. Because I have no knowledge of any such mechanism; but I read in the Salvetat extract of such an apparatus without a revolving mould.

103 Cross-int. 19. What is the function or office stated in the original Nimmo patent to be performed by the rib or former?

A. The original Nimmo patent states: "I employ a rib attached to a lever for spreading the plastic crucible material on the inside of the mould, and at the same time hardening, consolidating, and polishing the crucible on the inside by means of said rib." The function of the rib then is to co-operate with the mould in building up, hardening, consolidating, and polishing the walls of the crucible, and the rib alone could not perform this function.

Cross-int. 20. Does not the specification state in substance that the plastic material in the mould is to be partially spread by hand, or by a conical muller, before the rib is brought into action?

[Objected to, because it is clear that the court will understand what the specification states quite as well as the expert.]

[Respondents' counsel replies, that if this objection be valid more than two-thirds of the examination in chief of this witness would be liable to the same objection.]

A. Yes.

Cross-int. 21. Do you not find also, in the Salvetat extract referred to in your 18th answer, a stop or a device performing the function of a stop for limiting the descent of the lever and rib so as to regulate the thickness of the plastic material being formed by means of such rib?

A. I find in the mechanism referred to in that answer a stop regulating the downward movement of the lever and rib, but having no function to regulate the thickness of the walls of the vessel.

Cross-int. 22. Why does it not regulate the thickness of the walls of the vessel?

A. I was present at a trial of the Smith machine at Gautier's works, November 3d, 1877, and at a trial of the Wise lever and former, November 5th, 1877, at the same place. At the trial November 3d, four crucibles were made with the following results: First crucible, the mould was oiled, the former was dry. In forming the crucible, the clay collected upon the former; the inside of the crucible was rough, ragged, and ridged. In trying to take the upper half of the mould off the workman broke the crucible in two.

In trying to get the lower half of the crucible out of the lower half of the mould the bottom was pushed up through the crucible.

Second crucible, the mould was oiled, the former was wet; the result of this was the same as in the first trial, except that the workmen succeeded in getting the lower half the crucible out of the lower half of the mould, but in a damaged condition, it being pushed out of shape before it would come out. In this and the preceding trial the mould revolved at the rate of 288 revolutions per minute.

Third crucible, mould oiled, former wet. In this trial the engine was slowed to about one-half the speed of the former trials. While this crucible was being formed water was thrown inside the crucible, rendering the material soft, and not so much collected upon the former; I should think about half as much collected there. The inside of this crucible was badly torn and ragged. This crucible also broke in two halves in attempting to remove the upper half of the mould, and the bottom of the crucible was pushed up through the crucible in attempting to remove the lower half from the lower half of the mould.

145 Crucible number four. The mould was dusted with finely-ground plumbago. The speed of revolution of the mould was 288 per minute. The clay collected on the former the same as in number one and number two, and the inside of the crucible was the same as in number one and number two. This was left in the mould to dry, and remained there two days. I was present when they attempted to take it out of the mould. They could not remove the upper half of the mould from the crucible, which broke in two in the attempt. They could not remove the lower half of the crucible from the lower half of the mould; they had to dig it out with a knife. It had rusted the mould and adhered closely to it. To make these four crucibles it took nearly an hour,—between 50 and 60 minutes, not counting the time used in making the balls. In these trials, the clay was the same that is commonly used in Gautier's works. Their workmen, under the direction of Mr. Wallace, did all the work, except that our man oiled the mould in the first trial, and put the ball in the mould. He also assisted their man in forcing down the bracket that holds the spindle of the former. The direction of the motion of the revolving mould was such that the mould and its socket could not unscrew. In all these trials, the mould vibrated or wobbled very much.

November 5th, the Wise lever and former was tried; the mould was the same; number of revolutions was the same (288); it was

oiled and dusted with finely-ground plumbago; the former, which was iron, was wet. When the former had been pressed down into the crucible towards its side, it bound; and when it revolved at all, by contact with the clay, it wobbled very much and worked itself loose, and finally broke the lever in which it was held, and also the pin by which it was held in position. The crucible, which was hardly formed enough to be called a crucible, was got out of the lower half of the mould, not in good shape, however, and removing the upper half of the mould tore away a portion of the upper half of the crucible.

Cross-examined by W. Bakewell, of counsel with defendants:

Cross-int. 3. You were present this morning at the taking of the testimony of Mr. Gregory, and of other witnesses, employés of J. H. Gautier & Co. State whether you heard the testimony, and whether the trial of the Smith machine, and of the Wise lever and
146 former, which you have referred to in your testimony, were the same as those referred to by those witnesses.

A. I was present, and my testimony refers to the same trials.

Cross-int. 4. Under whose direction were those trials made?

A. They were made under the direction of Mr. Hiram Wallace, superintendent of J. H. Gautier & Co.'s works.

Cross-int. 5. And you were present, representing the complainants in this case, were you not?

A. I was.

Cross-int. 6. In making the three first crucibles, the mould was oiled. State why this was done.

A. It was done at the suggestion of Mr. Wallace, who thought it might facilitate the getting the crucible out of the mould. He had tried it dry.

Cross-int. 7. What kind of oil did you use, and to what extent was the mould oiled?

A. I am not certain whether sperm oil or machinery oil was used. The mould was thoroughly oiled,—as much as it could be without the oil running.

Cross-int. 8. If a thicker quality of lubricator had been used, is it not probable that the crucible would have been easily delivered from the mould?

A. I think not. In the trial of the fourth crucible, we dusted the mould, after oiling it with finely-ground plumbago. Plumbago itself is used as a lubricator, and I think had the effect of thickening the lubricator used.

Cross-int. 9. What was the revolving former made of in those trials of the complainants' Smith machines?

A. It was made of hard wood.

Cross-int. 10. Was the former oiled?

A. The former was not oiled.

Cross-int. 11. Was it dusted with plumbago?

A. It was not.

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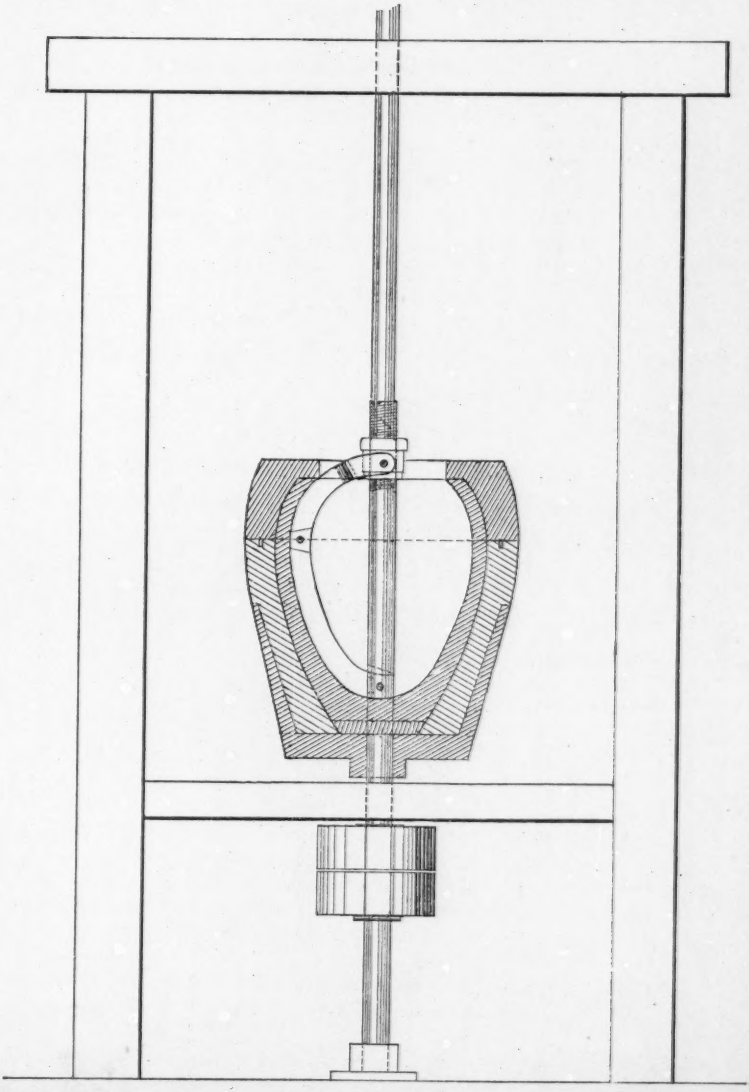
Arthur Pickering, et al.,
vs.
McCullough, Dalzell & Co.

Complainant's Exhibit,
Stewart No. 1.
JAMES I. KAY. Examiner.



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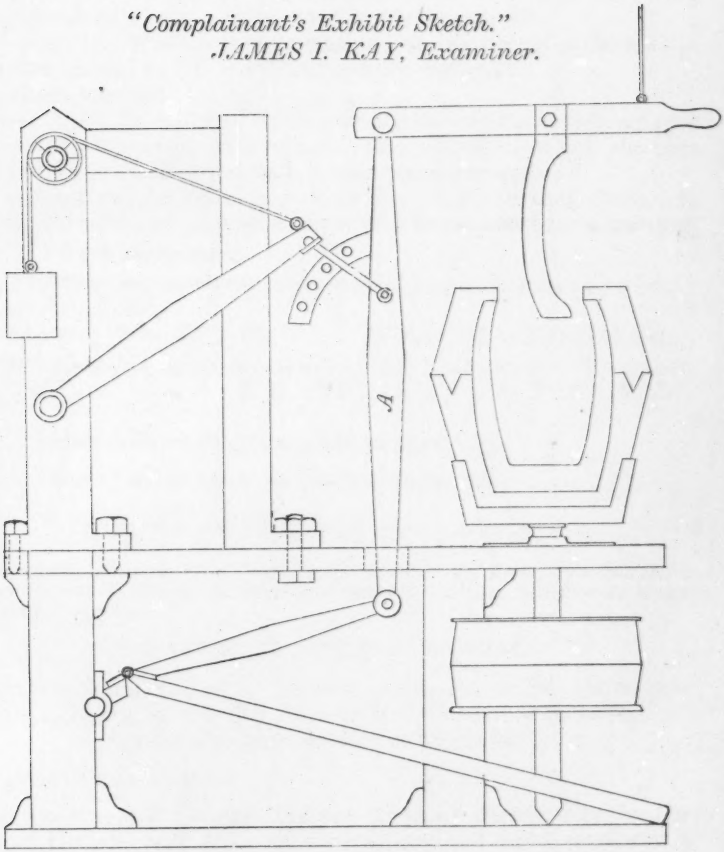
"Complainant's Exhibit Sketch."
JAMES I. KAY, Examiner.



Cross-int. 12. In the trial of the Wise lever and former, you say that the former was wet. What was it wet with?

A. It was wet with water.

Cross-int. 13. Why?

147 A. Mr. Wallace thought it might tend to prevent the accumulation of clay upon its surface. He did all he could to make the machine work.

Cross-int. 14. What was the condition of the hole in the wooden lever which formed the journal in which the revolving former worked?

A. The hole was in good condition when we began the trial, except that it had been a little worn in previous trials.

Cross-int. 15. Was there any metallic or other lining in the hole in which the journal of the revolving former worked?

A. There was not.

Cross-int. 16. Is it usual in machinery in which a revolving part is supported at one end only to make the journal in which the part revolves of a piece of wood with a hole bored through it?

A. I don't call to mind any other machinery of that character, but I should think something more would be required for a bearing.

Direct resumed:

Int. 17. Was any one present from the Phœnix Company's works? If so, give his name.

A. Yes, sir; Wm. Driscoll. WM. T. MACFARLANE.

Sworn and subscribed before me, at Jersey City, this 9th November, A. D. 1877. WM. PINTARD, *Notary Public, N. J.*

148 [Here follows diagram marked page 148.]

149 [Here follows diagram marked page 149.]

150 UNITED STATES PATENT OFFICE.

George Nimmo, of Jersey City, New Jersey, Assignor, by Mesne Assignments, to Arthur Pickering, Charles R. Vickery, Charles R. Atwood, and Phœnix Manufacturing Company.

IMPROVEMENT IN MOLDING CRUCIBLES.

Specification forming part of Letters Patent No. 49,140, dated August 1, 1865; Reissue No. 6,166, dated December 8, 1874; Application filed November 29, 1872.

To all whom it may concern:

Be it known, that George Nimmo (then of Jersey City, in the county of Hudson, and State of New Jersey) invented certain improvements in molding crucibles, letters patent for which were granted August 1st, 1865, numbered 49,140, and assigned to Arthur Pickering, of Boston, in the county of Suffolk, Charles R. Vickery and Charles R. Atwoood, both of Taunton, in the county of Bristol, and the Phœnix Manufacturing Company, (a corporation duly established under the laws of the State of Massachusetts, and having its

principal place of business at Taunton, aforesaid,) all in the said State of Massachusetts.

Long prior to said Nimmo's invention, the mode of manufacturing certain articles of pottery by means of a rib or former to give the desired shape to the inside of the article, and a revolving plaster vessel to properly present the "ball" (as the lump of tempered clay is called) to and support it under the action of the rib, was well known; but this mode of manufacture was not applicable in the manufacture of crucibles, because the apparatus was such that the crucible would be injured or destroyed in removing the rib, by the end of the rib striking the upper part of the crucible, as will be plain to all skilled in the art of crucible-making, and acquainted with the mode of manufacture above referred to.

Another mode of manufacturing certain articles of pottery-ware by means of a rib or former for the inside of the article, and a revolving table (a common potter's wheel) which partially presented the ball to and supported it under the action of the rib, the workman using his hands to aid in presenting the ball to and supporting it under the action of the rib, is described in a French work published in 1857, entitled "Lecons de Ceramique," par M. A. Salvetat, volume second, pages 121–2. This last-named mode of manufacture was applicable to the manufacture of crucibles, the apparatus being such that the rib was guided so as to cause it to approach the axis of the pot, where it was necessary that it should do so in order to prevent injury to the pot; but, even if useful at all in that manufacture, it is without doubt very much inferior to the mode of manufacture invented by Nimmo, and hereinafter described; the distinguishing difference between them being that the ball is presented to the rib and supported under its action, not by a flat revolving metal disk, but by a vessel made of plaster, which takes the place of both the flat revolving disk and the workman's hands, performing all the functions performed by this disk and the hands of the workman, but in a much more perfect manner and in less time.

The invention of said Nimmo is, in fact, an improvement on the mode of manufacture, as well as on the apparatus described in Salvetat's work, the improvement consisting in the different mode of presenting and supporting the ball; but we do not wish to be understood as claiming this mode of presenting and supporting the ball as the invention of said Nimmo, as his improved mode of manufacture is new solely because it is, as a whole, substantially different from the mode described by Salvetat, and from the mode first above referred to. Indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to so far as presenting the ball to and supporting it under the action of the rib is concerned. By Nimmo's improved mode of manufacture, much labor and expense are saved, and, what is still more important, crucibles are produced which are superior to those made by any prac-

tical mode known prior to said Nimmo's invention, in many very important respects.

Figure 1 is a plan, and Fig. 2 is a sectional elevation, of the best form of apparatus known to said Nimmo for practicing his improved mode of manufacture.

In these drawings, *a* is a bed carrying the vertical spindle *b*, on the upper end of which is the hollow chuck *c*, into which the plaster mold *d* fits, and these parts are revolved by a belt to a wheel, *e*, and crank. (See Fig. 1.)

151 Near the chuck *c* is an upright frame *g*, with rollers *h h*, over which the chain *i* passes, on one end of which is the counter-weight *k*, and on the other the lever *l*, having a handle *m* at one end, and carrying rib *n*. This lever *l* is guided by the uprights *g g* and cross piece *q*, and, when not in use, is drawn up by the weight *k*. The rib *n* can always be brought into precisely the same relation to the axis of revolution of mould *d*; consequently crucibles can be thus manufactured with very great uniformity. The material is also compressed between the rib and the supporting vessel, and the inside of the crucible is smoothed by the smooth surface of metal which constitutes the working face of the rib. The stop *p* arrrests the motion of the lever, when fulcrumed at *o*, as soon as the working face of the rib is brought into the desired relation with the axis of revolution of the mould—that is, as soon as the crucible is shaped. In all these respects this apparatus does not differ from that first above mentioned. The rib must then be withdrawn, and, to prevent its marring the interior of the crucible, it must be so guided that it will travel in a path materially different from that of the rib in the apparatus first above described, and substantially the same as that of the rib in Salvetat's apparatus. For this purpose the lever *l* is hung, by the chain *i*, between two uprights, *g g*, so that when it is drawn outward until its end clears the cross piece *q* it may
152 be readily lifted bodily, and guided by the cross piece *q* and the uprights, *g g*, in such a way that the rib will not strike against the interior of the crucible. The mould *d*, with the crucible in it, is then taken from the chuck and a second mould substituted. The crucible will soon shrink, so that it can be removed from the plaster vessel, when it is to be finished in the usual manner.

We disclaim, as the invention of said Nimmo, both the modes and both the apparatus above mentioned, and we also distinctly disclaim any and all modes of manufacture which can be carried on by any apparatus which lacks either the mechanism for guiding the rib in the manner above described, or the vessel for presenting and supporting the ball, as above described, said Nimmo's invention residing wholly in the combined use of both these features.

What we do claim as the invention of said Nimmo is—

The improved apparatus above described, having the specific character, objects, and functions above explained, and consisting of the rib, the revolving mould, the mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn, as set

forth, these elements being claimed only in combination each with all the others, and no claim is made to any combination of any of them less than the whole.

153 ARTHUR PICKERING.
C. R. VICKERY.
CHARLES R. ATWOOD.
PHŒNIX MANUFACTURING CO.,
By C. R. VICKERY, *President.*

Witness to A. P.:
J. E. MAYNADIER.
J. E. KNOX.
Witness to C. R. V. and C. R. A.:
B. C. VICKERY.
EDWARD KING.

154 [Here follows diagram marked page 154.]

155 *Testimony.*

Depositions and other evidence on part of the defendants, taken before James I. Kay, U. S. commissioner in and for said district, and examiner by agreement of counsel, at the office of Bakewell & Kerr, No. 94 Diamond street, Pittsburgh, Pa., commencing on Tuesday, August 21st, 1877, at 2 o'clock P. M., said depositions being taken by agreement of counsel.

Present: James E. Maynadier, Esq., counsel for complainants, and T. B. Kerr, Esq., of counsel for defendants; also, Mr. C. C. Arensburg, one of the defendants.

WILLIAM L. WINKLE, called on part of defendants, and being first duly sworn, deposes as follows:

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is William L. Winkle; my age is thirty-five years; I reside in Bolivar, Westmoreland county, Pa.; I am a potter by trade; I am now partner in the Bolivar Fire Brick Manufacturing Company.

Int. 2. What were you doing in the year 1864?

A. I was in the army.

Int. 3. Where were you stationed?

A. In the beginning of September, 1864, I was stationed at Camp Reynolds, Braddock's Fields, Pa. I was in the army of the Potomac, in East Virginia, in the early part of 1864.

Int. 4. At what time did you come to Camp Reynolds, at Braddock's Fields?

A. I was detailed, as near as I can remember, about the 28th day of August, 1864, and I believe it took me four days after that to get home to Pittsburgh.

Int. 5. Did you have any relations in Pittsburgh at that time?

A. Yes, sir.

Int. 6. Who were they?

A. My brother, Joseph Winkle, and sister, and sister-in-law.

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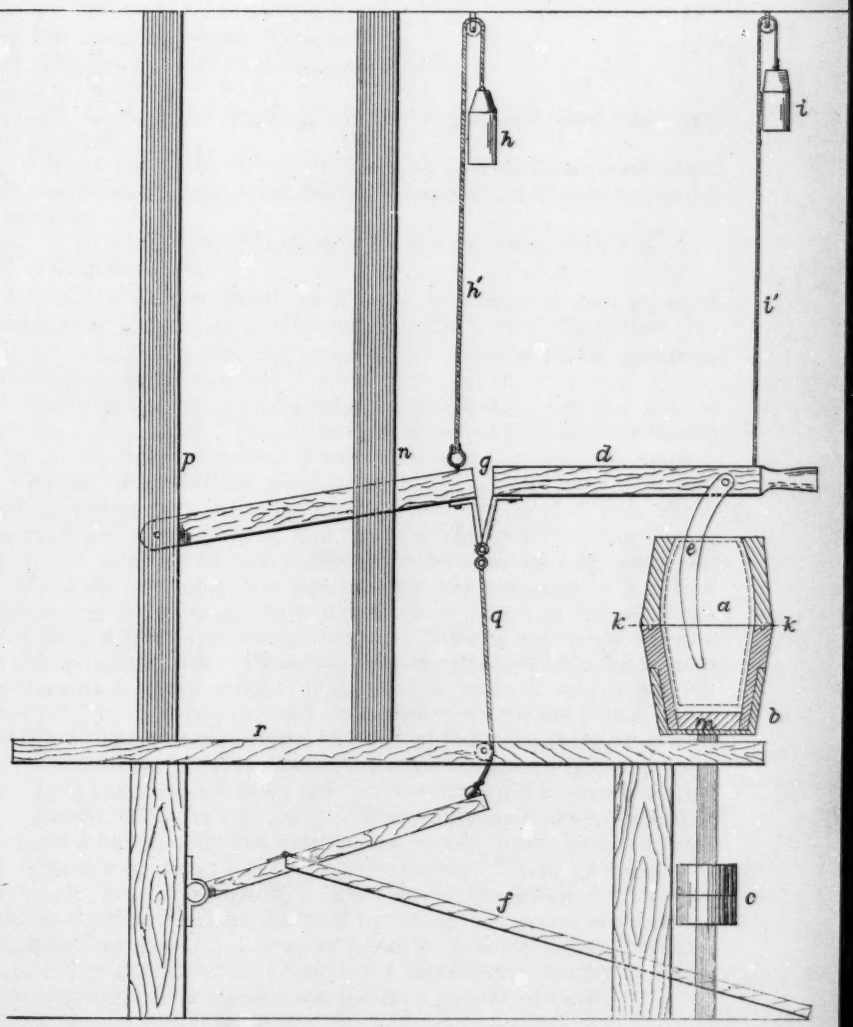
Arthur Pickering, et al.,
vs.
McCullough, Dalzell, & Co.,

Defendant's Exhibit. Kier Machine.
JAMES I KAY, Examiner.



Int. 7. What was Joseph Winkle doing at that time?

A. He was superintendent for S. M. Kier & Co., Stevenson street, Pittsburgh, Pa.

156 Int. 8. What was their business at that time?

A. They were principally interested at that time in making plumbago crucibles.

Int. 9. Did you see the machine by which they made crucibles?

A. Yes, sir.

Int. 10. When?

A. I seen it in September, 1864.

Int. 11. Who showed it to you?

A. My brother, Joseph Winkle.

Int. 12. Can you describe that machine?

A. Yes, sir.

Int. 13. Look at the drawing now shown you and state what you know about it.

A. I know this to be the exact thing, as near as I can remember, of the machine, as I saw it at Stevenson street, as shown to me by my brother.

Int. 14. Under whose direction was that drawing made?

A. Under my own.

[Drawing above referred to offered in evidence and marked "Defendants' Exhibit Kier Machine," James I. Kay, Examiner.]

Int. 15. Please describe that machine as you saw it in operation in September, 1864.

A. The first operation of making the pot is to weigh the clay of which the pot is made. It is then formed into a ball, and the mould *a* is put in the jigger head *b*. Then the clay is put into the mould. Upon execution of this the machine is put in motion, which is propelled by belt power on the pulley *c*. Then the lever *d*, with rib *e*, is inserted, and upon placing the foot on the treadle *f* the lever, with the rib attached to it, is pulled down by foot, and by compression of the rib *e* forming the pot, and by the pressure of the foot straightening the lever *d*, and when the lever becomes closed at the joint *g* the pot then is properly formed. That is the scale for the entire shape of the pot. Then, by removing the foot from the treadle *f* the weights *h i*, with cords h^1 i^1 attached to lever *d*, remove the rib *e* from pot by steadying the end of the lever *d* with the hand. Our mold is in two parts horizontally. The mould *a* is joined together with iron natches *k*. This mould [here follows diagram marked page 157] has a loose bottom (*m*). When taking the pot out of this mould, take the top half off first; and the second operation is to have a block, and then putting the mould over this block this loose bottom rests upon the top of the block. Then, by removing your hands from the mould, it slips down the block by its own weight to the floor. Then, the next operation, the pot is taken away to the finishing room, and remains upon the plaster bottom, portable bottom of the mould, until it becomes a certain consistency or hardness for drying. The moulds are made of plaster of Paris.

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Int. 16. Can you point out one of the moulds that were used on that machine?

A. Yes, sir; here it is.

[Said mould is now put in evidence and marked "Defendants' Exhibit Kier Mould," James I. Kay, Examiner.]

Int. 17. Are the iron pins and sockets on the two parts of Exhibit Kier Mould the parts you designate as natches?

A. Yes, sir.

Int. 18. Did you ever see this machine after that first time mentioned?

A. Yes, sir.

Int. 19. How frequently, and during what period of time?

A. I seen it up to, I believe, September, 1867, as near as I can remember dates and months. I suppose for one year of that time, from 1865 to 1867, I seen it about one year every day steadily.

Int. 20. When were you discharged from the army?

A. The seventh day of June, 1865.

Int. 21. During the time from September, 1864, until you were discharged, where were you stationed?

A. Camp Reynolds, Braddock's Fields.

Int. 22. During this time, from September, 1864, to June 7th, 1865, how frequently did you see that machine?

A. Upon an average, I would be safe to say, three days a week.

Int. 23. Can you give the names of any persons who were working on it when you first saw it in September, 1864?

A. Yes, sir. Frank Wright, Alexander Hewitt, and Joseph Winkle, my brother, and Andrew Graham. That is the amount of men that operated that machine at that time.

159 Int. 24. What was your rank at the time you left the army of the Potomac?

A. When I was detailed I was first sergeant with commission. I had not got my commission when I left; it was just issued.

Int. 25. To what duty and rank were you detailed at Camp Reynolds?

A. I was drill master there for raw recruits and garrison companies. I was first sergeant there, but had not been mustered in as lieutenant yet.

Int. 26. Did you ever operate the machine, Exhibit Kier Machine, at Kier's works during the latter part of 1864?

A. I done it for my own amusement; it was not a pay matter.

Int. 27. How many crucibles did you make at any one time on that machine during that period?

A. As near as I can recollect, I suppose I have run a hundred crucibles for one filling of moulds.

Int. 28. Do you know how many moulds they had in use at that time?

A. I believe about two hundred.

Int. 29. Did you do this work in your uniform?

A. No, sir.

Int. 30. Why not?

A. Because the work was too dirty for my clothes; it was black-lead.

Int. 31. How often did you work on that machine during that period?

A. It would be very tedious for me to count that, for I have done it a great many times.

Int. 32. Did you continue to visit the works to see the machine and to operate it during that part of the year 1865, prior to June 7th?

A. I always visited the works. Yes, sir.

Int. 33. Do you know whether this machine was in steady and continuous operation from September, 1864, until June, 1865?

A. It was, with the exception of the time taken up in finishing the work.

Int. 34. Do you mean the finishing of the crucibles made on the machine?

160 A. Yes, sir. The same men done the finishing that made them.

Int. 35. In what did this finishing consist?

A. Polishing the outside; bringing it to a compact body of smoothness. That was done on a whirler, made expressly for the purpose, which was revolved by hand, to suit the motion of the pot.

Int. 36. Did you ever see the oven in which these crucibles were burned or baked during that period, from September, 1864, to June 7th, 1865?

A. Yes, sir; I have seen it.

Int. 37. Do you know the capacity of that kiln or oven?

A. I could not say the exact capacity of that kiln.

Int. 38. State whether it was few or many.

A. It was a good many.

Int. 39. Can you state how many of these machine-made crucibles you saw at any one time at Kier's works during the period you were stationed at Camp Reynolds?

A. At one particular time my brother told me they were carrying about six thousand pots of a stock. He took me around to show me that amount. I thought there was bulk enough for a good many more, but he said that was all.

Int. 40. In the use of the Kier machine, making as it did a crucible which was narrower at the mouth, what prevented the rib from striking the narrow mouth and breaking it?

A. The principle of the double-jointed lever.

Int. 41. How did that keep the rib from striking the mouth of the crucible while being withdrawn?

A. By releasing the foot from the treadle, it gave motion to the rear joint which spread the hinge, then carrying the rib to the center of the pot by the springing of that hinge, which front end of the lever *d* is carried out by the small weight *i*.

Int. 42. What was the purpose of the post *n*?

A. As a guard for the lever.

Int. 43. Were there more than one of these posts?

A. Just one of the guards.

Int. 44. Can you state how great the bilge in the crucibles was?

161 I believe it was scaled to be three inches larger than the mouth of the pot.

Int. 45. Do you know what became of the pots manufactured during the period you were stationed at Camp Reynolds?

A. A great many of them were sold to the steel works in Pittsburgh.

Cross-examined by J. E. Maynadier, Esq., counsel for complainant:

Cross-int. 46. I see, by holding the drawing Exhibit "Kier Machine" up to the light, that the cord *h* went over a pulley journaled in the rear post of the machine, and the weight *h* hung back of that post. Please explain how this mistake came to be made in this drawing?

A. Because it had been used in both ways, acting to the same purpose on that lever *d*. The reason for changing it there was because this (the present one) was the original form.

Cross-int. 47. Where were you in 1868, when your brother Joseph applied for the patent for an improvement in machine for moulding crucibles?

A. I believe I was in Bolivar, Westmoreland county, Pennsylvania.

Cross-int. 48. When did you first see his patent, or a copy of it?

A. I could not give that, to a date. If it's a year ago, that is all.

Cross-int. 49. How came you to see it first?

A. I saw it in the Patent Office books. Mr. Bakewell was the first gentleman I saw it with.

Cross-int. 50. That was when you came to Pittsburgh as a witness in this case, was it not?

A. Yes, sir.

Cross-int. 51. Did not you about that time see a drawing made in the office of Messrs. Bakewell & Kerr, under your direction or from your description, like the one that I now hand you?

[Objected to as incompetent, and not cross-examination.]

A. I never saw this before, or one just like it. There are some differences.

Cross-int. 52. A drawing was made, then, in the office of
162 Messrs. Bakewell & Kerr, under your direction or from your description, was there not?

A. I believe not.

Cross-int. 53. Did not you see a drawing at that time in the office other than the one in the Patent Office book?

[Objected to as incompetent and vague.]

A. In connection with this same? No, sir.

Cross-int. 54. Didn't you see a drawing representing a machine which you described to Messrs. Bakewell & Kerr, at that time?

A. The machine described by me at that time, not; only the one in the Patent Office book.

Cross-int. 55. What other drawing did you see except the one in the Patent Office book of any machine for making crucibles at that time?

A. I believe it was a drawing of Nimmo's machine in the Patent Office book, made corresponding with that model there—Exhibit Nimmo Model.

Cross-int. 56. Were you at this office more than once within a year, and some time during last spring, or before that?

A. I never was in this office in my life until just before the injunction case. I believe I was here twice the same day.

Cross-int. 57. Did you not see another drawing of a double-jointed lever crucible machine about that time?

A. To the best of my knowledge I never saw a drawing of a double-jointed crucible machine, but the one that I represented, in my life.

Cross-int. 58. Did you never see a drawing of a double-jointed lever crucible machine with one of the cords running back over the back post, except this one (which is now put in evidence and marked "Complainants' Exhibit Sketch," James I. Kay, Examiner)?

A. Only the one that I have represented; I saw this one (Exhibit Kier Machine) before the lines were erased.

Cross-int. 59. Then, if I understand you, you testify positively that the drawing (Exhibit Kier Machine) is the only drawing you ever saw showing the double-jointed lever with the cord running back. Do I understand you right?

163 A. Yes, sir; you understand me right.

Cross-int. 60. How did that cord run in the drawing which you saw in the Patent Office book?

A. I believe it passed over the head of the post straight up; I would not be positive. I am not going to be positive upon a thing that I don't commit to memory.

Cross-int. 61. Does not this drawing (in the right-hand bottom corner of page 32, volume 3, Patent Office Report of 1869) show the cord running back over the back post, with the weight behind the back post; and is not it the drawing you saw in this office when you were here in the early part of this year?

A. Yes, sir; I believe this is the drawing. At least, my brother's name is to it, any way. It shows the cord running back over the back post the same as the one I have erased off mine.

[Adjourned to meet at same place at ten o'clock A. M., to-morrow morning, August 22d, 1877.]

WEDNESDAY, *August* 22, 1877.

Met at same place, pursuant to adjournment. Present, as before.

WILLIAM L. WINKLE—examination continued:

Cross-int. 62. You are willing to testify positively, are you not, that you never have seen but three drawings of this double-jointed lever machine, in which the cord ran back to the back post, these three drawings being the drawings in the Patent Office book, and these two? (Exhibit "Kier Machine" and "Sketch.")

A. I can't remember of ever seeing any other drafts.

Cross-int. 63. You never saw any drawing in which the front part of the lever was jointed to a rod, as is shown in this drawing, (Exhibit "Sketch,") did you, except this one?

A. I don't understand that question in regard to the rod. I want it explained to me.

Cross-int. 64. I mark the rod *A*, and repeat the question.

A. I can't remember that ever I did.

Cross-int. 65. Don't you know certainly whether you did or not?

A. I am not positive.

Cross-int. 66. Who else was present that knew about this machine, when you described it to Messrs. Bakewell & Kerr, in the early part of this year?

164 A. Frank Wright and Joseph Winkle, my brother.

Cross-int. 67. Where is your brother Joseph now?

A. To the best of my knowledge, he is in St. Louis.

Cross-int. 68. What is his business now?

A. The last report I had from him he was superintendent of the La Clede fire-brick works.

Cross-int. 69. You have not described in which direction the mould *a* revolved, as it is shown in the drawing Exhibit "Kier Machine." Please look at that drawing, and say in which direction it did revolve?

A. It revolved from the right hand to the left, in the position of the man in front of it.

Cross-int. 70. I don't fully understand your answer. Please make it clearer, if you can?

A. That is, revolving towards the rear part of the bench, coming to its position in the front part of the bench in the motion. That is, a man standing with his right hand to the rear side of the bench.

Cross-int. 71. Which hand of the man would be on the handle of the lever?

A. Left hand.

Cross-int. 72. Then if the figure of a man was drawn in Exhibit "Kier Machine," his face and breast would be towards you, would not it?

A. Towards the work—the pot.

Cross-int. 73. You mean to say that the man looks over the pot or at the pot, and towards the posts *n* and *p*?

A. The man has entire command of the pot and the posts in front, with the front view.

Cross-int. 74. Which foot does the man put on the treadle *f*?

A. The left foot

Cross-int. 75. See if this is right. The man stands with his left hand on the handle of the lever, his left foot on the treadle, and his right foot on the floor facing towards the posts *n* and *p*, so that if his figure was drawn in the drawing Exhibit "Kier Machine" you would have a side view of him in the drawing.

A. You would see the left side of the man.

Cross-int. 76. What does he do with his right hand?

165 A. It is used to command the work of the forming of the pot.

Cross-int. 77. When you say the mould revolves from the right hand to the left, you mean that the front part of the mould, or that part nearest the breast of the workman, moves from right to left. Is this so?

A. That is correct.

Cross-int. 78. How long, as near as you can now tell, was each part of the lever?

A. I could not positively give you inches for that measurement.

Cross-int. 79. State as near as you can.

A. I presume the lever, as near as I can remember, was about three feet and a half long, and the joint nearly in the center.

Cross-int. 80. In this drawing (Exhibit Kier Machine) the lever is shown as made of wood. What was it made of?

A. I believe it was made out of white-oak wood.

Cross-int. 81. What was the hinge made of, and how was cord *q* fastened to it?

A. The hinge was iron; the rope fastened to the eye of the hinge.

Cross-int. 82. What was the width and thickness of the lever, as near as you can now say?

A. As near as I can remember, the lever was about four inches broad by about an inch and a quarter or inch and a half thick.

Cross-int. 83. How many posts, in all, were there above the table (*r*)?

A. Just the two, *n* and *p*.

Cross-int. 84. What were the size of these posts, as near as you can now say?

A. Between four and five inches square.

Cross-int. 85. How was the lever fastened to the post *p*?

A. By a bolt run through.

Cross-int. 86. Was that a screw bolt, or was it riveted?

A. It was a portable bolt, which could be taken in and out. A riveted bolt could not be taken in and out.

Cross-int. 87. Was it a screw bolt?

166 A. When I used it it was a plain bolt, with head on.

Cross-int. 88. How was the rib *e* secured to the lever *d*? Was

it as shown in this drawing (Exhibit Kier Machine), or in some other way?

A. It was bolted, as shown in the drawing.

Cross-int. 89. Was the bolt a screw bolt, or was it riveted?

A. A screw bolt for practicability.

Cross-int. 90. What kind of bolt was it in fact?

A. An iron bolt.

Cross-int. 91. Please examine this drawing (Exhibit Kier Machine) very carefully, and say whether you have not made a mistake, in one respect at least, in the way in which the rib *e* is attached to the lever *d*.

A. As near as I can remember, I have made no mistake.

Cross-int. 92. Did you examine the drawing carefully in this respect before answering the last question, and are you positive you have made no mistake?

A. I have examined the draft, and there is nothing presents itself to me that I have made any mistake.

Cross-int. 93. You say you think a screw bolt is better for practicability than any other bolt. Please say now what kind of a bolt was in fact used, so far as you can recollect, to secure the lever *d* to the rib *e;* whether it was a screw or a plain bolt; whether it had a head or not; how it was used, and generally all about it. Give your recollection as to this as fully as possible.

A. It was a screw bolt, and the reason for this being a screw bolt was to screw the rib tight to lever, and for the purpose of being adjustable, to regulate rib at any time that it should be misplaced. This bolt was about a three-quarter-inch bolt, made square at the one end where the head is placed. That part of the square iron of the bolt was set in the eye of the rib that connected with the hole of the lever. The holes of the rib and the lever were made to fit the bolt for the purpose of avoiding friction upon the rib in the eye of the lever.

Cross-int. 94. I don't fully understand you; but I wish you would see if this is right: That bolt was a bolt made of square iron about three-quarters of an inch square, made round at one end, and with a screw thread cut upon that round end, and there was a
167 square mortise cut into the lever into which the square part of the bolt fitted. If this is not right, please state wherein it is wrong.

A. I can't tell whether the bolt was made out of square iron or not, but it was a round bolt at one end and square at the other end. I believe everything else about the bolt is about right. That about the mortise is right.

Cross-int. 95. About how long was the square part of this bolt, and how long was the round part of it?

A. I cannot give you the exact measurement for that. I make an estimate of about three and a half inches. About an inch and a half or three-quartsrs of this bolt was square iron, so that it did not come quite through the entire thickness of the lever to give chance

of extra thread in the hole of the round bolt, as a margin for screwing bur tight without interfering with the square shoulder of the bolt.

Cross-int. 96. By bur in your last answer, you mean the rib *e*, don't you?

A. I mean the bur that goes upon the bolt that goes through *e* and *d*. Some call them a nut and some call them a bur.

Cross-int. 97. If I understand you right, the square part of the bolt was larger than the round part, so as to leave four triangular shoulders, each shoulder being one corner of the square projecting beyond the round part.

A. A bolt is always less when a thread is cut upon it, which consequently, where you leave off, leaves that part of the bolt not cut larger than the one that is. That leaves the four corners of the iron prominent to the round bolt.

Cross-int. 98. All the round part of this bolt was threaded, wasn't it?

A. Yes, sir; right to the shoulder of the square iron, which thread of bolt formed the prominent shoulders of the square iron.

Cross-int. 99. You mean, then, if I understand you, that these screw threads were cut through the corners of the square iron, leaving four flat places on what you call the round part of the bolt?

A. I mean to say that the thread was cut deep enough into the square bolt to form these square shoulders.

Cross-int. 100. Did the screw threads extend clear around the round part, or were there four flat places in the round part?

168 A. The thread went clear around the round part, forming a regular round bolt, the distance of the thread being cut.

Cross-int. 101. Then there was a slight shoulder at the flat parts of the square iron, wasn't there?

A. There was, according to my statement already given, the reduction of the thread cutting, leaving whatever shoulder the thread cut left.

Cross-int. 102. The face of this shoulder was not flush with the side of the lever *d*, but was below that side of the lever *d*, wasn't it? I believe you have said this once, but I ask you now to be sure of it.

A. It did not come through the lever *d* flush, as I have already said, for the purpose of allowing the margin mentioned to tighten rib to lever.

Cross-int. 103. What was the rib made of?

A. Hard wood; face side to work was faced with sheet iron.

Cross-int. 104. What was the thickness and width of the rib at the top?

A. I cannot say.

Cross-int. 105. State as near as you can from your present recollection.

A. It may have been three inches, less or more. That takes the entire description I can give of the size. It was of oval form; it

was not a scale oval, but an ordinary oval, with the flat side of this oval next to the work of forming the crucible.

Cross-int. 106. My question was as to the size of that part of it which didn't go into the mould. Give the size and shape of that part, as near as you can from your present recollection.

A. The part that did not go in the mould was countersunk on the one side next to lever. The depth of that countersinking, as near as I can remember, came flush to the right-side face of the lever, the shoulder of the countersink on the lower side fitting tight up to the lower edge of the lever, acting as a brace to steady the rib, in addition to the bolt before mentioned. As near as I can remember, the upper end of the rib attached to lever would be about three inches broad after the shoulder being cut off the rib, leaving it, to the best of my knowledge, about two inches thick. Lever came down tight to the top of mould, which was the guard for the rib when at its proper position to complete form of pot.

169 Cross-int. 107. Please answer again cross-interogatory 91.

A. To the best of my knowledge, I have made no mistake, with the exception of omitting to state which side the bur was tightened upon of the lever. The bur was screwed upon the bolt on the right-hand side of the lever.

Cross-int. 108. And that is the reason why the bur does not show on the drawing, isn't it? The drawing showing the left-hand side of the lever?

A. Yes, sir; that's right.

Cross-int. 109. You spoke of the top of the mould forming a guard. Did you mean by this that the under edge of the lever came down upon the top of the mould when the lowest point of the rib got the right distance from the bottom *m?*

A. The lower edge of the lever was brought to the top of the mould, bearing upon it with as little friction as possible to avoid the wear of the top of the mould, likewise under edge of lever; and when at that point the work was executed with the rib.

Cross-int. 109½. And when the lever was in this position the front part of the rib was also in contact with the inner edge of the flange which projects inwardly at the top of the mould. Is this so?

A. It connected with very light friction.

Cross-int. 110. The workman had to bear very lightly with his left foot upon the treadle *f* at this point in the operation, didn't he?

A. When compression of forming the pot, he took more weight upon the treadle than when the clay was finished in the mould. When the clay was formed to the mould, he took less weight upon the treadle.

Cross-int. 111. The drawing (Exhibit Kier Machine) shows two pulleys upon the spindle. What did you have two for?

A. The one was a tight pulley for the purpose of putting the machine into motion; the second pulley is a loose friction pulley to lower belt to from the tight pulley for the purpose of putting machine out of motion.

A. Because it does not operate in connection with a mould, and because it is not so placed as to resist a lateral movement of the rib.

Cross-int. 23. Do you consider the operation described in the Salvetat extract, or any of the operations, (if you believe there are several described,) to be substantially the same as that described in either the original or reissued patent of Nimmo, so far as shaping the inside of the crucible is concerned?

104 A. I believe the Salvetat extract describes certain mechanism in which the interior of the vessel is shaped by a rib or former, and also that both the original and reissued Nimmo patent describe a similar mechanism for shaping the inside of the crucible.

BOSTON, *Nov.* 12, 1877.

Cross-int. 24. Do you know whether it is practicable to use a rib or former, such, for instance, as that shown in Complainants' Exhibit Nimmo Model, where a revolving wheel or jigger is used, without any mould?

A. I suppose it is, where no special exactness or uniformity in thickness of wall is requisite.

Cross-int. 25. Have you any knowledge of the actual use of such an apparatus?

A. I can't say that I have; but such an apparatus is shown in the drawing connected with the Salvetat extract, figures 238–241.

Cross-int. 26. Please state where in the Salvetat extract referred to it is stated that the outside of the vessel is formed by hand manipulation only.

A. In the last sentence of the central paragraph on page 108 of deft.'s record, following the description of the mechanism shown in figures 238–241, I find these words: "Figures 240 and 241 show the rib in the position which it occupies when the vessel is revolved by the motion imparted by the lathe *A*; the vessel is supported by the wheel *D*." It is distinctly stated in this extract that the wheel *D* supports the vessel which is being formed, internally, by the rib referred to; and it is obvious from figures 238 and 240 that there is no mould used in this connection.

Cross-int. 27. Then, as I understand you, it is not stated expressly that the vessel is formed by hand manipulation only, but that you infer this from the fact that a mould is not shown in figures 238 and 240, and that it is stated that the vessel is supported by the wheel *D*. Am I right?

A. I infer nothing. I state the fact merely that no mould is shown in the drawing, and that it is expressly stated that the vessel is supported by the wheel *D*. There is nothing in the sentence quoted from the extract about hand manipulation, in express terms, but no mechanism is shown or described for shaping the outside of
105 the vessel, and hence it could only have been shaped by hand.

Furthermore, there is no room for a mould between the wheel *D* and the bottom of the rib when brought to the position necessary in shaping the vessel, so that the lever shall rest upon the

stop as shown in figure 240; hence I say that these figures illustrate a mechanism having a rib such as that shown in the Nimmo model, where no mould is used.

Cross-int. 28. Supposing that in figures 238 and 240 a mould were placed on the wheel and around the vessel being formed, would not those figures show a rib, a revolving mould and mechanism by which the rib may be guided towards the axis of revolution of the mould as the rib is withdrawn?

A. Yes.

Cross-int. 29. Is not the manner in which the rib is guided, as described in the Nimmo reissue patent, substantially the same as is described in relation to the rib in the Salvetat apparatus?

A. As to its results, it is. The apparatus described in the reissue is lifted out of the vessel by a counter-balance, which relieves the operator from the labor of lifting the rib and lever, and the mechanism of the reissue also serves to remove the rib, without special care in the manipulation of the lever, in order to withdraw the rib without injury to the vessel; while with the Salvetat apparatus much care would evidently be required in withdrawing the sharply-curved rib from the extremely narrow mouth of the vessel. I have heretofore referred to the fact that this Salvetat apparatus is not provided with lateral stops to regulate the position of the lever and rib. Such a stop in the Nimmo mechanism aids also in withdrawal of the rib, since it forms a fulcrum upon which the lever turns, in the slight upward movement which raises the toe of the rib from the bottom of the vessel, before the bodily movement of the rib towards the center and upwards, out of the vessel.

Cross-int. 30. Does the W. Smith patent, number 40,506, show and describe mechanism by which the former is guided towards the axis of revolution of the mould, for the purpose of withdrawing the same?

A. Yes.

Cross-int. 31. Does not the patent No. 9,437 also show and
106 describe mechanism by which the former is guided towards the axis of revolution of the mould for the purpose of withdrawing the same?

A. Yes.

Cross-int. 32. Do not both of those patents, Nos. 40,506 and 9,437, known as the Smith and Wise patents respectively, describe the use of a revolving mould?

A. Yes.

Cross-int. 33. And the Wise patent refers to the use of a revolving mould, made of any suitable material, does it not?

A. Yes.

Cross-int. 34. And each of those patents (Smith and Wise) describes the use of a former within the revolving mould, for shaping the vessel to be formed in the mould, does it not?

A. Each of the patents referred to describes a revolving former

for shaping the vessel internally; but such former will not operate as described, so as to shape the vessel internally and finish it.

Cross-int. 35. If the Smith patent, No. 40,506, were subsequent in date of invention and issue to the Nimmo original patent, No. 49,140, would you consider it any infringement upon Nimmo's reissue, No. 6,166?

A. No; for the reason that the machine described in the Nimmo reissue is a practical machine for the purpose contemplated in the patent, and the machine described in the Smith patent is not; and also because the Smith machine is not provided with stops upon the frame to regulate the thickness of the bottom and walls of the vessel.

ALBERT H. SPENCER.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

DEPOSITION OF HENRY D. ATWOOD.

1/07 Direct examination by James E. Maynadier, Esq., of counsel for complainants.

BOSTON, *October* 13, 1877.

Int. 1. What is your name, and have you before testified in this case?

A. Henry D. Atwood. I have.

Int. 2. What have you done, with a view to ascertain whether the machine described in the Smith and Wise patents are practically operative or not?

A. We had constructed revolving formers, as near like those specified in the Smith and Wise patents as possible, and suitably attached to the uprights of two of our Nimmo machines, so that they could be worked, in connection with the revolving jigger head and moulds ordinarily used with those machines. Trials were made with these formers so adjusted; we made neither of them work satisfactorily. Subsequently, we had built a Smith machine, and trials were made with it; but we did not succeed in making crucibles with it.

Int. 3. When were these first trials made with the revolving formers attached to the Nimmo machines?

A. Last spring.

Int. 4. What was the difficulty experienced in making them work satisfactorily at that time?

A. The revolving formers tore the clay and sucked it away from the moulds, leaving the interior of the crucibles spongy in appearance.

Int. 5. State how many attempts were made at that time on these altered Nimmo machines.

A. On two occasions, at least. I cannot say how many separate crucibles were attempted to be made. There were not a great many. The workmen tried to make crucibles, that they might get a perfect one out if possible, on the first of these occasions to which I allude, until they gave it up. I saw several of them, which were cut down and placed aside. On the second occasion we did not make so many

as on the first, they being made for the inspection of our counsel, who was present.

108 Int. 6. How many formers did you try, and how did they differ from each other?

A. Two formers, I think. The Wise former was made of iron; the Smith former, of wood. The Wise former was the smallest.

Int. 7. Who were the workmen?

A. J. Frank Paine and George Brammer.

Int. 8. What instructions did you give them?

A. I can't remember that I gave them any. It was understood before, that as soon as the formers were in position they should try them.

Int. 9. How long had they been in your employ, and how do they rank as to skill in this art?

A. Paine has been in our employ since 1865; Brammer was taken on early this year, I think, but previously had been employed by the Jersey City Crucible Manufacturing Co., off and on from 1867. Paine is a good hand turner; Brammer has never turned a crucible by hand, but has been frequently employed in potteries; is considered a very good ball maker, and the crucibles he makes with our machine gives as good satisfaction as any. I don't know that there is any difference between the two men on the machine. I am satisfied with both as workmen.

Int. 10. When was the complainants' (Smith) machine built, and how was it driven when first tried?

A. Last June. It was worked by crank. Two men worked the crank, two more were pulling down the cross head, and one of those two worked the former.

Int. 11. Do you know how often that machine has been run?

A. On three occasions.

Int. 12. What difference can you see between it and the machine described in the Smith patent?

A. On the first two trials the mould was kept in its place by four set screws. We did not have a flange running away round the disc c. The mould itself had a flange instead of tapering at the bottom. The former was longer than the mould, measuring its length from the bottom of the crucible; I mean from the inside bottom of the crucible. Before making the third trial, we had a flange put upon the disc c. The flange upon the bottom of
109 the mould was still retained. The flange upon the disc was accurately adjusted to this flange upon the bottom of the mould, and the mould was retained in its position in the flange by two set screws, just as it is now. We made a change in the former, making it as it now is.

Int. 13. When was it tried last, and where?

A. On Thursday, 11th of October, at the works of the Phœnix Manufacturing Co., at Taunton, Mass.

Int. 14. Is it possible to make a crucible in this machine, or in any

other machine in which "the former revolves, * * * by contact with the plumbago batch"?

[Objected to as incompetent, the witness's testimony as to his experience with revolving formers being the only ground upon which he could express an opinion.]

A. Not when the former revolves so freely by contact with the plumbago batch as not to rub, in my opinion.

Int. 15. How confident are you in this opinion, and what are your reasons for it?

A. So confident that I cannot be disabused of this opinion until I have ocular demonstration that it is possible to make a crucible in a machine with a revolving former. My reasons are, that the revolving former used in all the trials I have alluded to, tore the interior of the crucible, and drew the plumbago batch away from the mould.

Int. 16. Did you observe any sticking of the batch to the revolving former? If so, what was the effect upon the wall of the crucible as to uniformity of thickness?

A. I did observe some of the batch sticking to the revolving former, and the wall of the crucible was made thinner in consequence, a ring being observable near the bilge of the crucible.

Int. 17. Can you produce samples of the articles made upon this machine?

A. Yes; but they are now in Taunton. They are marked S, 1; S, 5; and S, 6; C. F. S., Spl. Exr.

Int. 18. Please state whether the mould is properly secured or not in the machine described in the Smith patent; that is, whether a mould secured in that way could be practically used or not?

A. I think there would be difficulty found in the use, the sloping shape of the bottom of the mould making it liable to raise from

110 its position, being held therein simply by two set screws, the flange around the mould not being very high, and the pressure thrown against the mould, by the operation of making the crucible, being considerable.

Int. 19. Is a metallic-flanged mould, as shown in the Smith patent, capable of practical use in the manufacture of crucibles?

A. I don't think it is, as might be inferred from my previous answer, the circular rim g having no slot or rabbit within its interior, into which a corresponding rim on the bottom of the mould might set. The two set screws s, which are for the purpose of confining the mould in place, working against the sloping wall of the mould, could, with difficulty, be made tight to hold it down if they had blunt ends; if they had pointed ends I think they would do so, but would make a bur on the mould, so that it would be replaced with difficulty in successive operations of making crucibles. There is no provision made for getting the two parts of the mould out of position. They must be clasped in the workman's hands, and the workman would find it quite difficult, after removing the upper half successfully, admitting he did so, to take out the lower half with the crucible in it, and avoid bringing it in contact with his breast. I consider the

flanged mould inferior to one without a flange, and it would not be needed if the machine was provided with any other suitable stop.

Int. 20. What stops are in the machine described in the Smith patent, and state whether they are practically operative or not, and also how their operation would be affected by the mould being insecurely held in the hollow-headed chuck?

A. There is no stop except that derived from the counter weighting, until the sliding bracket q is brought down in contact with the top of the mould h^1. I don't consider this stop practically operative; because, if the sliding bracket q is brought down in contact with the mould h^1, it must produce a trembling or shaking of the mould with the crucible contained therein, and this might work injury to the crucible. If the sliding bracket was not brought down in contact with the top of the mould, but was brought as near in contact as the workman's eye would indicate to be the lowest point to which it could be brought without touching the mould, the bottoms of the crucibles would vary in thickness according as the position of the
111 bracket varied. The mould being insecurely held, and liable to shift in its position, and be raised up in the hollow-headed chuck, the sliding bracket would strike at some point on the top of the mould instead of resting upon the top of the mould squarely, and by so doing would cause shaking of the mould and the crucible therein. The flange of the iron mould which regulates the thickness of the crucible coming in contact with the revolving former, would cut it gradually away, more rapidly if made of wood than if made of metal, and the former would thereby be allowed to approach nearer the interior wall of the mould, thereby making the crucible thinner. The lifting of the mould would also admit of farther lateral movements of the former, than it would have if the mould was securely held; and as the bracket, if in contact with the mould, settled the mould down, the rim of the mould would be forced more closely against the former, and in its effort to release itself from the pressure would cut the former more deeply.

Int. 21. The Smith patent states that "the length of the former is equal to the inside height of the crucible." Is it possible to make crucibles with a wooden former of this length in the metal-flanged mould held in the hollow-headed chuck as those parts are described in the Smith patent, the upper corner of the wooden former being nearly on a level with the lower corner of the metal flange?

A. I think not, from my experience with it, as the batch when worked up to the flange fell over upon the top of the revolving former, and from thence fell into the interior of the crucible, and then was caught around the former, and the same or other portions of it were again brought up and fell over in the same way, and no crucibles were produced with a smooth interior.

Int. 22. Did you ever see this Smith machine used anywhere else than at your works, and by any other persons than your workmen? If so, where, and by whom?

A. Yes; I have seen the Smith machine used in Pittsburgh, at

the works of Hussey & Co., where it was set up and operated by the foreman of the works, as I understand him to be, Mr. Wallace, and others—workmen employed there.

112 Int. 23. Were the results any different on this occasion from those on the other occasions when you saw it used?

A. On this occasion the operators did not succeed in getting the crucible out of the mould—the attempt at removing the upper part of the mould invariably resulting in tearing the crucible asunder. The former gathered clay with its accustomed facility.

Adjourned to Taunton, Phœnix Co.'s works, Monday, October 15, 1877, at 10 o'clock A. M.

BOSTON, *October* 16, 1877.

Int. 24. State whether the quantity of batch put into the mould varies at all from the quantity of batch in the formed crucible. If so, how much does it vary, and why is this?

A. It does. Enough of the batch is put into the mould to enable the workman to fashion the crucible into the desired shape, and so as fully to fill up the space between the former and the wall of the mould. If an excess of batch was not put in, it would be found that the space between the former and the mould was not fully filled up, because some portion of the batch rises upon the former above the mouth of the mould, and is cut off. And if an excess of batch was not put in, the crucible formed would not be compact and solid, and would be condemned and thrown away; hence it is the invariable custom in making crucibles to work up an excess of batch into the ball out of which the crucible is to be formed. This excess would vary according to the size of the crucible, but every properly-made ball must contain considerably more material than the vessel to be made.

Int. 25. Suppose one of these formers was laid upon the batch of the material, and then lifted off, state what would be the condition of the surface of the batch and the surface of the former where they were in contact.

A. The condition of the surface of the batch and that of the former would be similar to that of the interior of a crucible and the outside of the former after attempting to make a crucible in the Smith machine. The surface of the batch, where it came in contact with the former, on the withdrawal of the former would present a roughened or spongy appearance, caused by the sticking of the batch to it, portions being torn off and adhering to the former.

113 Int. 26. Is it possible to make crucibles in any jigger in which the former does not rub upon the interior of the vessel formed?

A. I cannot conceive of any way in which it would be possible.

Int. 27. You spoke in your 5th int. of a "perfect" crucible. Please explain the sense in which you used that term.

A. By "perfect" crucible, I meant one that would pass inspection; in other words, be merchantable, presenting no blemish or defect that would cause us to break it up.

[Adjourned.]

BOSTON, *Nov.* 12, 1877.

Cross-examination by W. Bakewell, Esq., of counsel for defendants:

Cross-int. 28. Prior to the experiment or experiments referred to in your testimony in chief, what experience had you in the use of revolving formers with revolving moulds for the manufacture of vessels of plastic material?

A. I had no experience whatever, although I had been engaged in the manufacture of black-lead crucibles—which are made out of plastic material—for sixteen (16) years. I never heard of revolving formers until this year.

Cross-int. 29. State whether you had any experience in the use of revolving iron moulds prior to the experiments referred to in the last question.

A. The only moulds that we had in use prior to the experiments alluded to were plaster moulds. I have had no experience with other moulds.

Direct resumed:

Int. 30. The 28th question relates to these trials, only about which you have been asked in your direct examination, which, so far as I recollect, are only those tried with the Compts.' Exhibit Smith Machine. State briefly what experience, if any, you had prior to the building of that machine with revolving formers—how many formers have you tried, and what kind of moulds?

A. We had some experience prior to the building of the Smith machine with revolving formers and plaster moulds. We had both the Wise and Smith formers attached suitably to the uprights of our Nimmo machines for that purpose.

HENRY D. ATWOOD.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

114 DEPOSITION OF JAMES F. PAINE.

Direct examination by James E. Maynadier, Esq., of counsel for complainants.

TAUNTON, *October* 15, 1877.

Int. 1. State your name, age, residence, and occupation.

A. James F. Paine; 43; Taunton; potter.

Int. 2. What experience have you had in the manufacture of crucibles?

A. I have had thirteen years, the 26th of last September; twelve years of that has been occupied running a jigger.

Int. 3. How did you make the pots before you commenced to use a jigger?

A. Hand-turning.

Int. 4. When and where did you commence to make crucibles?

A. The Phœnix Manufacturing Company, Taunton, in 1864, September 26.

Int. 5. What kind of a jigger did you first use?

A. A jigger known as the Nimmo jigger.

Int. 6. What experience have you had in the use of jiggers with the revolving formers in place of the Nimmo rib?

A. Probably four days, all together, in all my trials. I think the first I made about twelve pots; the second was about fifteen pots; the third, I think, was seven pots; the fourth, ten pots.

Int. 7. What kind of moulds were used in the jigger when you first tried the revolving former?

A. Plaster.

Int. 8. When did you first see the machine now shown you, marked Exhibit Complainants' Smith Machine?

A. The last of last July.

Int. 9. How many attempts in all, as near as you can say, have you made to make a crucible on that machine?

A. Three.

Int. 10. Do you mean you have only tried to make three crucibles?

[Respondents' counsel objects to the present line of examination of this witness, and to all questions which may be asked him on the same subject, as incompetent and irrelevant, the issue in this
115 case not being that of the practicability or utility of any particular kind of former or rib.]

A. No; I have worked it at three different times. Have attempted 12, 7, and 10 with the Smith machine, as near as I can remember.

Int. 11. When did you last try it?

A. Last Thursday.

Int. 12. Have you ever succeeded in making a passable crucible on that machine?

A. I haven't.

Int. 13. Is it possible to make a passable crucible on any jigger in which "the former revolves * * * by contact with the plumbago batch," so that "there is no rubbing on the inside of the crucible?"

[Objected to, for the reason that the witness can properly testify to his experience only.]

A. I think it is not.

Int. 14. Did you ever know of any jigger, capable of practical use, in which the working face of the former did not rub on the inside of the article it formed?

A. No.

Int. 15. Suppose you put one of these formers upon a batch of the plumbago material, and then pull it off, by lifting the former bodily away from the batch, will part of the batch stick to the former, or not, supposing, of course, that the batch be not too stiff or dry to work?

A. It would.

Int. 16. Suppose there was a quantity of the material adhering to the former, and you took your hand and slipped the material off the former, would it slip off, leaving the former clean and the surface of the material smooth where it had been in contact with the former?

A. It would.

Int. 17. Did you ever try to make a crucible with one of these jiggers with a revolving former, by chocking the former so that it would rub on the inside of the crucible? If so, with what success?

A. I have. Passable success.

Int. 18. Why couldn't you get all the crucibles out of the
116 iron mould on Thursday last as well as you did one of them, and how was it that you got that one out?

[Objected to, as it does not appear that witness could not get crucibles out of the iron mould; and also respondents' counsel repeats the objection made to the 10th interrogatory, as against any evidence as to any peculiar mould.]

[Complainants' counsel suggests that this abundantly appears by the testimony of Macfarlane and Spencer.]

A. I had a different former in. I could not get the pressure on that former that I could on the other one.

Int. 19. State your opinion as to whether this flanged iron mould could be used practically or not in the manufacture of crucibles?

A. I think it cannot; there is such a suction to the iron that you cannot remove the pot from it without throwing the crucible out of its proper form. I don't think the flange would be so objectionable as the rest part of it below the flange would be. It is easy enough to free the flange.

Int. 20. What did you use with a view to insure getting the crucible out of the mould; and what did you find to answer best?

A. I tried the mould with water; dampened the mould. I tried the mould dry. I tried it with dust lead. I had the best success with oil.

Int. 21. When the mould is oiled or otherwise prepared so that the crucible can be got out readily, how does the revolving former affect the walls of the pot different from what it does when the walls of the pot stick fast to the inside of the mould?

A. The outer wall of the pot is not pressed solid to the wall of the mould.

Int. 22. Is there at times, while the mould is revolving, a space between the outer wall of the pot and the inside of the mould? If so, what causes it?

A. There is; the suction of the former; the material adhering to the former.

Cross-examination *de bene* by Thomas B. Kerr, Esq., of counsel for defendants:

Cross-int. 23. When you apply the knife to the top of the
117 crucible in the Nimmo machine to trim off the surplus stock, where does said stock go to?

A. It falls over on the bench.

Cross-int. 24. Being thrown off by the revolving mould?

A. Yes.

Cross-int. 25. As you used the complainants' Smith machine, the

inside of the crucibles moulded on it was all rough and grooved, were they not?

A. They were.

Cross-int. 26. And, as you used it, did it not make the crucibles free from faults and seams?

A. No, it didn't.

Cross-int. 26½. In one of these trials you made with complainants' Smith machine, the chuck unscrewed from the spindle, did it not?

A. It did.

Cross-int. 27. That was caused by the pressure of the former on the batch, was it not?

A. I should say it was.

Cross-int. 28. What would you consider the best way to keep the mould from sticking to the crucible?

A. In my trials with the Smith machine I found the oil was the best.

Cross-int. 29. As far as the operation of moulding was concerned, (I mean the action of the machine,) in forcing up the material into shape, and the withdrawing of the former from the inside of the mould, did the fact of the sticking of the material to the mould have any bad effect on it?

A. It had the effect that you couldn't free your mould from it; it would tear the pot in two.

Cross-int. 30. Did the sticking of the mould in any way affect the operation of the machine, in so far as forcing the clay up into the sides of the mould by the operation of the former, the insertion and withdrawal of the former, or the revolution of the mould, or the action of the devices by which the former is carried or moved are concerned?

A. I should say it didn't.

118 Cross-int. 31. Please state whether, in your opinion, the former in complainants' Smith machine would go clear to the side of the mould if the operator continued running the screw and the former did not encounter the flange of the mould.

A. I think it would touch the side of the mould if the former did not encounter the flange.

Cross-int. 32. In the trial of the Smith machine on Thursday afternoon, I noticed that the former was always pressed over to the side of the mould until a considerable amount of material exuded over the top of the mould. Did you put in an excess of batch in all your trials?

A. I did not.

Cross-int. 33. It always exuded over the sides, did it not?

A. Yes, sir.

Cross-int. 34. In one of the trials on that day, with what is called the Wise former and Smith mould, on that machine, I noticed that although the material had been forced upon by the former until it just reached the flange of the mould, the former was raised out of the mould and an additional lump of batch put in, and the former again

inserted and pressed against the side until the batch exuded in considerable quantities. Do you know why that was done?

[Objected to, because, to the knowledge of complainants' counsel, who was present on the occasion, the defendants' counsel is mistaken in regard to the material being forced up by the former until it just reached the flange of the mould.]

[Noon recess.]

[Defendants' counsel says the statement made in his question, is the result of close and careful attention to the operation, and he believes he is not mistaken in any particular stated.]

A. When we tried the Wise former we used the same amount of clay we used when we were trying the Smith, and it wasn't sufficient to fill the mould.

Cross-int. 35. I saw two trials of the Wise former of complainants' Smith machine. The first one was the one I have just spoken of. When the former was raised to put in the second ball of clay, did you notice that I scored its surface with my finger nail? You were standing at my elbow at the time.

119 A. I don't seem to remember much about that. I noticed the action, but I am not positive which former was being used when you did so.

Cross-int. 36. I held my thumb up for your inspection. Do you remember that?

A. I don't remember that.

Cross-int. 37. Do you remember my calling attention to the condition of the former at that time?

A. I do not.

Cross-int. 38. Do you remember the condition of the former when said former was drawn out of the mould before the pot was completed?

A. Yes. There was clay adhered to the former some, but not nearly as much as there was to the Smith at any time.

Cross-int. 39. Was there not a slight thin film of material covering the former at that time?

A. There was; the film was very light on it.

Cross-int. 40. Please state whether the last trial on Thursday afternoon with the Wise former a crucible was not formed which was removed from the mould without breaking.

A. Yes. The pot was thrown out of shape in taking it out of the mould—spoiled in taking it out.

Cross-int. 41. Please state whether you sponge-finished any of the pots made on the Smith machine either with the Wise or Smith former.

A. I don't remember of ever sponging any, but I think I did not; not at the time of making. When I come to finish, then I sponged.

Cross-int. 42. Is it not the proper time to sponge the inside of the crucible when the former has been removed and the mould is still on the chuck?

A. We usually sponge then.

Cross-int. 43. The material is very soft at that time, is it not, being in a condition suitable for moulding?

A. Yes, sir.

Cross-int. 44. If the interior of the crucible only roughed, the sponging operation smooth and finishes it, does it not?

A. In using our pots we use a little water, and we use the
120 sponge to wipe out the extra surplus water that's there. If the pot is rough and hubly the sponge will probably smooth it down.

Cross-int. 45. If the mould was made of plaster it wouldn't stick, would it?

A. It wouldn't be liable to stick near so bad.

Cross-int. 46. Don't you think it would free easier?

A. Yes, it would free very easy.

Cross-int. 47. And the machine would perform in the same way with the plaster mould as with an iron one, except as far as the freeing of the mould is concerned?

A. I think the inside working of the former would be the same with the plaster mould as with the iron one, and the movements of the machine would be the same.

Cross-int. 48. Do you know where the crucible made last Thurday on the Smith machine with the Wise former is?

A. It is in the shop.

Cross-int. 49. In the same condition as it was when taken from the mould?

A. It is, as far as I know.

Cross-int. 50. It was not sponge-finished on the inside, was it?

A. It was not.

Cross-int. 51. Has it been finished on the outside?

A. It has not.

[The complainants are requested to produce and file in evidence the crucible referred to, and which was marked *k* by complainants' counsel.]

[It is at the service of the defendants' counsel, and he can put it in evidence if he likes.]

[Defendants' counsel here puts the pot in evidence as Exhibit S. 8, and requests the complainants to let the same remain in their drying-room until they forward their exhibits to the court, so that the examiner may forward it at the same time.]

Direct resumed:

The defendants, Messrs. Arensberg and Dubarry, being both present and within a few yards of defendants' Smith machine, which is ready for use, are again invited to examine it, and also to try it, either or both, as they may desire. Material of any temper
121 they desire will be furnished them, every facility will be given them, and, if they prefer, no one else will be present.

[Defendants' counsel notes that the success or failure of the com-

plainants' Smith machine is a matter in which defendants have no interest, as that is not the point in controversy, nor relevant thereto; furthermore, the machine is in evidence in the case, and defendants' testimony is closed, and they can examine it at any time with equal advantage to their case; furthermore, testimony of witnesses is going on at this moment, and it is known to complainants that defendants and their counsel are to leave here for Pittsburg at seven o'clock, it now being three. For further reason for instructing his clients to decline the invitation, defendants' counsel refers to his reasons given on a former invitation on Wednesday last, and entered on H. E. Dubarry's second deposition. Defendants' counsel declines the invitation on behalf of Messrs. Arensberg and Dubarry.]

Int. 52. When the former was taken out and an additional lump of batch put in on the occasion referred to in cross-int. 34, how far up the mould did the material extend?

A. From one and a half to two inches from the top.

Int. 53. Please refer to your 31st cross-int., and answer and state whether you assumed the mould to be empty or not.

A. I assumed the mould to be empty. You wouldn't want to run the former up to the side of the mould with the clay in it; it would make it too thin and spoil it.

Int. 54. What would be the effect if the former of the Smith machine were short enough to go under the flange and you should attempt to press the former far enough to strike the side of the mould with the clay in it? What would become of the clay?

A. I should think the clay would rise up and fall back of the former; that is only my supposition; I never tried it.

JAMES F. PAINE.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

122 SECOND DEPOSITION OF JAMES F. PAINE.

BOSTON, *November* 10, 1877.

Int. 1. What is your name, and have you before testified in this case?

A. James F. Paine. I have.

Int. 2. Have you since giving your former deposition made other trials of the complainants' Smith machine? If so, when, where, who were present, and in what direction did the mould revolve?

A. I have; the 24th of October, I think it was; in Taunton, in the presence of Mr. Spencer, Mr. Maynadier, Mr. Brammer, and Mr. Driscoll. The mould revolved from left to right.

Int. 3. How did the mould revolve before?

A. From right to left.

Int. 4. What part of the mould went from left to right in the last trial?

A. I should say the part that would come in front of me; the part next my breast.

Int. 5. How do the moulds used on your Nimmo machine revolve?

A. From left to right.

Int. 6. What kind of former was used when you began this last time, and how was it mounted?

A. We used the Wise former. It was on a lever.

Int. 7. What was the lever fastened to?

A. It was on a sliding rod. The rod was attached by a bolt at the bottom, and there was an eye bolt at the top so that you could adjust it.

Int. 8. What was the rod fastened to?

A. It was attached to a piece of iron that was connected with the Smith jigger frame.

Int. 9. Do you mean that the cross head of the Smith machine was taken off, and an iron rod passing through a hole in the end of the lever was fastened on to the upright frame of the Smith machine?

A. Yes, sir.

Int. 10. What prevented this lever from sliding down too far on this rod?

123 A. There was a collar with a set screw in it.

Int. 11. What became of this lever, rod, and the Wise formers? Where are they now?

A. We detached them. I suppose they are in Jersey City. There's where they were sent.

Int. 12. How many Wise formers were used on that day? How many trials made with each?

A. Two. One of them was iron and one wood. Three trials were made with each.

Int. 13. What was this lever made of?

A. Wood.

Int. 14. Look at the drawing of the Wise patent now shown you, and state whether it was anything like the lever marked *oo* in that.

A. I should say it was.

Int. 15. After you made these six trials with the Wise formers, what did you do next?

A. We replaced the cross head of the Smith machine, and made six pots with the Smith machine, with the Smith former attached.

Int. 16. What mould was used in making these six pots?

A. The Smith mould was used in making three of them, and to make the other three we used a plaster mould.

Int. 17. What success did you have in these twelve trials?

A. The success was bad; could not get a good pot.

Int. 18. Did you succeed in making the iron mould shed properly?

A. Could not.

Int. 19. What effect did this last trial have upon your opinion about the practicability of using the Smith machine, or any other machine with a revolving former?

A. I don't think it can be done; it is worthless.

Int. 20. Are these things [now put in evidence and marked re-

spectively W 1, W 2, W 3, W 4, W 5, W 6, S 9, S 10, S P 3, and S P; C. F. S., Spl. Exr.] the things made at the time and place mentioned by you in this deposition?

A. They are all that were made on that occasion. There was one attempt to make one in a plaster mould, when the clay wrapped around the former.

124 Cross-examination by Wm. Bakewell, Esq., of counsel for defendants:

Cross-int. 21. Prior to the trials made or witnessed by you and referred to in your testimony in this case, what experience have you had in the use of iron moulds and revolving formers, or either of them, in the manufacture of crucibles?

A. None.

Cross-int. 22. Who directed and superintended the experiments referred to in your testimony to-day?

A. Mr. Spencer and Mr. Maynadier.

JAMES F. PAINE.

Attest: CHARLES F. SLEEPER, *Special Examiner.*

DEPOSITION OF GEORGE BRAMMER.

Direct examination by James E. Maynadier, Esq., of counsel for complainants.

TAUNTON, MASS., *Oct.* 15, 1877.

Int. 1. State your name, age, residence, and occupation.

A. George Brammer, age 35 years, Taunton, white-ware jigger man.

Int. 2. Where are you now employed, and doing what?

A. I am employed with the Phœnix Manufacturing Co., jiggering crucible.

Int. 3. When and where did you commence to make crucibles?

A. In Jersey City, in 1867.

Int. 4. What machine did you use then?

A. The Nimmo machine.

Int. 5. What work did you do on jiggers before you jiggered crucibles, and state what experience you had before that time in the use of jiggers?

125 A. I worked on a jigger about 10 years in a pottery, making plates, bowls, cups, mugs, mustard cups, saucers, and chambers.

Int. 6. When did you first see a jigger in which a revolving former was used in place of a rib?

A. I saw it in the Phœnix Manufacturing Co. here, when I came here to work, last spring.

Int. 7. Did you ever know or hear of any jigger being practically used for any purpose with a revolving former, or did you ever know or hear of anybody else who knew of such a machine being practically used?

A. I did not.

Int. 8. What experience have you had with a jigger with a revolving former in place of the Nimmo rib?

A. I assisted Mr. Paine, in August last, on the machine marked Exhibit Complainants' Smith Machine, and on last Thursday on the same machine.

Int. 9. How many crucibles in all have you tried to make on that machine?

A. In August last we made ten, I believe, and two of them we couldn't get out, they being broken in getting them out of the mould. On Thursday last we tried about ten more, and only got one whole one out. This one, marked S. 8, C. F. S., Spl. Exr.

Int. 10. Have you ever succeeded in making a passable crucible on that machine?

A. We have not.

Int. 11. Is it possible to make a passable crucible on any jigger in which "the former revolves * * * by contact with the plumbago batch," so that "there is no rubbing on the inside of the crucible"?

[Objected to, for the reason that the witness can properly testify to his experience only, and also because the question of the practicability or utility of any particular kind of former or rib, or any other element of complainants' combination, are matters not in controversy in this case, and all testimony of this witness objected to as irrelevant and incompetent.]

A. In my experience with it, it is not.

126 Int. 12. Did you ever know of any jigger capable of practical use in which the working face of the former did not rub on the inside of the article it formed?

A. No, sir; I did not.

Int. 13. Suppose you put one of these formers upon a batch of crucible material, and then pull it off by lifting the former bodily away from the batch, how will it leave the surface of the batch and the surface of the former, where they were in contact?

A. The suction from it leaves the surface of the batch rough, and some of the batch sticks to the former.

Int. 14. Suppose there is a quantity of the material adhering to the former, and you slipped or slid the material off the former with your hand, what would be the condition of the surface of the former and the surface of the material, where they had been in contact?

A. The surface of the material would be smooth where you slip it down with your hand. There would be a suction on the former, a little adhering to it.

Int. 15. Why couldn't you get all of the crucibles out of the iron mould on Thursday last as well as you got this out (S 8)? And how was it that you got that one out?

A. This S 8 one is not pressed properly to the outer wall of the mould, and the others were.

Int. 16. State your opinion as to whether this flanged iron mould could be used practically or not in the manufacture of crucibles?

A. I don't believe it could. In taking the pot away from the

mould, if we get a good one out, the pot sags down every time and gets out of shape; but we never got a good one out that was properly pressed on the outer wall of the crucible.

Int. 17. What did you find to be the best way of keeping the pot from sticking to the mould, so that it would come out?

A. We dampened the mould first with water. Then we tried it with fine dust lead, and then we tried it with oil. We found the oil the best.

Int. 18. What trouble arises from the use of this revolving former when the mould is oiled, so that the shaped crucible can be got out of it, different from what arises when the shaped crucible sticks so tight to the mould that it can't be got out?

A. When the crucible gets its proper pressure, there is a
127 constant accumulation on the former of material which ought to be in the crucible, and spoils the inside of the crucible when adhering to the former.

Int. 19. Did you ever see the wall of the crucible leave the wall of the mould while you were shaping it on this machine? If so, what made it do it?

A. I did. The suction from the former is what caused it.

Int. 20. Did you ever try the Smith machine, by chocking the former?

A. I did not.

Int. 21. Do you know what would be the effect upon the inside of the crucible?

A. I should say the effect would be that it would make a good smooth pot.

Cross-examination by Thomas B. Kerr, Esq., of counsel for defendants, *de bene esse:*

Cross-int. 22. If a little of the batch fastens on to the former, it will continue to accumulate until it extends around the whole circumference, will it not?

A. It does on this revolving former.

Cross-int. 23. If the former stops revolving, this will be scraped off the side of it which is the nearest to the mould, will it not?

A. I should judge so from this S 8 pot, for I noticed when the former stopped revolving it smoothened the pot.

Cross-int. 24. The deposit was cleaned off the side of the former in that case which was nearest to the mould, was it not?

A. No, for he put it back again, and when he took it out there was a scum on it.

Cross-int. 25. It revolved when he put it in again, did it not?

A. Yes, sir.

Direct resumed:

Int. 26. Suppose the former stopped revolving when a band of the material was around it, would it be cleaned off; and if so, where? Supposing the mould to keep on revolving, and the former to be pressed further sideways?

A. It would clean off the surface where it bore on the crucible.

128 Int. 27. Do you know why the former used in making the pot S 8 was so much cleaner than the regular former of the Smith machine?

A. The former bound, and didn't revolve freely when he got the proper pressure on.

Int. 28. What do you believe about the practicability of a metal mould for use in the crucible business, which is made outside like the one in complainants' Smith machine?

A. From all of my experience, it is utterly impracticable. For the reason that no matter how hard you try, you injure the crucible in forcing it out of the iron mould.

GEORGE BRAMMER.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

SECOND DEPOSITION OF GEORGE BRAMMER.

BOSTON, *November* 10, 1877.

Int. 1. What is your name, and have you before testified in this case?

A. George Brammer. I have.

Int. 2. Have you, since giving your former deposition, made other trials of the complainants' Smith machine? If so, when, where, who was present, and in what direction did the mould revolve?

A. I assisted Mr. Paine on the 24th of October, A. D. 1877, at the Phœnix Crucible Manufacturing Company's works at Taunton, Massachusetts, in the presence of Mr. A. H. Spencer, Mr. J. E. Maynadier, Mr. J. F. Paine, and Mr. William Driscoll, on the trial of the said complainants' Smith machine. The mould revolved from left to right.

Int. 3. State what kind of former was used when you began this last trial, and how it was mounted.

A. We used a rod fastened to the Smith machine, and on the rod there was a wooden arm or lever, and the neck of the former revolved in that arm. The former used was a Wise former.

129 Int. 4. How many Wise formers were used that day, and how many trials made with each?

A. We used two formers—an iron one and a wooden one. We tried three pots with the iron former and three with the wooden former.

Int. 5. Look at the drawing of the Wise patent now shown you, and state whether the wooden lever is anything like that marked *oo* in the drawing.

A. It was similar, with the exception that the one we used had two cross pieces, which made the lever stronger.

Int. 6. After making these six trials, what did you do next?

A. We took the rod off the Smith machine and put on the Smith cross head, and put in a Smith former.

Int. 7. How many trials did you make then, and what moulds did you use?

A. We made six trials—three with the iron mould and three with the plaster of Paris mould.

Int. 8. What success did you have in these twelve trials?

A. We could not succeed in making a pot.

Int. 9. Did you leave any of these crucibles in the iron mould for any length of time? If so, which one, for how long?

A. We left the last crucible that we made in the iron mould with a Smith former in the mould for two days, and then we tried to take it out of the mould, but we could not get it out without breaking it. It stuck to the walls of the mould, so that it came in two halves when we attempted to take the mould apart.

Int. 10. Where are the Smith machine and the Wise lever and formers now?

A. The last I saw of them they were boxed up in the shop of the Phœnix Company's works, and marked for Gautier & Co.'s crucible works of Jersey City, and were being carried out of the shop to the depot.

Int. 11. Are these things [now put in evidence, and marked, respectively, W 1, W 2, W 3, W 4, W 5, W 6, S 9, S 10, S P 3, and S P; C. F. S., Spl. Exr.] the things made at the time and place mentioned by you in this deposition?

A. They are all that were made on that occasion. There
130 was one attempt to make one in a plaster mould, when the clay wrapped around the former.

Cross-examination by William Bakewell, Esq., of counsel for defendants:

Cross-int. 12. Was there anything on the arm or lever to which the Wise former was attached, as stated in your third answer, for the former to work in; or did it simply revolve in a hole bored in the wooden lever?

A. There was a kind of a pivot hole at the top of the former, and there was a pin in the lever to keep the former in its place. It worked in a hole bored in the wood.

Cross-int. 13. Was it so with both the iron former and the wooden former?

A. They both worked the same.

Cross-int. 14. Were you told before you tried the experiment with the Smith machine that it would not work?

A. I was not.

Cross-int. 15. In these trials referred to by you, what did you personally do?

A. I made the balls, and I assisted Mr. Paine in trying to take them out of the mould, and I assisted him all through.

Cross-int. 16. Before you commenced the experiments referred to in your deposition to-day, did you believe that the machines which you spoke of trying would operate successfully?

A. From my former experience with it, I did not think it would.

Cross-int. 17. What experience have you had previous to your trials of the complainants' Smith machine and Wise lever and

formers, with crucible machines having iron moulds and revolving formers?

A. I never had any, and I never saw any until I saw the Smith machine some time last spring.

Cross-int. 18. What is the reason, in your judgment, that the Smith machine did not work successfully at these trials?

A. I think that the revolving former is impracticable, from what I have seen of it. GEORGE BRAMMER.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

131 DEPOSITION OF WILLIAM DRISCOLL.

Direct examination by James E. Maynadier, Esq., of counsel for complainants.

TAUNTON, *Oct.* 15, 1877.

Int. 1. State your name, age, residence, and occupation.

A. William Driscoll; 23; Taunton; employed as mixer in this establishment, (Phœnix Manufacturing Company,) and have the general charge of making repairs about the establishment, of machinery and everything else.

Int. 2. When did you first see the machine, (Exhibit Compts.' Smith Machine,) and what did you have to do about making it?

A. Last July. I saw drawings of the machine previous to that. I had to instruct the pattern-maker how to make his patterns for this machine.

Int. 3. What differences do you see between that machine and the one described in the Smith patent now shown you?

A. They speak in their specification of a circular flange; we have the same on ours, but it isn't conical. The mould shown in the drawing is shown tapering at the bottom; the mould in ours is not. Another difference I see is, that they use two weights to counterbalance the sliding bracket; we used one at first and two afterwards.

Int. 4. What would be the practical effect, when power was applied to revolve the mould and an attempt was made to shape the batch, if the machine was built with the flange *g*, two set screws and a tapering mould, precisely as shown in the Smith patent?

A. If the set screws didn't hold it perfectly tight, and the cross head was not resting on the upper edge of the mould, the mould would fly out of the jigger head.

Int. 5. Would the machine made as described be safe or unsafe, in your opinion?

A. Unsafe. The mould would be apt to fly out, with the mould revolving at great velocity, unless properly secured.

Int. 6. State whether the means shown in the Smith patent for securing the mould are practically operative or not.

A. I think not.

132 Int. 7. Suppose the mould and flange *g* were made precisely as shown in the Smith machine, and state what the effect would be when the former began to press sideways on the

material, assuming the set screws made as well as they possibly could be, and worked as well as they possibly could.

A. The mould would vibrate at the top, constantly vibrating backward and forward, and the vibration of the mould would loosen the set screws, and the mould would fly out of position as far as the cross head would allow.

Int. 8. Suppose the former was made, as shown in the Smith patent, equal in length to the inside height of the crucible, and state what trouble would arise when the former was pressed over far enough to bring the wall of the crucible to the right thickness, supposing the mould to vibrate as you have described.

A. The mould vibrating so, the flange would ride the former right on top, and snap the spindle off between the upper edge of the former and the under edge of the face plate, supposing the spindle to be of cast iron. If it was of wrought iron it would bend it.

WM. DRISCOLL.

[Cross-examination waived.]

Attest: CHAS. F. SLEEPER, *Special Examiner.*

SECOND DEPOSITION OF WILLIAM DRISCOLL.

BOSTON, *November* 10, 1877.

Int. 1. What is your name, and have you before testified in this case?

A. William Driscoll. I have.

Int. 2. Have you made any trials of the Compts.' Smith Machine since your last deposition? If so, where, and when?

A. We made a trial, the 24th of October, at the Phœnix Manufacturing Co.'s, in Taunton, and in J. H. Gautier & Co.'s Crucible Works, in Jersey City, November 3d.

133 Int. 3. What was the speed of the mould on these occasions?

A. 257 revolutions per minute at Taunton; 288 at Jersey City.

Int. 4. How was the former supported during the first part of the trial on the 24th of October; and what had you to do with the manufacture of this part of the machine? And refer to the drawings of the Wise patent, if that will help you in explaining.

A. The former was supported in a slot in the lever, and held in place by means of a pin. The lever was like the lever *oo* shown in the Wise patent, the lever fitting on to a rod secured to the frame of the Smith machine by two bolts, one at the top and one at the bottom. I made the drawings for the formers, and superintended the construction at the machine shop of the whole.

Int. 5. How did this lever differ from that shown in the Wise drawing? And what was the reason for the differences, if there were any?

A. I don't see but one difference, and that was the pin that was used to keep the former in the slot.

Int. 6. Where did you last see this lever?

A. At J. H. Gautier's factory, in Jersey City, the 5th of November.

Int. 7. Did you see the machine tried at Gautier's works with the Smith cross head removed, and the Wise lever and connecting apparatus put in place of it?

A. I did.

Int. 8. How did it differ, if at all, then from what it was when it was tried in the Phœnix Co.'s works?

A. No difference whatever.

Int. 9. What happened when it was tried in Jersey City?

A. In trying to force the former from the center to the outer axis of revolution, the operator could not steady the lever, which caused the former to wobble. The wobbling of the former broke the lever. The machine had to be instantly stopped, so as to prevent any further damage.

Int. 10. Under whose supervision was this machine boxed and sent to J. H. Gautier & Co.'s?

A. Under mine.

134 Int. 11. Was the machine used at Gautier's works the same machine as that used at the Phœnix Co., and the same one referred to by you in your first deposition as Exhibit Compts.' Smith Machine?

A. It was.

Int. 12. What success did the workmen have in trying to make this machine work at Gautier & Co.'s?

A. Very poor success; couldn't make a crucible on it.

Int. 13. When and where did you last see Exhibit Compts.' Smith Machine?

A. The 5th of November, at J. H. Gautier & Co.'s crucible works, in Jersey City.

Cross-examination by Wm. Bakewell, Esq., of counsel for defendants:

Cross-int. 14. Who constructed the Wise lever which you have referred to?

A. George E. Wilbur, a pattern-maker at Taunton.

Cross-int. 15. Who instructed him how to make it, if you know?

A. I did.

Cross-int. 16. Did he make it in accordance with your instructions?

A. He did.

Cross-int. 17. How did you find out how to have it made?

A. By the description of it, and specifications of the Wise patent.

Cross-int. 18. Who furnished you with that specification; and was it printed or written?

A. I got the specification from Mr. Maynadier; it was written.

Cross-int. 19. Why did you have the lever made of wood?

A. I am not certain whether the specifications called for a wooden lever or not.

Cross-int. 20. Would not iron have been a more suitable material, in making the lever, than wood?

A. It would.

Cross-int. 21. Then why did you not make it of iron?

A. Simply because I got my instructions to make it of wood.

Cross-int. 22. From whom did you get these instructions?

135 A. From Mr. H. D. Atwood.

Cross-int. 23. Do you not attribute the failure of the Wise machine in a large measure to the use of the iron mould?

A. I do not attribute it to the iron mould; not wholly to the iron mould.

Cross-int. 24. Do you think, then, that the Wise machine would work successfully with an iron revolving mould, and a non-rotating rib or former?

A. I think not. I think it would be impossible to remove the crucible from the mould.

Cross-int. 25. Is it necessary to use an iron mould with the Wise machine in order to conform to the specification of his patent?

A. It is not.

Cross-int. 26. Does he give any directions in his specification as to the means of preventing the plastic material from adhering to the mould and to the rotary former?

A. He does.

Cross-int. 27. What does he say is to be used?

A. Oil.

Cross-int. 28. In experimenting with the Wise lever and former, were you careful to follow all the directions or suggestions made in the specification as to the use of that machine?

A. We were, and did follow them.

Cross-int. 29. Did you oil the former in making these experiments with the Wise machine?

A. We did on one occasion—two occasions, I think.

Cross-int. 30. Which occasions were these?

A. They were trials made by the men in the shop, about which I have not testified, but not in those trials which I have testified about.

Cross-int. 31. And did you, in those trials which you testified about, use with the Wise lever and former the kind of mould which you consider the most suitable?

A. It don't make any difference whether it's a plaster or iron mould you use with a revolving former, you can't make a crucible.

Cross-int. 32. How could you know, before you tried the Wise machine, that you could not make a crucible with it?

136 A. Because the principle of making a crucible with a revolving former is wrong.

Cross-int. 33. If, as you say, you regard a plaster mould as more suitable for making crucibles, and as the Wise specification provides for using moulds made of any suitable material, why, then, did you not use a plaster mould with the Wise machine?

A. Because you can't make a crucible in any mould with a revolving former. We have used plaster moulds in previous trials not testified to.

Cross-int. 34. What experience have you had in the use of revolving iron moulds and revolving formers, or either of them, prior to the experiments with Compts.' Smith Machine and Wise lever and former.

A. I've had no experience with them.

WM. DRISCOLL.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

United States Circuit Court, Western District of Pennsylvania.

ARTHUR PICKERING, *et als.*, Compl'ts, } In Equity.
vs.
M. MCCULLOUGH, JR., *et als.*, Def'ts. }

Depositions and other evidence on part of the complainants, before William Pintard, a notary public in and for the State of New Jersey, by agreement of counsel, at the office of J. H. Gautier & Co., and at the office of the notary, in Jersey City, N. J., commencing Friday, November 9, at 10 o'clock A. M.; said depositions being taken by agreement of counsel.

Present: James E. Maynadier, counsel for complainants, and W. Bakewell, of counsel with defendants.

DEPOSITION OF CHARLES E. GREGORY.

A witness produced on the part of the complainants, being duly sworn, on his oath saith to questions asked:

Int. 1. What is your name, age, residence, and occupation?

137 A. Charles E. Gregory; 40 years old; residence, New York; crucible manufacturer; one of the firm of J. H. Gautier & Co.

Int. 2. Please state what opportunity you have had to ascertain whether the machine now shown you (marked Exhibit Complainants' Smith Machine) is practically operative or not; and after having done so, state what your belief is on that point, giving your reasons.

A. The machine has been erected in the factory of J. H. Gautier & Co., and worked by one of our men, Joseph Ryder, in my presence. I should say that it was not practically operative, for the reason that the revolving former of the crucible in its operation takes up a considerable quantity of the material of which the crucible is made, and leaves the interior surface of the crucible honeycombed. That's one reason. A further reason is, that it is not practicable to remove the crucible from within the mould.

Int. 3. How long have you been engaged in the manufacture of crucibles?

A. Since the year 1858.

Int. 4. When did you first commence to manufacture them by a machine consisting mainly of a revolving mould?

A. About the year 1865.

Int. 5. Did you ever know or hear of, or know anybody else who ever knew or heard of, the manufacture of crucibles with a revolving former in place of the rib?

A. I never heard of it, or knew of it before, until I was so informed by one of the employés of the plaintiff in this case, since the machine was erected in our place.

Int. 6. Who were present when you saw the machine tried?

A. J. H. Gautier, Hiram Wallace, and Ryder, the operative, and same representatives of the plaintiffs in this case, two or three in number.

Cross-examination by W. Bakewell, of counsel for defendants:

Cross-int. 7. What machine have you used in your works for the manufacture of crucibles, machine or machines?

A. We use the machine patented by T. G. French.

Cross-int. 8. What description of tool is used in that machine for the shaping of the crucible?

138 A. An iron rib.

Cross-int. 9. Am I right in inferring from your answer to the 5th direct interrogatory, that neither you nor any of your employés who worked the machine (Exhibit Complainants' Smith Machine) at your factory had any practical experience in the use of a revolving former in the manufacture of crucibles in a revolving mould?

A. I believe that to be the case, never having previously seen a machine with such a former.

Cross-int. 10. How is it in regard to your own experience, or that of your employés who tried the complainants' Smith machine, as to the use of a revolving iron mould?

A. I have never previously seen a revolving iron mould. I don't know as to the employés. I refer to iron moulds in crucibles.

Cross-int. 11. You have never had any personal experience in the manufacture of crucibles, other than the seeing of it done, in your establishment and other similar ones, have you?

A. I have formed crucibles on the French machine in use in our factory, as a matter of curiosity, to see if I could handle the machine.

Cross-int. 12. Are you sufficiently skilled in the art to form an opinion as to the cause of the failure of complainants' Smith machine, tried at your factory?

A. Well, I think I am by my observation, if that is admissible.

Cross-int. 13. To what, then, do you attribute that failure?

A. I have answered that in the direct.

CHAS. E. GREGORY.

Sworn and subscribed to before me, at Jersey City, this 9th November, A. D. 1877.

WILLIAM PINTARD,
Notary Public, New Jersey.

139 DEPOSITION OF HIRAM WALLACE.

HIRAM WALLACE, a witness produced on the part of the complainants, being duly sworn, on his oath saith to questions asked:

Int. 1. What is your name, age, residence, and occupation?

A. Hiram Wallace; 53½; 206 Warren street, Jersey City; crucible business—manufacturers.

Int. 2. How long have you been engaged in the manufacture of crucibles?

A. About 29 years, with two firms; about 9 years with J. Dixon & Co., and about 20 years with J. H. Gautier & Co.

Int. 3. When did you commence using a machine with a revolving mould and a rib to shape the crucibles?

1 A. I can't exactly tell whether it was in 1865 or 1866.

Int. 4. Have you tried the machine now shown you (Exhibit Complainants' Smith Machine)?

A. I did try it, sir.

Int. 5. Is it possible to make a crucible with that machine? Please give your reasons fully for that opinion?

A. We couldn't make one here with it. Well, it was on account of the revolving rib, of tearing the stuff, of sticking to it; then we made one in the mould, and then it stood 54 hours, and couldn't get it out then without breaking it. That is about all I can give you about it. I believe I could make oath that I could work on it for a year and could not make one.

Int. 6. Did you ever know or hear of anybody ever using a revolving former in the manufacture of crucibles?

A. I did not, sir.

Cross-examined by W. Bakewell, of counsel for defendants:

Cross-int. 7. When was the machine which you have referred to as "Complainants' Smith Machine" put up at the works of J. H. Gautier & Co.?

A. It was put up, I think, last Tuesday or Wednesday.

Cross-int. 8. Do you know who made that machine, or by whose direction it was made?

A. Never heard of it till I saw it here.

Cross-int. 9. Prior to experimenting with that machine, did
140 you ever have any experience in the use of a revolving tool for forming the interior of a crucible?

A. I never had any.

Cross-int. 10. What kind of mould did you use on that machine when you tried it?

A. It was an iron mould.

Cross-int. 11. Did you ever have any experience in the use of iron moulds for forming crucibles previous to the trial of the machine referred to?

A. Never saw one.

Cross-int. 12. State what machine or machines, involving the use

of revolving moulds, you have used during your 29 years of manufacturing crucibles.

A. Iron. That is the rib I am speaking of. The machines were called the French machine.

Cross-int. 13. Have you always used the French machine during that time?

A. We used Nimmo's machine for a while. I do not know how long we have used it.

Cross-int. 14. Are you an employé of J. H. Gautier & Co., or are you manufacturing on your own account?

A. I am in J. H. Gautier's employ.

Direct resumed:

Int. 15. Please state what you know as to the use of the wooden frame and the small revolving formers now shown you (marked Exhibit Complainants' Wise Lever and Wise Formers).

A. Well, the one they tried with a wooden frame it took two men for to work it, and it broke, and then I told them to stop; I was afraid somebody would get hurt with it.

Re-cross-examined:

Cross-int. 16. Who furnished you the wooden frame (marked Exhibit Wise Lever) you referred to in your last answer?

A. That was sent here with the machine. They all come together.

Cross-int. 17. With what machine?

A. Well, it came with the stuff in the box. I did not notice what came.

141 Cross-int. 18. You say, as I understand you, you did not use the Wise lever, did you?

A. We used what they called the wooden lever, whatever that is.

Cross-int. 19. That is the lever you spoke of as having broken?

A. That is the one, sir.

Cross-int. 20. Describe the machine in which you used that wooden lever?

A. It was the same machine that we tried with the wooden revolver.

Cross-int. 21. Was it the machine called the Smith machine?

A. It was called the Smith machine.

Cross-int. 22. The other parts of the machine which you used with that wooden lever were made of iron, were they not?

A. Of iron.

Cross-int. 23. In what part did the lever break?

A. Broke where the former was fastened to; in the journal of it.

Cross-int. 24. Was there any iron or metallic bushing or journal-box for the neck of the revolver to work in?

A. I don't think there was.

Cross-int. 25. If that lever had been made of wrought iron it would have been much less liable to break, would it not?

A. I think so.

Cross-int. 26. Do you consider that lever, as it was before it broke, to have been a good mechanical job?

A. Not for that purpose. HIRAM WALLACE.

Sworn and subscribed to before me, at Jersey City, this 9th November, A. D. 1877. WM. PINTARD,
Notary Public, New Jersey.

DEPOSITION OF JOSEPH RYDER.

JOSEPH RYDER, a witness produced on the part of the complainants, being duly sworn, on his oath saith to questions asked:

Interrogatory 1. What is your name, age, residence, and occupation?

142 A. Joseph Ryder; 39 years old; Jersey City; crucible maker.

Int. 2. How long have you been engaged in making crucibles, and where have you been employed?

A. Since 1865, with J. H. Gautier & Co.

Int. 3. State what you know about the trials of the machine now shown you (marked Exhibit Complainants' Smith Machine)?

A. Well, we made three pots on it; couldn't get them off; had to tear them all to pieces to get them off. We made one more pot, and let it stand 54 hours; couldn't get that off either; had to tear that all to pieces to get that off.

Int. 4. How much of the material stuck to the revolving former in each of these trials? State how much, if any.

[Objected to as leading.]

A. Average a pound and a half.

Int. 5. Is it possible to make a crucible with that machine? And state your reasons.

A. It is not, the way the machine stands now; in one instance the stuff sticks to the iron mould and cannot be got off. One is, the rib don't work the stuff.

Int. 6. How were the insides of the crucibles left by the revolving former?

A. Looked like a honeycomb inside instead of a smooth surface.

Int. 7. Did you ever know or hear of anybody's ever using a revolving former to shape the inside of a crucible?

A. No, sir.

Int. 8. State what you know about a trial of this wooden lever with the small iron revolving former. (Marked Exhibits Wise Lever and Wise Former.)

A. I know one man couldn't work it, in my estimation. I tried to work it and couldn't work it.

Cross-examined by W. Bakewell, of counsel with defendants:

Cross-int. 9. You have never had any experience in the use of iron moulds in the manufacture of crucibles, have you?

A. No, sir.

Cross-int. 10. And you think that the machine which you have referred to as complainants' Smith machine did not work well because of its having an iron mould, do you?

143 [Objected to because the witness has given another reason in addition to this.]

A. Yes, sir.

Cross-int. 11. And you think the revolving former was also objectionable. Is this so?

A. Yes, sir.

Cross-int. 12. You never had any previous experience in the use of revolving formers in crucible machines, had you?

A. No, sir.

Cross-int. 13. How many times in all did you try the complainants' Smith machine?

A. I tried it twice; made four pots.

Cross-int. 14. You have said in your answer to the 8th direct interrogatory, in reference to the trial of the wooden lever marked Exhibit Wise Lever, and small iron revolving former Exhibit Wise Former, that one man couldn't work it. State why.

A. He has not strength enough to hold it in position.

Cross-int. 15. As I understand, when an attempt was made at Gautier's factory, the lever and former referred to in the last question were attached to the iron frame of the machine you have referred to as complainants' Exhibit Smith Machine. Is this so?

A. Yes, they were.

Cross-int. 16. And on the first trial the lever broke, did it not?

A. Yes, sir.

Cross-int. 17. The wooden lever split, commencing at the hole through which the neck of the revolving former passed?

A. Yes, sir.

Cross-int. 18. Was there any metallic bushing or journal-box in the wooden lever for the neck or journal of the revolving former?

A. No, sir. JOSEPH RYDER.

Sworn and subscribed before me, at Jersey City, this 9th November, A. D. 1877. WM. PINTARD, *Notary Public, N. J.*

144 DEPOSITION OF WILLIAM T. MACFARLANE.

WILLIAM T. MACFARLANE, a witness produced on the part of the complainants, being duly sworn according to law, on his oath deposes and says to questions asked:

Int. 1. What is your name, and have you before testified in this case?

A. William T. Macfarlane; I have testified in this case before.

Int. 2. State what you know in regard to the trials the Smith machine Exhibit Complainants' Smith Machine and of the Wise Machine, Exhibits Wise Lever and Wise Former, at the works of J. H. Gautier & Co.

Cross-int. 112. When the lowest point in the rib was the right distance from the bottom *m*, and the front of the rib bore with a light friction upon the flange, and the under edge of the lever bore with a light friction upon the top of the mould, the ends of the lever at *g* had just come together, if I understand your reasoning right.
170 Say whether this is so or not.

A. Yes, sir; that completes the motion.

Cross-int. 113. It seems to me that you have made two statements in regard to that bolt and bur for connecting the lever *d* and rib *e*, one of which is necessarily wrong. Those two statements are, first, that the round threaded part of that bolt stuck out on the left-hand side of the lever and through the top of the rib; and, secondly, that this round threaded portion stuck out on the right-hand side of the lever *d* and away from top of the rib. Now, please consider this matter carefully, and examine the drawing (Exhibit Kier Machine) if you want to, and state whether this round screw threaded part of the bolt stuck out from the right or from the left side of the lever *d*.

A. I say, as I have stated before, that the square end of the bolt was inserted into the rib and the lever, and consequently to leave the square end of the bolt in that position the round end of the bolt must pass through to the right-hand side of the lever, leaving the square end of the bolt in the mortises made to admit them.

Cross-int. 112. Then your answers to cross-interrogatory 91 and cross-interrogatory 107 are wrong, aint they?

[Question objected to, first, because it has been answered before several times; and, second, because it attempts to force the inference that the last answer of the witness does not agree with the former answers to it, which is not the case; and, third, because the whole tendency of these repeated questions is to mislead him in supposing he has made an error in his answers.]

Complainants' counsel humbly submits, that, as to the third point in the objection, the design is to give the witness an opportunity to correct an error, if he has fallen into one, as the complainants' counsel certainly believes he has.

A. I say, as I have said before, that the bolt is inserted upon the left-hand side, passing through rib and lever, square end of bolt fitting the mortise made in rib and partly in lever, leaving a margin
171 of round bolt in the hole of lever mortise for the purpose of leaving sufficient thread to be tightened up with bur on the right-hand side. It was inserted on the left and passed through to the right.

Cross-int. 113. Don't you see that the drawing contradicts the answer you justmade,—that is, that the drawing is wrong if your answer is right?

A. I claim that the drawing is according to my answer.

Cross-int. 114. How many pots could you turn out in an hour on that machine, making your own balls, and taking, say, No. 50?

A. That is a thing that I could not give you a definite answer on.

Cross-int. 115. State as near as you can.

A. If I would tax my ability to its fullest extent, I believe I could make the balls and the pots and take the pots from the jigger head to drying room, about twenty or twenty-five. That is about as near an estimate as I can make.

Cross-int. 116. When you say take the pots from the jigger head, you mean take the moulds with the pots in them, don't you?

A. Yes, sir.

Cross-int. 117. What should you estimate as a fair average hour's work on that machine, supposing you were working as conscientious workmen ordinarily do, and not trying to see how many you could make? Supposing, as before, that you made the balls, shaped the pots, and carried them in the moulds to the drying room?

A. It is not a practical way of working; not being accustomed to a single-handed form of working of that kind, I could not give a definite answer. I believe, conscientiously, that I could make, or any other man with equal ability, upon an average of fifteen pots an hour.

Cross-int. 118. You don't know, do you, what is reckoned a fair day's work for a good workman nowadays in crucible works where they use these machines with the revolving mould and rib?

A. I do not know positively, for the present date, what amount of pots men are making, but I have made upon this Kier machine four hundred, and finished a goodly number besides, with the assistance of one man making balls and another bearing pots from jigger heads.

Cross-int. 119. Do you mean four hundred of No. fifty's in a day of ten hours?

172 A. I mean such as the mould represented in this office, (Exhibit Kier Mould,) which I believe to be a No. fifty mould. I mean four hundred such as that in ten hours.

Cross-int. 120. In what part of the ten hours were you occupied in finishing the goodly number you referred to?

A. The latter part of the afternoon, probably two hours.

Cross-int. 121. So that you averaged about fifty of these pots per hour?

A. I came pretty near that.

Cross-int. 122. Are you sure that the back part of the lever *d* in that Kier machine was a straight piece of wood, as shown in the drawing Exhibit Kier Machine?

A. I never knew of any other class of lever but a straight lever.

Cross-int. 123. This lever was arranged edgewise in the machine; that is, it was wider from top to bottom than it was thick through from side to to side, wasn't it?

A. It was put in that way for the purpose of giving strength to the lever; where if it had been put in the reverse it would have been too weak to do the work.

Cross-int. 124. Isn't the rib *e* in this drawing (Exhibit Kier Machine) shown wrong at the bottom?

A. It's about as near right as I can remember. I do not claim to

know whether this is to a fraction of the form or not, but is as near as I can remember.

Cross-int. 125. Was the sheet iron used over the bottom of the rib, or only on the greater part of the working face of it?

A. That I am not positive, but believe there was at times a piece of sheet iron over the lower end.

Cross-int. 126. When did you enter the army?

A. The 11th day of August, 1862.

Cross-int. 127. That was before you were twenty-one, wasn't it?

A. Yes, sir.

Cross-int. 128. When did you come to this country?

A. I came to this country in the fall of 1861.

Cross-int. 129. Where did you ever work as a potter between those two dates?

A. I never worked as a potter at that time. I was employed
173 by S. M. Kier, at Bolivar, Westmoreland county, making fire clay terra cotta work.

Cross-int. 130. What other ware was made at S. M. Kier & Co.'s from the fall of 1864 up till June, 1865?

A. As near as I can remember, crucible business was the principal business, with the exceptions of my brother, Joseph Winkle, experimenting between times, getting up a class of ware called the Bristol ware. That is to the best of my memory.

[First clause of the answer objected to as irresponsive.]

Cross-int. 131. Don't you know that what was known as queensware was made there at that time?

A. I do not remember of queensware being made at that time.

Re-direct examination:

Int. 132. In reference to the direction of the revolution of the mould in the Kier machine, your answer to cross-interrogatory 77 seems to be at variance with the direction indicated by you with your hands at the time of answering the question. Now, for the purpose of ascertaining definitely what the direction of that motion was, as you remember it, please mark an arrow upon the edge of the mould of the Exhibit Defendants' Model, indicating such direction of motion of the mould of the Kier machine.

[Objected to because complainants' counsel has no knowledge whatever of any motion of the hands of witness, and because the witness has already clearly and with great fullness and detail described the motion of that mould; and, also, because the arrangement of the Exhibit Defendants' Model is such as seems to complainants' counsel extremely like to mislead the witness in his answer to the question; the frame of the question when taken in connection with the construction of the edge of it, making it a grossly leading question.]

A. I have done so, and the point of the dart indicates the direction of the motion of the mould, as I have stated, from right to left.

Int. 133. Please state whether the position of the workman in

operating a machine like Exhibit Defendants' Model is or
174 is not the same as the position of the workman in operating the Kier machine.

[Objected to because the position of the workman of the Kier machine has been fully described, and it does not appear that the witness knows anything about any other machine.]

A. A man has to stand precisely in the same position as upon the Kier machine.

Int. 134. When was it that you made a full day's work at the manufacture of crucibles on the Kier machine?

A. I believe, as near as I can remember, about the latter end of 1866. Not positive, exactly.

Re-cross-examination:

Cross-int. 135. Please turn the mould in Exhibit Defendants' Model, so when you face the machine the arrow will be next to you, and state whether the feather part is on the right or the left of the arrow, as you understand it.

A. The feather end of the arrow is on the left.

Cross-int. 136. And when the arrow is in that place the mould is moving from the left hand to the right hand, is not it, just the reverse of what you said when *I* asked you?

A. I claim as taking the mechanical view from the position of the dart upon the model, as I have stated, that the point of the dart passes from the right hand and comes to the left, which brings the point of the dart upon one revolution immediately to its starting position, and leaving it there, right-hand side.

Cross-int. 137. Don't you see that your answers to Mr. Kerr about the direction in which this mould revolves are exactly the contrary of your answer to cross-interrogatory 77?

[Cross-interrogatory 77, and answer thereto, read to witness.]

A. I don't see it.

Cross-int. 138. Doesn't the front part of the mould, or that part nearest the breast of the workman, move from left to right in a machine like Exhibit "Defendants' Model," when the mould revolves in the direction you indicate by the dart?

A. The mould as I have represented by the dart, I claim
175 as practical, passes from the right hand, consequently motion coming round to the left hand, and as my statement before given, stating that the mould revolves to the rear of the table coming to the front, substantiates the position of my dart set upon the mould.

[Answer objected to as not responsive, and question repeated as cross-interrogatory 139.]

A. I stand in front of the machine. The mould starts from the right hand of the workman; for instance, if I should put a projecting arm onto the point of the dart or mould, it would clear the right hand in starting, and if my right and left hand was put upon the

mould, consequently I claim that the first hand that this projecting arm would come in contact with would be the left hand, in all cases.

[Same objection to the answer.]

Cross-int. 140. You have not yet come anywhere near answering my question, although I am satisfied from your manner that you fully understand it, so I repeat it again, emphasizing certain parts of it. Doesn't the front part of the mould, or that part *nearest the breast of the workman*, move from left to right in a machine like Exhibit "Defendants' Model," when the mould revolves in the direction you indicated by the dart?

A. The center of the mould is the starting point. Upon the motion put to the machinery with the pot standing immediately in the center, consequently leaving dead lines, passes to the right hand, upon revolution comes to the left hand.

[Same objection to the answer.]

Cross-int. 141. Why don't you say whether that part of the mould nearest your breast, as you stand in front of the model, moves from the left to the right, or right to left?

A. I do say that the front part of the mould, in connection with the breast, passes to my right hand before it comes to my left.

Cross-int. 142. Doesn't the front part of the mould, or that
176 part nearest your breast, as you stand in front of the machine, move from left to right, and not from right to left?

A. I just say, as I have said before, that the motion is the same as I have said before. WM. L. WINKLE.

[Adjourned to meet at same place at 2:15 o'clock P. M.]

FRANK WRIGHT called on part of respondents, and being duly sworn, deposes as follows:

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is Frank Wright; my age is forty years; I reside in Pittsburgh, Pennsylvania; I am a potter by trade.

Int. 2. Where did you work in the summer and fall of 1864?

A. At S. M. Kier's crucible works, on Stevenson street, Pittsburgh. I was finishing crucibles there.

Int. 3. Did they have a machine there for moulding crucibles?

A. Yes.

Int. 4. What was that machine like?

A. It run by steam. It was a long lever and two uprights and a bench. There was a jigger head; the mould was put into the jigger head, and the top mould was put on, and then the profile or rib was brought down through the center of the clay. To bring the profile down, of course they had to put the foot on the treadle and the left hand on the end of the lever. When the profile was brought down to the bottom of the pot, the pot was finished inside; after the pot was finished inside, the left foot was took off the treadle and the profile took out of the pot, and the mould crucible was took off the jigger head, and took into the drying room and dried. When the

pot was dried, the top mould was took off the bottom mould, and this bottom mould was put on a chuck, and the crucible took out of the mould. Then it was took to the finishing room, and after it became stiff enough it was finished, and after that it was put away to dry to go to the kiln.

Int. 5. Can you point out one of the moulds which was used at that time with that machine?

A. Yes. That is one of the moulds for No. 50. (Witness refers to Exhibit "Kier Mould.")

Int. 6. To what was the rib or profile attached?

177 A. It was attached to the lever.

Int. 7. Was there anything peculiar about this lever?

A. There was a joint in the middle.

Int. 8. Look at the drawing Exhibit "Kier Machine" now shown you, and state if you ever saw anything like it.

[Objected to because the witness was present during the whole of the examination of Wm. L. Winkle, and has been familiar with drawing ever since it was first put in evidence, to the knowledge of complainants' counsel, and, as he infers, some time before that.]

A. Yes; it is like the Kier machine. The hinge in the middle of the lever is just the same.

Int. 9. In that machine, as seen by you in 1864, was the post *n* solid?

[Objected to as leading.]

A. No, there was a slot in it, in which the lever worked up and down.

Int. 10. Did you ever use the Kier machine?

A. Yes; I used it frequently.

Int. 11. Can you state how frequently the Kier machine was used in the works in 1864, and thereafter?

A. It was used every working day, more or less.

Int. 12. How many crucibles was it the custom to make on the machine on ordinary working days, when it was used?

A. I used to make a hundred a day and finish them, and a hundred covers.

Int. 13. About how much of the day was devoted to moulding the crucibles on the machine?

A. I moulded them in the forenoon.

Int. 14. During the afternoon, was the machine ordinarily used by any of the other workmen?

A. Sometimes it was.

Int. 15. What was the highest number you ever saw made on the machine in an hour, say?

A. I have seen sixty an hour made.

Int. 16. Made by whom?

A. Joseph Winkle.

178 Int. 17. Were you acquainted with William L. Winkle in 1864?

A. Not before I went to work there.

Int. 18. Did you know of the fact of his being stationed at Camp Reynolds, at Braddock's Fields?

A. Only by hearsay.

Int. 19. Who told you?

A. Joseph Winkle, and William Winkle himself. I seen him in the city frequently with his military clothes on.

Int. 20. Did you ever see him at the works during that time?

A. I seen him every week, more or less.

Int. 21. Was the Kier machine in use during the time of these visits of Winkle's?

A. Yes, sir.

Int. 22. Did you know whether he ever saw you at work at the machine?

A. I don't know.

Int. 23. Can you give the number of crucibles made on the Kier machine, which were in the works in stock, at any time during these visits of William Winkle?

A. I can't give the exact number; I have heard that there was some six thousand on hand.

Int. 24. You say you have heard; how many did you see, do you suppose?

A. It might be that, it might be less.

Int. 25. Do you mean that during that time you saw a large number of crucibles in stock?

[Objected to as leading.]

A. I saw a large number of crucibles in stock.

Int. 26. How long did you continue to work, and see worked, the Kier machine after the year 1864?

A. I was there until December, 1867, and saw it worked until that time.

Int. 27. State whether it was worked continuously or not during the period from 1864 until December, 1867?

A. It was worked as a general thing. It might be off sometimes, and sometimes working.

179 Cross-examined by J. E. Maynadier, Esq., counsel for complainants:

Cross-int. 28. When did you commence to work for Mr. Kier?

A. In 1864; in May, 1864.

Cross-int. 29. How do you fix that date?

A. About the middle of May—about the fourteenth—there was a gentleman working there that I went to see; he was living in Birmingham; I went to Kier's works to see him; he told me I could have gone there to work if I wished to work; I seen Joseph Winkle and he told me I could go to work finishing crucibles; I commenced to work finishing crucibles.

Cross-int. 30. What other potters worked there in 1864?

A. Joseph Bradley and a boy. I don't recollect his name. I don't recollect of any one else, except Joseph Winkle.

Cross-int. 31. What other potters came there while you were there? Name all that you can recollect.

A. William Winkle. No other potters that I recollect at that time. There was another potter came there in 1866 or 1867, I could not tell which positively. His name was John Sherwood. There was Andrew Graham, but he was not a potter. I missed one. His name was Alexander Hewitt, but he was not a potter.

Cross-int. 32. Who made the balls when you used the machine?

A. Andy Graham. Sometimes I made them for Joseph Winkle. No one else that I recollect.

Cross-int. 33. Name all persons you ever saw shape the pots on this machine?

A. Joseph Winkle, myself, Frank Wright, Wm. L. Winkle. John Sherwood also made some sometimes.

Cross-int. 34. Do you know where John Sherwood is now?

A. I have heard he was at New Brighton, Pa. I have not seen him there.

Cross-int. 35. How many potters' wheels did they have in that place of Mr. Kier's, on Stevenson street?

A. One wheel.

Cross-int. 36. Who worked on that?

A. Joseph Winkle, myself, John Sherwood, Wm. L. Winkle, once in a while.

Cross-int. 37. Had they begun to make Bristol ware in May, 1864, when you first went there?

180 A. I did not hear anything of it at that time. They made Bristol ware, though, after; I could not say what time, though some little.

Cross-int. 38. About how long?

A. It might have been 1865 or 1866; I could not say positively.

Cross-int. 39. They had begun to make queensware before 1866, had not they?

A. I could not say as they did. They commenced making in 1866.

Cross-int. 40. Who was the burner when you first went there, and how many did you have while you were there?

A. Joseph Winkle. I could not say how many they had; I assisted myself sometimes.

Cross-int. 41. Do you know of any other one but Joseph Winkle and yourself?

A. Alexander Hewitt assisted sometimes. I don't know of any one else.

Cross-int. 42. Do you know where Alexander Hewitt and Andy Graham, or either of them, now are?

A. Andy Graham is in the city of Pittsburgh. I heard that Alexander Hewitt was in St. Louis.

Cross-int. 43. When did you first see this drawing, Exhibit Kier Machine?

A. I suppose I seen it last spring first, or something like it; pretty near.

Cross-int. 44. The drawing you saw last spring had that cord n^1 and the weight h running back over and back of the back post, didn't it?

A. Yes.

Cross-int. 45. It was more like this drawing (Exhibit Sketch), wasn't it, in that respect?

[Question and the use of the drawing now presented to the witness objected to, the drawing not being identified in any way, and if material to complainants' proofs, part of his own case.]

A. I never seen this drawing before. This one (Exhibit Kier Machine) I have seen with the cord running back.

181 Cross-int. 46. Where did you see the drawing last spring, and who was with you when you saw it?

A. I saw it in a patent book. Joseph Winkle and William Winkle were with me when I saw it.

Cross-int. 47. Where do you work now, and what are you doing?

A. I work at Gist street, near Soho, making encaustic flooring tiles.

Cross-int. 48. Who are you at work for?

A. For the Encaustic Tile Company.

Cross-int. 49. Which of these two drawings (Exhibits Kier Machine and Sketch) is nearer like the machine you saw at Kier's place, according to your best recollection?

A. This one (Exhibit Kier Machine).

Cross-int. 50. When did you first see the machine at Kier's?

A. In 1864; the latter part of the summer. I could not say positively what time.

Cross-int. 51. Was that machine changed in any way after you first saw it; and if so, how?

A. It was never changed, only the weight running back sometimes back over the front upright. I don't recollect seeing it back over the back upright.

Cross-int. 52. Which way did the mould revolve?

A. From the left to the right.

Cross-int. 53. Do you mean that the part of the mould nearest you went from the left to the right?

A. It went to the right from the breast; from the breast to the right.

Cross-int. 54. Please look at that drawing very carefully, (Exhibit Kier Machine,) and state what difference, if any, you see between it and the Kier machine, as you recollect it.

A. I don't see any difference.

Cross-int. 55. Did you have anything to do with making that drawing?

A. No; I never seen it before I seen it in this office.

Cross-int. 56. Didn't you and William Winkle together give the information from which it was made?

A. No, sir.

Cross-int. 57. How was the lever connected with the treadle in the Kier machine?

182 A. It was connected from hinges to the treadle by a piece of wire.

Cross-int. 58. Did that wire go over a pulley in the bench?

A. I don't recollect any pulley in the bench.

Cross-int. 59. What was the length, breadth, and thickness of the lever, as near as you can now recollect?

A. It would be about four inches deep and from one to two inches wide. I could not say positively as to the width. It might be three foot long, and might be more.

Cross-int. 60. How was the end of the lever fastened to the back post?

A. By an iron pin, that ran through the post and end of the lever.

Cross-int. 61. Was this a round pin, and what kind of a head did it have on it?

A. It was a round pin. I don't recollect much about the head.

Cross-int. 62. What kept the lever from working off sideways?

A. The slot in the post *p*.

Cross-int. 63. How big were those posts *p* and *w*?

A. They might be about five inches square.

Cross-int. 64. Is that rib in that drawing (Exhibit Kier Machine) drawn right?

A. As near as I can recollect.

Cross-int. 65. Don't you know that the clay would bunch up in the bottom of the pot at the center with a rib like that?

A. No; I don't know.

Cross-int. 66. Do you know whether it would or not?

A. I don't know whether it would or not.

Cross-int. 67. What was the rib made out of?

A. White oak.

Cross-int. 68. Any kind of a facing; and if so, what and how much of the face of the rib was covered?

A. The face of the rib was covered with sheet iron that worked next to the pot.

Cross-int. 69. How was the sheet iron held on?

A. It was generally tacked on. I generally tacked it on myself.

Cross-int. 70. Any other way of fastening it?

183 A. Not that I know of.

Cross-int. 71. Did the sheet iron extend under the bottom of the rib as well as along the sides?

A. No. It came near to the bottom, and not to the top.

Cross-int. 72. How wide a strip of sheet iron would you use?

A. It might be four inches at the top, taper down a little.

Cross-int. 73. How near the bottom did it go?

A. It might go within two or three inches, as near as I recollect.

Cross-int. 74. Why didn't it make a bad looking mark near the bottom of the pot?

A. We generally smoothed it off; filed it off smooth. When the profile was took out, if there was any marks left in the pot, we took them out with a piece of leather or a sponge. Sometimes we used both.

Cross-int. 75. What would a ball weigh for a number fifty pot?

A. I forget the weight, now.

Cross-int. 76. Do you think somewhere about thirty-six pounds?

A. I could not say positive. It might be that, and might be less.

Cross-int. 77. It could be less than thirty pounds, could it, so far as you can now form any opinion?

A. I could not say positively.

Cross-int. 78. The ball maker has to weigh the clay, cut it up with a wire, and mush it together again, and form it into a ball, hasn't he?

A. Yes.

Cross-int. 79. That drawing (Exhibit Kier Machine) is wrong, isn't it, in the way the rib is secured to the lever?

A. Not that I know of.

Cross-int. 80. How was the rib secured to the lever, so far as you can now recollect?

A. The rib was bolted to the lever.

Cross-int. 81. What kind of a bolt?

A. Well, it was bolted with two bolts. They were half-inch or five-eighth bolts.

Cross-int. 82. Screw bolts or plain bolts?

A. Screw bolts.

184 Cross-int. 83. Head one end and nut the other, in each bolt?

A. Four square head at one end and nut on the other, each bolt.

Cross-int. 84. Two round holes through the rib, and two round holes through the lever. The shank of the bolts lying in these holes, the screw part of the bolts sticking out at one side through the nuts?

A. There was two round holes in the rib and a slot in the lever that the rib or profile was bolted to. The bolts went through the rib and screwed up together.

Cross-int. 85. The drawing don't show that, does it?

A. No; it only shows one bolt.

Cross-int. 86. How big was the rib at the top?

A. It might be three inches, and might be more.

Cross-int. 87. Do you mean three inches square or three inches thick one way?

A. It might be over three inches through, oval shape.

Cross-int. 88. Do you mean to say it was oval shape at the top?

A. It was flat on the top where the bolts run through where it fastened to the lever.

Cross-int. 89. How big was it there?

A. It might be five inches wide, probably an inch or an inch and a half thick.

Cross-int. 90. Was there anything but these two bolts to keep it in its place on the lever?

A. We used washers in under the bolt heads, and under the nuts.

Cross-int. 91. Anything else but that to keep the rib in its place?

A. Not that I know of.

Cross-int. 92. Which foot did the workman put on the treadle, and which hand on the lever?

A. The left foot and the left hand.

Cross-int. 93. And the mould was on his left side, wasn't it?

A. Opposite his breast.

Cross-int. 94. How high was the top of the mould?

A. You could look into the crucible; about level with the breast, so you could look into the crucible.

Cross-int. 95. How far did a man have to carry the mould with the pot in from the machine to the drying room?

185 A. It might be fifteen feet and more.

Cross-int. 96. How far was it, according to your best recollection?

A. He might go thirty feet sometimes.

Cross-int. 97. Was the drying room about as big as this room?

A. I guess it was fully as large as this.

Cross-int. 98. How far was the door of the drying room from the machine, as near as you can now recollect?

A. It might be from six to ten feet, as near as I can now recollect.

Cross-int. 99. Did Joseph Winkle take the moulds out and put them in himself, when he made that sixty number-fifty pots in an hour?

A. No; he had a mould runner.

Cross-int. 100. Would the mould runner take the full mould out of the machine and put the empty mould in?

A. No; the man that made them helped the mould runner to take them out; the crucible maker put them in.

Cross-int. 101. Who fetched the empty moulds as they were needed?

A. The mould runner.

Cross-int. 102. Are you positive that Joseph Winkle, with the help of one ball maker and one mould runner, made sixty number-fifty pots in an hour?

A. I am positive; I made the balls.

Cross-int. 103. Who was the mould runner?

A. Alex. Hewitt.

Cross-int. 104. How was the cord h^1 and weight h, when you first saw the machine?

A. I could not say positive which way.

FRANK WRIGHT.

[Adjourned to meet at same place at 8:30 o'clock P. M.]

WEDNESDAY, August 22d, 1877, 8:30 o'clock P. M. Met pursuant to adjournment. Present as before.

ANDREW GRAHAM, called on part of respondent, and being duly sworn, deposes as follows:

186 Int. 1. State your name, age, residence, and occupation.

A. My name is Andrew Graham; I am thirty-five years of age; I live in Pittsburg, Pennsylvania; I am a letter carrier at present.

Int. 2. Where did you work in the winter and spring of 1865?

A. In the Keystone Pottery, or crucible works it was then; S. M. Kier's, on Stevenson street, Pittsburg.

Int. 3. During that time, did you ever see a machine for making crucibles?

A. Yes.

Int. 4. Look at the drawing now shown you, marked Exhibit Kier Machine, and state whether you ever saw anything like that before.

A. Yes, sir.

Int. 5. Where?

A. At the works, on Stevenson street.

Int. 6. Is that the machine you refer to in your answer to interrogatory 3?

A. Yes.

Int. 7. Did you ever see any person at work with that machine making crucibles? And if so, state who.

A. I saw Joseph Winkle and Frank Wright.

Int. 8. Do you know how many times you saw it during the early part of 1865, before mentioned?

A. I could not say positively how often; it was more than once.

Int. 9. In operation?

A. Yes.

Int. 10. Did you see any crucibles which were made on it?

A. Yes.

Int. 11. How many, as near as you can state?

A. Well, I could not say; kiln fulls.

Int. 12. Do you know how many the kiln held?

A. I don't know.

Int. 13. Can you estimate it?

A. No.

Int. 14. Can you say whether it was many or few?

A. It was many.

187 Int. 15. Where did you work in the factory, and what did you do?

A. I worked mostly in the lower part of the building, and done the mixing.

Int. 16. In what part of the building was the machine?

A. On the third floor.

Int. 17. How was the material taken up from the lower floor to the upper floors of the building?

A. By an elevator.

Cross-examined by J. E. Maynadier, Esq., counsel for complainants:

Cross-int. 18. Please point out all the differences that you can see between that drawing (Exhibit Kier Machine) and the machine.

A. I can't see any difference; I can't recall any difference.

Cross-int. 19. How many posts were there above the bench?

A. Two.

Cross-int. 20. How big were they?

A. I could not state exactly the size.

Cross-int. 21. State it as near as you can recollect.

A. About three or four inches square.

Cross-int. 22. What went across the top of the posts?

A. I could not say; I think they were up to the ceiling.

Cross-int. 23. You saw that drawing (Exhibit Kier Machine) before you began to give evidence, didn't you?

A. Yes, sir.

Cross-int. 24. How long did you work at the Keystone Pottery?

A. I could not state the time positively; between three and four years; I think it was in 1863 or 1864 when I commenced, and about 1866 when I quit.

Cross-int. 25. When did they begin to make Bristol ware at that pottery?

A. I could not say; they carried it on with their other work, but I have no idea when they commenced.

Cross-int. 26. When did they begin to make queensware at that pottery?

A. It was a short time before I quit; I don't remember how long, though.

188 Cross-int. 27. Are you a potter?

A. No.

Cross-int. 28. Who worked there when you were there?

A. Joseph Winkle was foreman; Alexander Hewitt, Frank Wright; there was a man they called Saul, but that is all I know about him; I don't remember any other names.

Cross-int. 29. Do you know anything about any complaint about the crucibles?

[Objected to as incompetent, and not proper cross-examination.]

A. No.

Cross-int. 30. Didn't Mr. Kier have a great deal of trouble and loss from the crucibles proving worthless, and speak to you about it frequently?

[Objection continued.]

A. I don't know anything about his trouble or loss, but he never spoke to me about it.

Cross-int. 31. Didn't you hear of it at the time?

[Objection continued.]

A. No.

Cross-int. 32. Do you recollect that machine well enough to say how the rib was fastened to the lever?

A. It was fastened to the lever with screws.

Cross-int. 33. What kind of screws?

A. I don't remember; I think they were bolts; I should have said, with nuts on them.

Cross-int. 34. How many?

A. I don't remember.

Cross-int. 35. How was the lever pulled down?

A. By a treadle, I believe.

Cross-int. 36. What connected the lever and the treadle?

A. I hardly know what it was; they worked with their foot.

Cross-int. 37. How many potters' wheels did they have there?

A. Only one, I think.

189 Cross-int. 38. How did they make the Bristol ware? On a wheel or mould, or how otherwise?

A. I think some was thrown on a wheel, and some was pressed.

Cross-int. 39. How many presses did they have there?

A. I don't remember.

Cross-int. 40. Was the queensware made in moulds, or on a wheel?

A. Some of it was made in moulds, I believe; some on a wheel.

Cross-int. 41. Did you ever see any other drawing of the Kier machine before you saw this one (Exhibit Kier Machine)?

A. I never saw any other drawing, to my knowledge, except the machine itself.

Cross-int. 42. Did you have any talk, some time early this year, with Mr. Joseph Winkle, Mr. Frank Wright, or any one else, about this Kier machine?

A. No.

Cross-int. 43. When did you first hear that you were wanted as a witness in this case, and from whom?

A. From Will. Winkle, yesterday evening.

ANDREW GRAHAM.

[Adjourned to meet at same place, at 10 o'clock A. M., to-morrow, August 23, 1877.]

AUGUST 23, 1877, 10 o'clock A. M.

Met pursuant to adjournment at same place. Present as before.

FRANK M. REESE, called on the part of respondents, and being first duly sworn, deposes as follows:

Int. 1. State your name, age, residence, and occupation.

A. My name is Frank M. Reese; I am twenty-four years of age; I reside in Pittsburg, Pennsylvania; I am a solicitor of patents.

Int. 2. State whether you ever had any experience in the use of crucibles in the manufacture of crucible steel; and if so, what has it been?

A. I have been familiar with the use of crucibles in the manufacture of crucible cast steel for the last ten years. I have been

190 engaged for a period of four years in the employ of Reese, Graff & Dull, and of Reese, Graff & Woods, during that time. When in the employ of these companies the use of crucibles has daily been under my observation. During one year of the time I was in the employ of these companies my duties were to attend to and do the mixing of the steel. I have used a good many crucibles, and have seen thousands of them used.

Int. 3. What do you mean by the mixing of the steel?

A. What is meant by the term mixing, is the preparation of the stock in the right proportions to produce, when filled into or put into crucibles or pots, and subjected to the melting operation, the quality of steel desired.

Int. 4. What form of crucible is used in the manufacture of steel?

A. The only form that I have ever seen used, or that practically could be used, is the bilged form of crucible.

Int. 5. State your reasons for the latter part of your last answer.

A. In the first place, the crucible should be of that form, because it gives greater strength to them, they being subjected to a great deal of strain during the "teeming" operation, and also as well as during the handling, filling, and lowering into the furnace. Secondly, because the pots or crucibles do not occupy so much space in the furnace or hole, and also because the crucible having flaring sides would be subjected greatly to the cutting action of the heated currents of gas which would cut through or melt the sides of the crucible. Thirdly, because it is the only form I can conceive of that could be handled by the workman without great danger or liability to spill the metal when conveying it from the hole to the moulds, which is done by swinging the crucible a short distance at each step. Fourthly, because it is necessary to have the crucible with a narrow mouth, in order that the teeming operation may be done without spoiling the stock and moulds. The operation of teeming, or pouring, requires great skill, which skill is only acquired after long-continued practice. The moulds into which the metal is teemed are generally square, being from three and one-half to four and one-half inches in thickness and width, inside measurement. That is to say, the cavity of the mould is that size, and is generally from twenty-four to thirty inches deep. The moulds are made of
191 chilled iron. The inside of the mould is planed and the parts are finished up so as to fit together accurately when clamped together. The mould is divided longitudinally into two parts, which are clamped together by rings when the moulds are prepared for teeming. When the metal is poured or teemed into the mould, it must descend in a small unbroken stream immediately, without touching either of the sides, to the bottom of the mould, which is made very thick and heavy to resist the cutting action of the molten metal. It is imperatively necessary that this should be the case, for if the metal touched either of the sides in descending, it would cut furrows and grooves into them and thereby spoil the moulds. The stream also would be broken, and envelop air-forming cells

in the ingot, thereby depreciating the stock and rendering it worthless for many purposes. Now, for the purpose of rendering this operation at all practical, it is necessary that the crucible should be of the bilged form, having a narrower mouth than belly, because the teeming operation must be done slowly and the crucible turned gradually, so as to form a small unbroken stream until the contents are entirely teemed. Fifthly, the crucible must be of bilged form in order that it may be held tightly and securely during this operation by the tongs of the workman. If the crucible was not bilged, it would be impossible to hold it on this account, as there are no forms of tongs for holding it at present, and if tongs were made to hold it, they would have to be adjusted so as to clamp the side and the mouth of the crucible, thereby throwing the strain on the weakest part, which would undoubtedly break it. Besides the square moulds there are other shapes. There are flat moulds used for forming plate and sheet steel. The cavity of these moulds is generally from twenty-two up to twenty-eight inches deep, and about four and one-half inches wide, and about fifteen inches long. It is equally difficult to teem into these moulds as into ones of the other shape.

Int. 6. Can you produce a drawing of the tongs used by the workman in conveying the crucible and teeming, which illustrates the manner of grasping the crucible?

A. I can produce a drawing of one used by the melter during the teeming operation, but have no drawing of the one used to convey the crucibles to the moulds.

192 [The drawing is put in evidence and marked "Exhibit Teeming Tongs," James I. Kay, Examiner.]

Int. 7. How does the melter use the tongs shown in the drawing, in the operation of teeming?

A. He generally grasps the end of the handle of the tongs with his right hand, and grasps the tongs with his other hand as near the crucible as he can stand the heat, and braces his right forearm on his thigh so as to hold the tongs securely and prevent the crucible from shaking, and steady it. He gradually turns the pot or crucible so that the metal collects in the belly and gradually flows from the mouth in a small stream into the mould.

Int. 8. Please describe the tongs which are used in removing the crucible from the hole of the furnace and conveying it to the mould.

A. They are like these tongs, (referring to Exhibit "Teeming Tongs,") except they are not provided with projecting arms that fit down the sides of the pot or crucible, and that the jaws are at right angles to the handle, so that they can be lowered down into the furnace, and the jaws will clasp the crucible below the bilge, so as to secure a firm hold without producing undue strain on the crucible.

Int. 9. Where do the pot holes of the furnace stand with relation to the floor upon which the workman stands?

A. In the ordinary melting shop, they are generally circular cavities, extending down below the surface of the floor.

Int. 10. How does the workman proceed in conveying the pot from the furnace to the moulds?

A. After the tongs have been lowered and the pot securely grasped, it is raised out from the furnace by the "puller-out," who then conveys it, on account of the great heat and of the weight, by swinging it a short distance at each step he takes.

Int. 11. Does this motion have any tendency to disturb the molten metal?

A. It causes the metal to dash against the sides of the crucible, but it is prevented from being thrown out on account of the mouth of the crucible being narrower than that portion where the metal lies.

Int. 12. State what effect the splashing of the molten metal would be liable to have.

193 [Here follows diagram marked page 193.]

194 A. It would be very liable to get into the operator's shoes. His limbs are generally protected by wet rags, carpet, or leather, and are better protected than his feet.

Int. 13. How many heats does a steel crucible ordinarily stand?

A. They generally last three heats, but if they happen to be of uniform material, or get wet and not properly dried before using, they will go to pieces, or be otherwise rendered unfit for service, in one or two heats. Crucibles will sometimes stand more than three heats, but they are very rarely used more than that, on account of the uncertainty of the amount or per cent. of carbon the stock will take from them after having been used for three heats.

Int. 14. Can you state the amount of the annual production of crucible steel in the United States?

A. I cannot, to my own knowledge, and do not believe that any person living can. The difficulty arises from the fact that returns are not made of the amount of production in all cases to the Secretary of the Iron and Steel Association, or any other person; but the production of the rough ingots in the United States was probably from sixty-five to seventy thousand tons for, say, the year 1876, it being much larger than the actual production of finished steel.

Int. 15. How many crucibles are ordinarily used in the production of a ton of ingot steel?

A. A melting shop, which consists of twelve holes, when running full, requires twenty-four crucibles a day, three heats being made a day, and produces from fifty-five hundred to sixty-five hundred pounds of ingots, according to the amount of material charged. It will take from nine to eleven pots to make a ton, according to the charge. In the furnace, two pots are put in each hole.

Cross-examined by J. E. Maynadier, Esq., counsel for complainants:

Cross-int. 16. How long since you were employed in the manufacture of crucible steel?

A. It is nearly six years.

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Arthur Pickering, et al.,
vs.
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Defendant's Exhibit. Teeming Tongs.
JAMES I. KAY, Examiner.

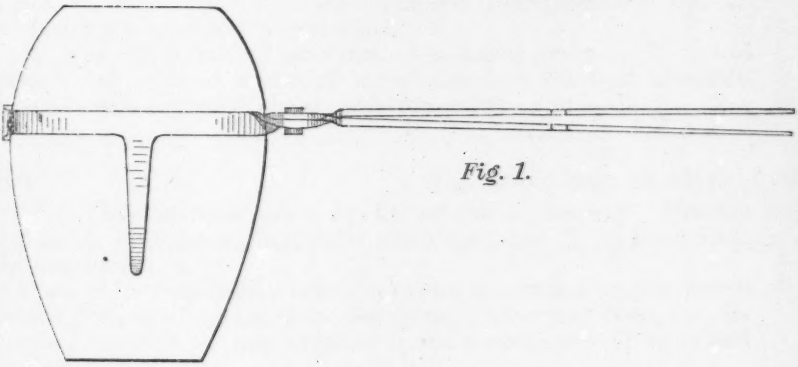

Fig. 1.

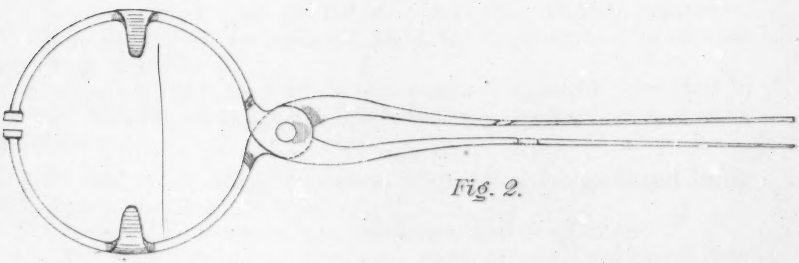

Fig. 2.

195 Re-direct examination:

Int. 17. Since that time have you had this manufacture under your notice, and been familiar with it as practiced in the works in the city of Pittsburgh, and had your attention directed to the various statistics and publications with regard to the same?

A. Yes, sir. I frequently go through the various manufactories of steel in this city, and have been doing so for the past six years. I also make it a point to go through and examine all the steel works and mills in every place that I may happen to visit. The last time I was in Philadelphia, in August, 1876, I visited several works in that city, and examined their method of manufacture. With regard to publications and statistics in regard to the manufacture of crucible steel, I make it a special point to have all the statistics that I can gather of that kind. I have statistics for 1873, 1874, 1875, and 1876, from the Iron and Steel Association, National, I think it is, showing the capacity of most all the steel works in the country.

Int. 18. State whether, in the practice of your profession, your attention has been directed to this art.

A. Yes, sir; it has. I have made it a special study. I have had cases which required a special knowledge and practical acquaintanceship with regard to the manufacture of iron and steel.

FRANK M. REESE.

196 WEDNESDAY, *Sept.* 12, 1877.

Met at same place by agreement of counsel. Present: James E. Maynadier, Esq., for complainant, and T. B. Kerr, Esq., for defendants.

Counsel for respondents offers in evidence certified copy of letters patent No. 9,437, granted to Jacob and Freeman Wise, on November 30, 1852, for improvement in the manufacture of stone and earthen ware.

Also, a model which is marked "*Exhibit Wise Model*," James I. Kay, Examiner, the same not being certified as such.

Also, a certified copy of letters patent No. 40,506, granted to William Smith, on November 3, 1863, for improvement in making plumbago crucibles.

Also, a certified copy of letters patent No. 49,140, granted to George Nimmo, on August 1, 1865, for improvement in moulding crucibles.

J. N. McINTIRE, called on behalf of the complainants, and being duly sworn, deposes as follows:

Int. 1. State your name, age, residence, and occupation.

A. Jacob N. McIntire; forty-one years of age; residence, New York city; occupation, solicitor of patents and expert in patent cases.

Int. 2. What opportunities have you had to familiarize yourself with mechanical principles, what opportunities to apply such principles in the examination of patented inventions, and what experience

in the study of drawings and specifications of inventions, and as an expert in patent cases.

A. When quite young I worked in a machine shop learning the machinist trade, and was engaged in making drawings of machinery, and from which to build machinery; after which occupation, I was, for a short time, draughtsman of the United States Patent Office; for about the past nineteen years I have been engaged in my present business, in the course of which I have had to devote myself wholly to the preparation and study of specifications of patents and inventions, and to the making of expert investigations in the various branches of the mechanical arts; I have been frequently called
197 to give my opinion under oath as an expert in patent causes in the United States courts, and during the last five or six years have had the greater part of time occupied in the last mentioned capacity of expert in patent cases.

Int. 3. Please state what, if any, special attention you have given to the mechanism employed and the operations practiced in the manufacture of crucibles and other articles of pottery.

A. I have examined some into the state of the art, as exhibited in numerous works and articles upon the subject, and in some of the patents for machines for manufacturing crucibles and other articles of pottery.

Int. 4. Please state whether you have examined a certified copy of original letters patent No. 49,140, granted to George Nimmo on August 1, 1865, for improvement in moulding crucibles; and if so, whether you understand the construction and operation of the machine therein described and shown.

A. I have examined a certified copy of said patent, and believe I fully understand the construction and operation of the machine therein shown and described.

Int. 5. Please state what you understand to be the construction and operation of the machine shown and described in said original Nimmo patent.

A. In this patent, the machine is shown and described as consisting simply of the usual stand or table, in which is mounted the ordinary vertical and rotatory shaft or spindle, (driven by pulley and belt,) at the upper end of which is the chuck or receptacle for the plaster mould, in which is to be made a crucible or vessel to be manufactured from the ball or batch of material supplied to the said mould; and of a shaping and compressing rib or "former," provided with a suitable handle, so arranged in conjunction with a framework, extending upward from the stand or table, just referred to, and with a suspending chain passing upward and over pulleys or sheeves in said framework, and so provided (at the end opposite to that at which said chain is attached to said handle) with a counterbalancing weight, that said handle and rib may be conveniently moved in a certain manner to affect the formation, within the mould and from the batch of material, of the vessel to be made. The said framework, with which said handle is combined or

arranged, being so made with a stop or bearing surface
198 beneath which the notched rear end of the handle may be
placed, and with another stop or bearing surface down on to which the lower surface of said handle, (near its middle, lengthwise,) may be brought, that when the said handle and rib shall have been forced downward, and into the revolving batch of material by the hand of the workman who manipulates said lever as far as it can be carried, the proper conformation or shape will have been given to the interior surface of the moulded mass or article; the external shape of said article conforming to the internal surface of the mould, and the material composing the crucible or other vessel being properly compressed or compacted, and the internal surface properly smoothed by the rotation of the material or stock running in contact with the stationary pressing surface of the rib. As shown and described, the manipulation of the movable and counterbalanced handle, with its forming rib, is as follows: The rotatory mould having been supplied with the proper batch of material, and the said handle and rib being supposed to be disengaged at its notched rear end from the framework, and to be bodily elevated or held up entirely out of the workman's way (and with the rib some distance above the top of the mould) by the counterbalancing weight, the batch of material is partially spread by the workman, either with his hand or with a conical muller, when the operator taking hold of the said handle, or the handle end of the lever, pulls or brings the latter downward in such a manner (causing the rear notched end to descend further than the forward handle end) as to effect an engagement between the rear notched end of said handle or lever and the shoulder or bearing surface beneath which said notched end is adapted to be placed, and then gradually forcing downward the forward or handle end of the lever, substantially in the arc of a circle, the center of which would be at the point of engagement or bearing between the rear notched end of the lever and that part of the frame with which it engages, forces the forming rib downward and backward until the lower surface of the handle or lever comes down on to the stop in the framework, when the formation of the article to be moulded will be competed. The handle and rib being then vibrated or turned upward and away from the surface of the moulded article, and the notched rear end of the
lever being withdrawn from beneath the stop or surface
199 with which it was engaged, said lever and rib are returned to
the elevated and counterbalanced position in which these parts were assumed to be when I started to describe the operation of the machine, and the rotation of the mould being stopped, said mould, with its contained vessel, is removed from the machine, as and for the usual purposes, when a fresh mould may be inserted in the chuck, and the described operations repeated for the successive production of duplicate vessels.

Int. 6. State whether you have examined a copy of reissued letters patent No. 6,166, granted to the complainants as assignees of George

Nimmo, on December 8, 1874; and if so, state whether you are familiar with the drawings and specifications of the same.

A. I have examined a copy of said patent, and believe I understand the specifications and drawings thereof.

Int. 7. Please compare the same with the original letters patent granted to said Nimmo August 1, 1865, No. 49,140, and state whether, in your opinion, the machines and operations described therein are similar, and whether the specifications of each refer to or describe the same matters.

[Objected to, because it is clear upon inspection that they do.]

A. Upon comparison of the reissued patent with the thing shown and described in the original Nimmo patent, I find that while the *drawing* of the reissued patent appears to be similar to the *drawing* of the original patent, (varying only in scale,) an additional letter of reference (*q*) is supplied to the reissue drawing, and the specification of said reissued patent clearly indicates and describes not only a mode of operation of the machine shown that is wholly inconsistent with the original Nimmo patent, but one which is also impossible in a machine constructed as shown and described in said original patent. Near the end of the specification of this reissue patent I find the following description of the construction and operation of the machine: "The rib must then be withdrawn, and, to prevent its marring the interior of the crucible, it must be so guided that it will travel in a path materially different from that of the rib in the apparatus first above described, and substantially the same as that of the rib in Salvetat's
200 apparatus. For this purpose the lever *l* is hung by the chain *i*, between two uprights, *g g*, so that when it is drawn outward until its end clears the cross piece *q*, it may be readily lifted bodily and guided by the cross piece *q*, and the uprights, *g g*, in such a way that the rib will not strike against the interior of the crucible." Now, this description distinctly says that the machine is so constructed and operating that, in order to withdraw or remove the rib *n* from the interior of the finished article, said rib and the handle or lever are to be moved bodily in a horizontal plane or direction until the rear notched end of said lever shall be clear of the bearing surface or lower end of the cross piece *q*, and that said rib and lever are *then* to be lifted bodily, being guided by the frame pieces *g* and piece *q* during their ascent. Not only is the mode of operation thus pointed out in the reissue inconsistent with the description of the machine given in the original patent, but said machine is *incapable* of any such mode of operation; because, in order to give the described initial movement to the lever and rib to free the rear end of the lever "until its end clears the cross piece *q*," the lower end of the rib *n* would have to come in contact with the interior of the moulded vessel, at the line of junction of its side and bottom, and such contact would mutilate and destroy, at this point, the internal surface of the finished article. This new matter in the reissue specification may be quite relevant in the description of

a machine made different from that shown and described in the original Nimmo patent, and while such mode of operation (of which the Nimmo machine is incapable) may be quite necessary in a machine in which the organization is such as is adapted to the making of crucibles or other vessels of *bilged* form, it is not at all necessary in a machine such as Nimmo's, on which or with which it is impossible to make a vessel the mouth of which is of less diameter than some other portion of the vessel. I have made an exact tracing of so much of the drawing of the original Nimmo patent as is necessary to illustrate the impossibility of working the machine according to the instructions given in the reissue specification; the red lines which I have added in my drawing illustrating the position in which the rib *n* and lever *l* are to be placed *before* the withdrawal of these parts *upward* from the finished vessel, according to the instructions given in the reissue.

201 [Said drawing last referred to offered in evidence, and marked "Exhibit McIntire No. 1," James I. Kay, Examiner.]

Int. 8. Please compare the model "Complainants' Exhibit Nimmo Machine," with the machine shown and described in the original Nimmo patent No. 49,140, and *shown in the drawings of the reissue No.* 6,166, and state whether the said exhibit is substantially like or unlike the machine so shown and described, and point out particularly the points of difference or similarity as the case may be.

A. Upon a comparison of this exhibit model with the machine shown and described in the original patent, (and illustrated by the drawing of the reissue patent,) I find the two things to be substantially different in the following particulars, namely: the *model* machine being one constructed for and adapted to the making of *bilge shaped* vessels, has a mould made in *two* parts, so as to permit, by the separation of its parts, (in the manner common to such moulds,) the extraction from the mould, at the proper time, of the moulded vessel or article; while the machine shown in the Nimmo patent, being one adapted only to such vessels as have no bilge, has simply a solid plaster mould, that is, a mould made in *one piece*, such as is and was for a great many years prior to the Nimmo invention used in the moulding of all sorts of vessels, the mouths of which were no smaller than any portion below the mouth.

I also find that in this *model* machine the forming rib is one adapted to the purpose of making a *bilged* vessel, while the rib *n* of the Nimmo patent machine is not adapted to any such purpose, and that the construction of the movable handle or lever that carries the moulding rib in this *model* machine is such, at the rear notched end of said lever, that the latter may be moved horizontally, so as to free the rear notched end entirely from the shoulder or bearing surface beneath which it is adapted to be placed, and then may be moved up bodily, after the formation of the moulded article, without any mutilation of or injury to the latter; while in the Nimmo patent machine the construction and arrangement of parts are so different that, as I

have already explained in another answer, the lever and rib *cannot* be thus manipulated.

202 And I also find that the construction of this *model* machine and its former mould are such that, unlike the Nimmo patent machine, the hand lever with its shaping rib *cannot* be brought into operation in the manner shown and described of the Nimmo patent machine, that is, by first inserting the rear end of the hand lever beneath the bearing which forms its fulcrum, and then swinging the forward end of said lever and the shaping rib downward and backward to spread the material in mould and shape the article being moulded. There is also a slight difference in the construction as to the shape of the frame works in which the movable levers are arranged in the two cases and as to the shape and arrangement of the pieces or parts of the frames beneath which the rear ends of the hand levers are fulcrumed, but the other differences are the more material ones. I may, however, remark *this* difference in the construction, which I now notice for the first time, namely: that in the *model* machine there is a horizontal cross bar running from the extreme front edge to the rear edge of the vertical frame work in such a manner as to constitute a long rest or support for the lower surface of the hand lever clear back to its rear end, upon which supporting surface said lever may ride bodily backward (in the direction of its length); while in the Nimmo patent machine I find no such supporting surface for any such purpose, but simply a short or narrow stop, (marked *p*,) against which the lower surface of the hand lever strikes and by which the downward vibratory or swinging movement of said hand lever is arrested. This substantial difference of construction between the two machines is quite important, in my judgment, in view of these facts, namely, that in the Nimmo patent machine the rear notched end of the hand lever is first brought down so as to get a bearing beneath or fulcrum at the point *o*, and then has its forward end vibrated or swinging downward and backward, and therefore requires only the simple stop *p*, at the point, and for the purpose indicated in the Nimmo patent; while in the *model* machine the hand lever with its forming rib, having to be brought down bodily nearly to its lowermost position before the rear notched end of the lever can be fulcrumed, and having then to be moved to a considerable extent backward in a substantially horizontal direction, the *long* bear-

203 ing surface for the lower side of the hand lever to rest and slide upon (not found in the Nimmo patent machine) seems to be quite necessary or useful. There is, of course, no clamping ring to the mould in the Nimmo patent machine such as I see in the *model* machine, said Nimmo patent machine, unlike the other, as I have before remarked, having a *solid*, instead of a partible mould.

Int. 9. Please state whether you have examined a certified copy of letters patent No. 9,437, granted to Jacob & Freeman Wise, on November 30, 1852, and state whether you are familiar with it and if you understand the machine shown and described therein.

A. I have examined a copy of said patent, and believe I understand the construction and operation of the machine therein shown and described.

Int. 10. Please compare the machine shown and described in the Wise patent just referred to, with the machine shown in the Nimmo original and reissued patents, and state whether the two are similar or dissimilar, and point out the points of similarity, if any.

A. Upon a comparison of the machine shown and described in the Wise patent with the machine shown in the Nimmo original and reissued patents, I find the two machines to be substantially alike in the following particulars, namely: that in each there is the usual stand or table having mounted in it vertically a rotatory shaft provided with an ordinary pulley for the application of the motive power, and having at its upper end, and immediately above the table through which said shaft passes, means for holding and rotating the mould in which the material to make the intended article is to be placed and worked into shape; that in each case there is an upwardly projecting frame work, in conjunction with which is arranged a movable handle or lever device, provided with a suitable moulding or shaping rib or former, which is forced downward into the batch of material and towards the circumference or side of the revolving mould to spread and shape the plastic material, by the hand power of the workman, applied to the former or shaping device through the medium of said handle or lever device; and that in each case a mould is employed which gives external shape to the article to be moulded, and which is readily attachable to and removable from the rotatory device with which the upper end of the vertical shaft or spindle is provided.

204 And I find the two machines to *differ* in construction and mode of operation in the following respects, namely: that in the Nimmo machine a plaster mould made in one piece and adapted only to make a vessel having no bilge is employed, said mould being adapted to fit into and be rotated by the socket or chuck at the upper end of the rotatory spindle or shaft of the machine, while in the Wise machine a *two part* or *partible* metallic and bottomless mould is employed that fits down over and around a false bottom or head block *d*, mounted on the revolving disk (or ordinary potter's wheel) located at the upper end of the rotatory spindle of the machine, said mould being temporarily secured to, and thereby made to rotate with the revolving disk or wheel; that in the Nimmo machine the forming rib is stationary relatively to the hand lever by means of which it is forced into and against the material to shape it up in the mould, and said lever with its rib is *first* brought down into working position, and its rear end fulcrumed and *then* swung further downward to make the rib spread or shape the material, while in the Wise machine the rib or "former" (which is of a different shape) is so mounted in or combined with the hand lever as to be capable of rotation by contact with the material being operated upon, and said "former" and its hand lever are described as being first brought down about centrally into the batch of material and to

about the lowermost position, the "former" being *then* moved towards the circumference of the mould, by means of the hand lever, to press and shape the plastic material to the required form; that the Nimmo machine is provided with a counterbalance or weight to assist in the elevation and retention in their uppermost position of the combined hand lever and "former," while the Wise machine is lacking in this counterbalance device; and that the Wise machine has its hand lever and "former" device so arranged and operating as to be capable of adjustment so as to make one "former" produce different internal shapes in the articles moulded, while in the Nimmo machine there is no such capacity, the machine being capable only of giving one predetermined shape or conformation to the interior of the moulded article.

I may remark that the counterbalance, weight, or device to assist in the elevation and retention of the moulding rib and lever
205 are up out of the way of the workman (while removing the mould with the finished article, placing in the machine a fresh mould, supplying the mould with the ball or batch of material, etc.) was a very common contrivance in machines of the class under consideration, and well known in the state of the art a great many years prior to the Nimmo invention; and that both the solid mould, made of plaster, and other materials, and the partible mould, made either of metal or plaster, were common and well known in the art to which these machines relate, prior to both the Nimmo and the Wise inventions. It will be observed that, in the drawing, the comparison just made between the Wise machine and the Nimmo machine, I have assumed the construction and operation of the Nimmo machine, so far as the hand lever and former or rib are concerned, to be such as I have before stated my understanding to be, from the *original* Nimmo patent; and I would here state that if it be assumed, as in the Nimmo *reissue*, that the hand lever and rib are so constructed and operating that the rib is first moved toward the center of the mould, and then lifted upward, said Nimmo machine would be, in my judgment, so far as this part of it is concerned, substantially *like* the Wise machine.

Upon this point of the similarity between the Nimmo machine and the Wise machine of 1852, (when the Nimmo machine is assumed to be made and to operate as indicated in the Nimmo reissue patent,) this significant fact may be remarked: that while in the Nimmo machine there is no necessity whatever for moving the forming rib first toward the axis of rotation of the mould and then upward, after the completion of the moulded article in the Wise machine it is impossible to extricate the "former" shown from the finished vessel, except by first moving the 'former' towards the axis of rotation of the mould and then elevating it. This peculiar and necessary movement of the former is fully and clearly described in the specification of the Wise patent, while in the original Nimmo patent there is no description of nor allusion to any such unnecessary movement or mode of operation in the extraction of the "former"

or rib *n* shown in that patent. In this Wise patent are also shown and described means for setting and holding the "former" during the moulding of the vessel in a position oblique to the axis of rotation of the mould, so that even if the "former" itself were
206 not bilge-shaped it could not be withdrawn vertically from the finished vessel without having been first moved towards the axis of rotation of the mould.

[Adjourned to meet at same place on Thursday, September 13, 1877, at 10 o'clock A. M.]

THURSDAY, *Sept.* 13, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

Int. 11. Please answer the same question with regard to patent No. 40,506, granted to Wm. Smith, November 3, 1863, for improvement in making plumbago crucibles.

A. Upon a comparison of these two machines the first point of difference that strikes me is this: That the Smith patent shows and describes a machine specially adapted to the making of *bilged* black-lead crucibles, such as are generally used in the manufacture of crucible steel, while the machine shown in the Nimmo patent is neither adapted to nor capable of making this sort of crucibles. In the next place, the rib or "former" in the Nimmo machine may be swung upward and outward from the interior of the finished vessel in a curved path or line of motion, while the organization of the Smith machine is such that the "former" must first be moved horizontally towards the axis of rotation of the mould, and then vertically upward or in a direction at right angles to its first movement to effect the extraction of the "former" from the finished article; and the mould in the Smith machine being specially adapted for the formation of bilged crucibles is partible, the two portions being separable at a horizontal plane near the middle of the mould, while in the Nimmo machine the plaster mould being adapted to the formation of vessels, the diameters of which decrease gradually below the mouth, is made as is usual in moulds used for such purposes, in one solid piece. In the following features of construction and operation the two machines are substantially alike—that is, they each have the usual vertical rotatory shaft mounted in suitable framework, driven by belt and pulley, and provided at its upper end with a sort of chuck in which the mould to be rotated may be placed and held; they each have a "former" adapted to be inserted into the rotating mould to press into
207 shape against the interior of said mould the ball or batch of stuff from which the intended vessel is to be moulded or made, and they each have means for forcing downward into the mould and towards the circumference thereof the "former" or shaping device, and counterbalancing weights to assist in the elevation and retention of these last-mentioned means up out of the workman's way during the removal of the mould and finished article and placement in the chuck of a fresh mould.

In the Smith machine the device or part of the machine carrying the "former" is different in its detailed construction from the device carrying the rib in the Nimmo machine, and the "former" in the Smith machine is capable of rotation by frictional contact with the surface of the material being operated upon, while the rib *n* in the Nimmo machine operates more like a scraper, but these forms of rib were common in the prior state of the art, and in both machines the rib or "former" is inserted into and withdrawn from the mould by a sort of compound or double motion, the motions in the Smith machine being two rectilinear movements, one horizontal, the other vertical, while in the Nimmo machine there is a vertical movement bodily of the forming mechanism combined with a curvilinear or vibratory motion.

Int. 12. I now show you a drawing entitled "Lecons de Ceramique." Please state whether you recognize the figures therein shown; and if so, where you saw them, and when.

A. I do recognize the figures of said drawing. I have seen them before, and have had orally translated to me, in New York, the descriptions of these figures and other text relevant to the subject-matter in a work at the Astor Library, New York City, N. Y., from the plates of which these figures appear to have been taken.

[*Stipulation.*—It is hereby stipulated that the defendants may put in evidence, before October 1st, 1877, a copy of so much of the text of said work, "Lecons de Ceramique," as may be referred to in the answer of the witness, together with a copy of the plates relevant to the said text, and a translation of the same, verified as such by the translator, complainants reserving the right of objection and criticism as to the correctness of the same.]

208 Int. 13. Please compare the machine shown and described in Nimmo reissued patent No. 6,166, with what is shown and described in the work of Salvetat, entitled "Lecons de Ceramique," referred to in my last question, and state wherein, if at all, you find any similarity between the two things.

A. Upon making the comparison called for, I find the exposition made in the work referred to to involve about all of the devices, and substantially the same combination of devices, constituting the machine shown and described in the Nimmo reissue patent. The description and drawings in *Salvetat* describe and show various means and operations employed in the moulding and finishing of various articles of pottery; and in this description and drawings I find apparatus involving substantially all the devices embraced in the Nimmo machine, and involving substantially the combination of devices referred to in the claim of the Nimmo reissue, that is to say, I find shown and described in Salvetat machinery in which [which] the usual rotatory vertical shaft of the "potter's wheel" is provided with a chuck in which is placed and held the usual mould employed to give the external shape to the article to be moulded therein, said machinery being also provided with a rib or "former" adapted to be brought down into and give internal shape to the plas-

tic material in the revolving mould, said rib or "former" being secured to a counterbalanced hand lever which swings on a fulcrum in the frame of the machine in such manner that when brought down into the rotating mould until arrested by a gauge or stop (which is properly adjusted for the purpose) the rib or "former" will have completely pressed into the desired shape within the rotatory mould the material of which the manufactured vessel is composed.

In addition to a moulding mechanism embracing substantially the combination of devices referred to in the claim of the reissue patent, and operating as described in the original Nimmo patent, I find in Salvetat illustrations of numerous other forms of moulding machines, among which there is shown and described a peculiar mode of mounting and operating the forming rib for making bilged-shaped vessels that appears to be indirectly referred to in the Nimmo reissue specification, namely, a hand lever and rib combined and so mount-
209 ed in the machine that a rib adapted to produce a bilged shape in the interior of the moulded article may be readily withdrawn through the mouth of the moulded vessel by a sort of compound movement of the forming rib towards the axis of rotation of the vessel and upward out of the latter. It is true that in Salvetat this peculiar mechanism and mode of operation in a moulding machine is fully shown and described in connection with the formation of a vessel which has a *great* bilge, that is, has the mouth through which the forming rib has to be withdrawn considerably less than half of the interior diameter of the largest part of the vessel, so that by the means shown and described the ready extraction of the moulding rib is effected in a case where the difficulty of withdrawing said rib is very much greater than in the making of bilged crucibles, while in the Nimmo reissue nothing is shown or described as to the vessel so shaped that there could be any difficulty in simply swinging the forming rib up and out of the finished vessel with the hand lever of said rib permanently hinged at its rear end; but as the Nimmo reissue appears to refer indirectly to a sort of compound motion to the rib and hand lever (during the removal of the "former" from the finished vessel) somewhat resembling the fully shown and described construction and operation of the mechanism in Salvetat, I have thought it proper to speak particularly of this mechanism. It is most clearly illustrated at figures 238, 239, 240, and 241 of the plates.

Int. 14. Please state if you have read the evidence of Winkle and others descriptive of the drawing "Exhibit Kier Machine," and state whether you understand the construction and operation of the machine therein showed and described; and if so, compare the same with the machine shown and described in the Nimmo original patent, and shown in the drawing of the reissue, and state whether you find any similarity between them, and if so, what.

A. I have read the testimony and examined the drawing, and I believe I understand the construction and operation of the machine illustrated in this drawing marked "Defendants' Exhibit Kier Ma-

chine." Upon a comparison of this Kier machine with the Nimmo machine I find them to resemble each other in these general features of construction and operation which were common in machines known and used long prior to the Nimmo patent, namely, in
210 the respects that each machine has the usual vertical rotatory shaft provided with a chuck at its upper end just above the table, and with a suitable driving pulley, each machine having also the usual frame work projected upward from the table to guide and hold the hand lever, to which is rigidly attached the "former" or moulding rib, said lever in each case having counterbalancing means to assist in the lifting and holding up out of the way the lever and rib.

I also find these two machines to be substantially alike in the particular that in each the hand lever is so made and arranged with the rest of the machine, that in the withdrawal of the forming rib from the interior of the moulded article said handle and rib may be so manipulated by the workman as to cause the rib to be moved first toward the axis of rotation of the mould, and then upward and out of the finished article. I, however, find these differences of construction, namely: that in the Kier machine the mould is partible and adapted to the formation of a bilged crucible, while in the Nimmo machine it is solid and not adapted for the making of that kind of crucible; that in the Kier machine the rib is of the proper form to make a bilged vessel, while in the Nimmo machine it is not; that in the Kier machine the duplex hinged lever is pulled downward by the workman through the medium of both its handled end and the treadle to which he applies his foot, while in the Nimmo machine the lever is manipulated entirely by the hand of the operator.

[Adjourned to meet at same place at 2 o'clock P. M.]

THURSDAY, *Sept.* 13, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

Counsel for respondents offers in evidence a model which is marked "Defendants' Exhibit Smith Model."

JAMES I. KAY, *Examiner.*

Int. 15. Did you ever see a machine constructed in accordance with the Smith patent in operation; and if so, when and where?

211 [Objected to because the expression "constructed in accordance with the Smith patent" is altogether too vague and indefinite, as it may mean any one of a vast number of machines, and the question therefore is wholly irrelevant and immaterial.]

A. I have seen in practical operation a machine for making crucicles constructed substantially like the machine shown and described in the Smith patent. I saw such a machine in operation yesterday, at the establishment of the defendants in this suit.

Int. 16. Did you ever see the defendants' machine in operation; and if so, when and where?

A. Yes, sir. I have seen their machine at their establishment in this city. I saw it yesterday. I understand you to mean a machine like the model "Exhibit Defendants' Model."

Int. 17. How does the practical operation of the Smith machine compare with the operation of defendants' machine?

[Same objection as to interrogatory 15, it nowhere appearing, with any reasonable degree of certainty, what the Smith machine, so called, is.]

A. They appeared to be equally successful and practicable as machines for moulding or making black-lead crucibles. I saw crucibles made with about equal facility and of about the same degree of perfection on the two machines. About the only material difference I noticed in the production of two crucibles of the same size and material, and equal perfection of finish, made one on each of the two machines, was, that in the operation of the Smith machine the batch or ball put into the mould was all worked up into shape by the machine alone, while in the case of the defendants' machine portions of the stock or material had to be lifted and worked up to the action of the rib or former by the right hand of the operator, which had to be inserted into the mould during rotation of the latter. What I mean by the Smith machine, is one made substantially identical with the machine illustrated in the drawing of the Smith patent, and described in the latter.

Int. 18. Look at the Exhibit Smith Model, and state if there is any similarity between it and the Smith machine, about which you have just been testifying.

212 A. Yes; the Smith machine I saw in operation was substantially identical with this model.

Int. 19. Please compare the construction and operation of the defendants' machine with the Wise, Smith, Kier, and Salvetat machines, and state whether there is any similarity between them.

A. Defendants' machine is substantially like the machines shown in the prior state of the art as exhibited by the several machines referred to in the question in these respects, namely: that it is adapted to make a bilged crucible in a partible mould mounted in a rotatory chuck by the action upon the batch of material, while rotated with the mould containing it, of a rib or former having combined with it proper means or mechanical devices by which said rib or former may be first inserted or forced downward about centrally into the revolving mould, then moved toward the interval circumference of the mould, to force outward and properly shape up the plastic material, then moved back again into the vicinity of the axis of rotation of the mould, and then lifted or elevated vertically out of the mould and finished vessel; the elevation and the retention of the rib and its connected devices being facilitated by the ordinary counterbalancing weight. I find in the defendants' machine substantially the same de-

vices combined and operating together in substantially the same manner as is exhibited in the prior machines referred to.

Int. 20. Please now compare the invention set forth in the reissue patent of Nimmo, No. 6,166, and referred to in the claim of said patent, with the defendants' machine, and state whether the latter embraces substantially the same or substantially a different thing from that referred to in said claim, giving your reasons for any opinion you may express, and making any reference you may see fit to the state of the art prior to Nimmo's invention.

A. As I understand the invention referred to in the claim of the Nimmo reissue, it consists in the combination (in a machine for moulding pottery ware) with the "rib," such as was well known and commonly used many years previously, and the "revolving mould," well known long prior to the Nimmo invention, of "the mechanism by which the rib is guided toward the axis of revolution of the mould as it is withdrawn." Exactly what is the third element of the combination referred to in this claim, I can-
213 not discover from the claim alone, but I understand perfectly from the specification and drawing of the patent to which the claim distinctly refers back by the words "as set forth" that "the mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn," is composed or made up as shown in the drawing of the hand lever *l*, supporting chain *i*, uprights *g g*, cross piece *q*, and stops or bearing surfaces *o* and *p*; these several devices being all arranged and working together substantially as shown and described in the patent to constitute "the mechanism" forming the third element of the combination referred to in said claim. Upon inspection of the defendants' machine, I find therein a rib substantially like the rib referred to in this reissue claim as to its function of pressing and shaping up the material in the mould of the machine, though differing in construction from the rib referred to in said claim in the particular in which it resembles ribs used in pottery machines prior to Nimmo's invention, namely, in the respect that it is adapted to form up or shape a bilged vessel.

I also find in the defendants' machine a revolving mould substantially like the mould referred to as the second element in this reissue claim, in the particular that it is a plaster mould, and is arranged in and adapted to be rotated by the chuck, but differing from said second element of said claim in the two items or particularities of structure in which it resembles moulds made and used long prior to the Nimmo invention, namely, that it is shaped for the production of bilged vessels, and is made in two separate pieces. I don't, however, find in the defendants' machine anything that strikes me as bearing any sort of resemblance to "the mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn," that is made the third element of the combination referred to in this reissue claim. In the defendants' machine the shaping rib is rigidly combined with a carriage that rides in a plane at right angles to the table of the

machine, and on a cross bar or frame, which latter is mounted upon the vertical post or standard of the machine, in such manner as to travel freely up and down thereon, and to be capable of turning round on said post, the rear end of said frame being guided by a slotted frame piece, when the cross bar with its combined rib carriage and rib is moved up and down, while a simple mechanism
214 is so combined with the rib carriage and the cross bar, upon which it is mounted, that by means of two handles arranged near each other the operator can conveniently manipulate the parts of the machine to which I have just referred in such a manner that the shaping rib, the rib carriage and the cross bar, and frame on which the latter is mounted, may be all so moved down together as to bring the shaping rib down to about its lowermost position in the mould; to then cause the rib carriage to slide on its cross bar or frame until the shaping rib shall have been forced as far as necessary towards the internal circumference of the mould; to then retract the shaping rib to the vicinity of the axis of rotation of the mould, and to then elevate all the parts again bodily so as to throw the shaping rib clear of the mould and up out of the workman's way.

I am unable to discover any substantial similarity between this mechanism, by which the rib in the defendants' machine is moved and controlled in the manner described during the operation of the withdrawal of the rib from the interior surface of the finished vessel and clear of the mould, and "the mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn, as set forth" in the specification of the Nimmo reissue patent; though, in my opinion, the means employed to effect the necessary movement of the rib in defendants' machine, as well as the combination of rib, revolving mould, and mechanism or means for guiding the rib during the operation of its withdrawal from the finished article, are substantially similar to the means and combinations of devices exhibited in machines showing the state of the art prior to the Nimmo invention, for in these prior machines there was combined with the revolving mould and rib or "former" mechanism substantially like that just referred to as being in the defendants' machine for guiding or controlling the movements of the rib or "former" in substantially the manner in which said device is guided or controlled in defendants' machine. I am, therefore, of the opinion that there is no substantial similarity between the defendants' machine and the invention referred to in this reissue claim.

In drawing the comparison just made between defendants' machine and the combination of elements or the thing referred to
215 as the invention in this claim of the Nimmo reissue, and in expressing the opinion I have as to a substantial difference between the two things, I have based my conclusions partially upon the assumption that the combination referred to in the claim of the Nimmo reissue is made up as I have taken for granted: first, the rib; second, the revolving mould; and, third, *the mechanism* for guiding the rib, shown and described in the patent, or as the equivalent

of this third element of the combination, a rib guiding mechanism substantially like that shown and described in construction and operation; because various mechanisms for so guiding or controlling the movements of the rib or "former," as that the latter could (according to its shape and the form of the vessel) be withdrawn from the finished article in various ways, among which was included the withdrawal of the rib by an initial movement of it toward the axis of rotation of the mould, and then a secondary movement of it upward and outward from the mould had been devised and used long prior to the Nimmo invention, and therefore if the combination referred to in this Nimmo reissue claim be construed to mean the combination with the rib or "former" (of a pottery machine) of the revolving mould of such machine, and *any sort* of mechanism or *any* and *every* means for so guiding the rib or "former" as that in the withdrawal of the latter from the finished vessel, the rib might be first drawn towards the axis of rotation of the mould and then upward out of it, the combination referred to in this reissue claim would clearly be, in my opinion, substantially the same as the combinations of rib, revolving mould and rib—guiding mechanisms shown in the machines prior to Nimmo's invention.

In drawing the foregoing comparison and conclusions, I have taken into consideration the fact that in the machines prior to the Nimmo invention some are provided with a fixed or not rotative "former" or rib, while others have "formers" which are free to rotate or move about their supporting axis during the operation of shaping up the plastic material by frictional contact of the surface of the "former" with the mass of material being operated upon within the revolving mould of the machine, and I have considered the fact that in some of the prior machines in which the mechanism for guiding or controlling the movements of the "former" 216 most nearly resemble that employed for guiding the rib in the Nimmo machine, a revolving "former" is employed; but as in other prior machines having substantially this mechanism for guiding the "former" a non-rotative "former" or rib is used, and as both kinds of "formers," each of various shapes, were common to machines of the class to which Nimmo's invention relates long prior to his invention, I do not consider it at all material to the combination referred to in the claim of this reissue, when construed to be broad enough to cover anything more than the combination of the precise devices and mechanism shown in the drawing, whether the forming tool or device of the machine be of one or another of the several kinds well known prior to Nimmo's invention.

[Adjourned to meet at same place to-morrow, September 14, 1877, at 10 o'clock A. M.]

FRIDAY, *Sept.* 14, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

J. N. McINTIRE—examination continued:

Int. 21. State whether you put any mark upon any crucibles made on the Smith machine at defendants' works; and if so, state how you marked them, and whether they were all made in the same mould.

A. Yes, sir. I marked three crucibles, all made on the Smith machine, two of which were made in the cast-iron mould (parted horizontally) and one in one of the plaster moulds employed usually in making crucibles on the other machines that they had in the establishment. I marked them with the Roman numerals X, XI, XII. I, however, do not remember now which of these numbers I put on the crucible made in the plaster mould. I marked the one that was left in the cast-iron mould on the inner surface of the crucible, and the two that were on the board on the outer surface of the crucibles.

217 Cross-examined by James E. Maynadier, counsel for complainants:

Cross-int. 22. (*De bene.*) Of what kind of wood was the revolving "former" made which you used in what has been called the Smith machine?

A. It was not made of wood at all. It was made of metal.

Cross-int. 23. (*De bene.*) Did it occupy as much of the interior of the mould as does the one represented in the drawing of the Smith patent, or was it more like the revolving "former" in "Exhibit Smith Model" in this respect?

A. I should say the "former" was larger in proportion to the size of the mould than that shown in the Smith model. As nearly as I can carry the sizes and proportions in my mind's eye, the diameter of the "former" at its largest part was about five-eighths or more of the diameter of the mouth of the finished crucible.

Cross-int. 24. (*De bene.*) Do you know why this "former" was made of metal instead of being made of wood as described in the patent, and why it was made so much smaller in proportion to the mould than is shown in the patent?

A. I suppose it was made of metal because that is stronger, not liable to warpage or shrinkage, and can be so fitted into the machine as to fit and continue in working operation upon its spindle with more exactness than if made of wood. Both wood and metal, and wood faced with metal, were common materials and modes of construction of "formers" of this class of machines prior to the Smith patent. The material of the "former," its size, proportions to the mould in which it is to be operated, as well as the shape of both the "former" and the mould are all mere matters of mechanical judgment in the construction of the machine, and several machines varying in all these particulars might be made, each of which might

be substantially the sort of machine shown and described in the Smith patent.

Cross-int. 25. (*De bene.*) The shape of the mould and the shape of the revolving "former" (of the Wise and Smith patents) or of the working face of the rib (of the Nimmo patent) depend wholly, do the not, upon the shape of the vessel to be produced?

A. As you have got the several machines mixed in your question, I can't answer it without a little explanation. In the
218 Smith patent the shape of the revolving former is wholly dependent on the internal shape of the vessel to be made; that is, its profile in vertical section must be the same as that of the interior of the finished vessel. In the Nimmo machine the working face of the rib must in like manner correspond in profile to the vertical profile of the interior of the finished vessel. In the Wise machine, however, this is not so, as in that machine the same former may be so adjusted and used as to make vessels having various shapes in vertical profile.

Cross-int. 26. You referred in one of your answers to certain formers as old and well known prior to the Smith patent. Can you give any instance of any revolving former of less diameter than the interior of the vessel desired, except the Wise and Smith patents?

A. I did not say in any previous answer that *revolving* formers *o less diameter* than the interior of the vessel to be made were common or well known prior to the Smith patent, further than is exhibited in the prior patent of Wise, of 1852. The Wise machine is the only one I remember in which the revolving former was employed prior to the date of the Smith patent, and in this Wise machine this kind of former was made very much smaller than the interior of the vessel, in order that it might be most easily inserted downward into the latch, and it was not only made of either wood or metal, but was also made capable of adjustment, as before remarked, so as to produce vessels of different internal shapes. Any person skilled in the art with a knowledge of the Wise patent, and of the various wooden and metallic ribs or formers used prior to Wise's invention, would be fully instructed how to make the Smith machine with a former of any desired proportions relatively to the vessel to be made, and of either wood or metal, of these materials combined, or of some other similar material.

Cross-int. 27. Did you know prior to to-day that the Smith patent contained this statement, namely, "This former is made of wood"?

A. Of course I saw that the first time I read the patent.

Cross-int. 28. (*De bene.*) What was your reason for omitting all reference to this change when you described the Smith machine, so called, upon which you saw the three crucibles made which you marked?

219 A. I don't recollect having "described" the Smith machine upon which I saw the crucibles made, any further than saying in substance that it was a machine made substantially like the machine shown and described in the Smith patent. I presume I had no other reason for omitting to say that the revolving former was

made of metal than for omitting to say anything about what material it was made of, or for omitting to say what materials the several other parts of the machine were made of; a good reason for omitting all mention of the materials being this, that in my judgment it was and is perfectly immaterial whether the former and other parts were made of wood or metal. It never occurred to my mind that it was of any consequence in the subject under consideration, and that is probably why it never occurred to me to mention what material the former of the machine was made out of.

Cross-int. 29. You have just said that in your judgment it "is perfectly immaterial whether the former * * * was made of wood or metal." When you qualified yourself as an expert, you said nothing which, in my opinion, even tended to show that you were qualified to hold or express any opinion whatever upon this matter. Do you believe that you have any definite knowledge as to the practical difference between the comparatively large wooden revolving former shown and described in the Smith patent, and the comparatively small metallic revolving former used in the machine on which you saw those three crucibles made? If you do, state upon what grounds.

A. In the first place, it is true that I have said it is perfectly immaterial, in my judgment, whether the former in the working Smith machine be made of wood or metal, so far as is concerned the question whether that machine is one made substantially like the machine shown and described in the Smith patent. In the next place, I think I am sufficiently qualified, and have so stated, to enable me to form a tolerably correct judgment upon the point upon which I have expressed the opinion just stated. I have never tried any experiments, or seen any tried, with Smith machines having the formers made of greatly different sizes comparatively to the mould, and of different materials, and therefore cannot
220 state any very positive opinion as to what, if any, differences in practical operation might be observed between the effects in operation of a comparatively large wooden revolving former and a comparatively small metallic revolving former. In my judgment, however, there could be no material difference in the practical operation and effect of the machine by a mere change of the material composing the former, and my reason for this conclusion is, that I know of nothing to prevent substantially the same practical operation of the surface of the former upon the plastic material employed to make the crucible, whether said "former" surface be composed of some sufficiently hard and properly finished wood or some properly finished metal or other substance, and I should think that in practical operation a comparatively small revolving former would be more desirable than one very much larger, for the very simple reason, (which I suppose is familiar to all workmen skilled in the art of making crucibles,) namely, that as the profile, or that part of the surface of the former which gives shape to the side of the vessel is the part that serves to press and work up the batch into shape during the rotation of the

mould, and the bottom portion, or lower end of the former, has to be forced down into the batch and effect the displacement of the material as it is made to descend to its lowermost position, it is a fact too plain to be overlooked, that the greater the diameter of the revolving former, (or the bigger its lower end is,) the more difficult it must be to first displace the material and bring the former down to its proper working position, and the less opportunity there will be for the desired lateral movement of the former in the operation of shaping up the material. If I remember, those skilled in the art were instructed by the old Wise patent of 1852 as to the desirability of having the revolving former to be made of metal or wood, made slender or of small size, compared with the diameter of the vessel to be made.

Cross-int. 30. You never saw any other revolving former of less diameter than the vessel which it was designed to make used, except the one you saw used in making those pots which you marked, did you; and you never saw this one used except upon that single occasion, did you?

A. I never *saw* any machine with a revolving former in practical operation making crucibles that I remember, except the ma-
221 chine which I have seen running at the defendants' establishment in this city. I have seen and examined the machine two different times, I think, but believe I have only seen it *in operation* making crucibles on one occasion.

[Adjourned to meet at same place at 2:15 P. M.]

FRIDAY, *Sept.* 14, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

J. N. MCINTIRE—examination continued:

Cross-int. 31. (*De bene.*) Did the revolving "former" keep clean when you saw it in use, or did the material adhere to it to any extent; and if so, describe the extent as well as you can?

A. In making the sample crucibles, to which I have already referred, on the Smith machine at the defendants' establishment, the "former" was comparatively clean after the formation of the crucible. The workman who manipulated the machine was not one of the men who was in the habit of running, or at all experienced in the use of any of the crucible-making machines at the shop, and when he first started to work the machine did not manage it properly, so that the stuff gathered some on the revolving "former," and he had to scrape it down with his hand into the bottom of the mould and move the "former" up again towards the side of the mould. The crucible was, however, finished up in a satisfactory condition, even after this imperfection at the first movement of the "former" towards the side of the mould.

Cross-int. 32. (*De bene.*) How do you know what you state about the workman?

A. From what he told me.

Cross-int. 33. (*De bene.*) How about the other two sample crucibles that you saw made?

A. The last two crucibles were made without any trouble with the stuff gathering on the "former."

Cross-int. 34. (*De bene.*) What prevented the material from sticking to the revolving "former" when these two sample crucibles were made, so far as you could judge?

222 A. So far as I could judge, there was no tendency of the material to gather on the "former"; probably because the latter was worked or moved up properly against the plastic material.

Cross-int. 35. (*De bene.*) Do you mean that the material did not stick to the "former" at all when these last two sample crucibles were made?

A. I noticed the surface of the metallic "former" had a different appearance after its removal from the finished vessel, due to the presence on its surface of a thin film or small particles of the material and moisture.

Cross-int. 36. (*De bene.*) What was the speed of the revolving mould, and how was it driven—by hand, or by being belted to the shafting?

A. I didn't calculate the speed of the revolving mould, nor observe particularly the speed of the main driving shaft in the shop, or the size of the pulleys on the shaft and on the machine. The spindle or vertical shaft of the machine was provided with the usual fast and loose pulleys, with a belt running off a counter shaft, and had the usual treadle shipper lever through the medium of which the workman threw the belt off and on, and so far as I observed, the machine was run at about the same speed with other crucible-making machines that I saw in the shop.

Cross-int. 37. (*De bene.*) What, if anything, was used to prevent the adhesion of the material to the revolving former when you saw this Smith machine at work?

A. I didn't see anything used for this purpose, except that the workman wiped the former off clean and oiled it, (with a piece of waste, I believe,) and appeared to wet the former or material inside, or both slightly, with a piece of sponge or something of that sort, with which he squeezed out or sprinkled in a little water while the mould was running and the plastic material being shaped up by the former.

Cross-int. 38. (*De bene.*) How long a time did it occupy for making these three sample crucibles, and how long a time was it from the beginning of the first one till the third one was shaped up, so far as you can judge?

A. I did not take any account of the time occupied in making them, and could not now form any definite idea of it, but I
223 should think that one of them was made somewhere in about two or three minutes. My impression is now, that one of them was made in about the same length of time that I noticed another

workman occupied in making a crucible on the other kind of machine.

Cross-int. 39. (*De bene.*) These three sample crucibles are the only ones you ever saw made on this machine with the metallic revolving former, are they not?

A. I am not positve that they are, but I never saw more than one or two others, if any.

Cross-int. 40. (*De bene.*) How did they prevent the material from adhering to the walls of the metallic mould, so that they could not get the crucible out?

A. I did not see but one crucible taken out of a metallic mould. In the removal of this from the mould, (which was partible horizontally about the middle,) the operator unfastened the parts of the mould, and carefully lifted off the top half, and then setting the remaining portion with its contained crucible on top of a post no larger round than the false bottom, he gently removed the lower half of the mould downwards, when the crucible was carefully lifted from the false bottom and left on the drying board. There did not appear to be any troublesome tendency of the mould and the material to hang together, and I suppose that the inner surface of the metal mould had been oiled.

Cross-int. 41. (*De bene.*) Are you perfectly sure that the metallic "former" revolved on the spindle during all the time that the mould revolved and the metallic "former" was in contact with the material; and state whether you watched the whole operation in making all three of the sample pots carefully, with a view to see whether the "former" revolved or not?

A. I did watch the operation of the machine with this special object in view, and observed that the "former" revolved most of the time, and, so far as I could see, always when in frictional contact with the mass of material being operated upon. It would be quite impossible to determine by visual inspection whether or not the former ceased to revolve at some moment when its surface might be in actual contact with the material. The top of the crucible is pretty small; the head carrying the rib comes down pretty close to
224 it, and there is not much room where one can get his head in to see; besides, there is more or less liability of one getting his face splattered with the material. Of course there is more or less friction to be overcome before the revolving former can be made to turn on its axis of motion, and even though its surface may be more or less in contact with the rotated mass of material, said former will not rotate until it shall have been forced sufficiently hard up against the material to create a frictional contact sufficient to overcome the friction it encounters in the operation of running on its axis.

Cross-int. 42. (*De bene.*) What prevented the former from going too deep into the mould and making the bottom too thin?

A. The carriage on which the former was mounted was forced down to just the right position to leave the lower end of the former at the right place.

Cross-int. 43. (*De bene.*) Well, what determined how far down the carriage should go?

A. The workman regulated that by a gauge or mark on the frame somewhere.

Cross-int. 44. (*De bene.*) Do you know why he did not depress the carriage until it came in contact with the top of the mould, as described in the Smith patent?

A. I suppose he did not because that would shove his former down too far. I will add that I do not recollect that the Smith patent describes what you say it does in the last end of your question.

Cross-int. 45. (*De bene.*) Don't you know that the Smith patent describes the carriage as pressed down as far as it will go in order to bring the lower extremity of the former the right distance from the upper surface of the false bottom, and that when pressed down as far as it will go the under surface of the carriage is arrested by the upper surface of the mould?

A. I know that the specification of the Smith patent says as follows: "The length of the 'former' being such that when the bracket *q* is pressed down as far as it will go the lower extremity of the 'former' *l* will be distant from the surface of the false bottom *n*, of the mould, the thickness which is required for the bottom of the crucible," but I have not understood, and do not understand
225 that this language recites that the vertically sliding bracket is forced down on to the top of the mould so that the latter constitutes the stop, to determine the point down to which the "former" may be forced. And it is a matter of inference whether the top of the mould is to be thus utilized as a stop or gauge to the descending bracket, or whether the latter is stopped by the usual means of a stop in the frame of the machine. It is true that no stop appears in the drawing, but in the single view of the machine given it would not naturally be seen. It is also true that no mention is made in the specification of any stop on the frame of the machine, and that in drawing the machine looks as if the lower surface of the bracket was down close to the top of the mould, from which appearance it is not an unnatural inference that the top of the mould does serve, in the machine shown in the drawing, to stop or regulate the descent of the bracket and "former," but this is only an inference, and it is quite as natural or fair to infer that although not mentioned it is designed in the patent to have the usual stop device on the frame of the machine somewhere, because in all prior moulding machines some such stop device was so universally well known and used that the omission to speak of it in the specification would leave no person skilled in the art in any doubt as to the necessity or propriety of having such stop on the frame any more than they would be in doubt about numerous other details of construction neither shown or described in the patent. In the Wise patent, for instance, of 1852, where this common stop device is necessary, said device is not shown at all in the drawing of the patent, though it does happen to be mentioned somewhere in the specifications.

Cross-int. 46. (*De bene.*) What prevented the workman from moving the revolving metallic former too far away from the axis of revolution of the mould, and thereby making the wall too thin, when making the three sample crucibles you spoke of?

A. Why, of course he could not push the former any further than it was permitted to go by contact at its upper end with the inwardly projecting flange formed on the top of the mould, said flange being designed to thus limit the movement of the former and so regulate or determine the thickness of the vessel being moulded.

226 Cross-int. 47. (*De bene.*) How about the plaster mould which you saw used in that machine?

A. I did not notice how the plaster mould was made. I only observed particularly the flange on the metallic mould, as I was careful to notice if it was made according to the Smith patent, and knew that according to the patent the flange at the upper end of the mould should thus regulate the extent of motion sidewise of the former.

Cross-int. 48. (*De bene.*) Can't you say how the workman regulated the sidewise movement of the former when he used the plaster mould?

A. No; I did not notice. This mould didn't belong to the machine, and was not adapted to be used in that kind of a machine, and was only stuck in and used experimentally to make a crucible in a mould composed of plaster instead of in a mould made of metal.

Cross-int. 49. (*De bene.*) How do you know whether the three sample pots are "in a satisfactory condition" or not?

[Objected to, as an incorrect statement of the witness's testimony.]

A. I don't know *what* condition they are in. I have not seen them since they were moulded. After they were moulded those that were taken out of the moulds appeared to me to be perfectly made, like crucibles made on the other machines in the establishment. I don't recollect using the words quoted in your question, except in describing a certain incident in connection with the making of *one* of said crucibles.

Cross-int. 50. (*De bene.*) You don't profess to be able to judge, by looking at a crucible, whether the material is "strained," or whether it is properly compacted, or whether it has more or less air caught in the material by the overlaying of one part of the material upon another, or whether there are any other latent defects in the vessel, do you?

A. No; I don't pretend to be an expert as to the latent qualities or defects which may be inherent to the moulded articles. All I have intended to assert has been this: that upon a visual inspection, the moulded crucible about which I have testified appeared to me to present the same appearance, as to perfection of shape and
227 smoothness of the moulded surface, that is presented by the other crucibles made at the establishment of the defendants.

Cross-int. 51. (*De bene.*) Did you revolve the metallic former by hand, so as to see whether it would revolve freely on its spindle?

A. Yes, sir.

Cross-int. 52. Do you believe that the revolving stop formed by the upper surface of the mould in the machine shown in the Smith patent (assuming for this question that there is no other stop to limit the downward motion of the bracket *q*) is substantially the same as the stop *p* of the Nimmo patent; or that the revolving stop formed by the flange around the mouth of the mould is substantially the same as the stop *o* of the Nimmo patent?

A. I don't exactly understand your question, but will say that the revolving top of the mould in the Smith machine (when assumed to operate as a stop for the descent of the "former frame") is not, in my opinion, the mechanical equivalent of either the stop *o* or the stop *p* in the Nimmo patent; in the latter it takes both stops *o* and *p*, operating together on the hand lever, to effect the stoppage of the moulding rib in its two movements, or compound movement downward and backward, while the revolving top of the mould referred to serves only to stop the descent of the former and exercises no influence over the movement of the latter in its motion towards circumference of the mould. In so far as the two stops *o* and *p* in the Nimmo patent perform conjointly the office of limiting the descent of the forming rib, and thus the thickness of the bottom of the moulded vessel, these two stops are similar in function to the top of the revolving mould in the other case. This is about my idea of whatever similarity there may be between the top of the mould in one case and the stops in the other case. I don't see any substantial similarity between said flange and said stop *o*, as mechanical devices, further than that in one machine the said flange operates to limit the movement sidewise of the former, while in the other case the said stop *o* perform as one of its functions the office of determining the point to which the former can be moved sidewise, or towards the circumference of the mould.

Cross-int. 53. (*De bene.*) Do you know the name of the workman who made those three sample pots?

A. Mr. Du Barry, one of the defendants.

J. N. McINTIRE.

228 Defendants' counsel here states that the evidence as to that branch of the defence based upon the Kier machine is closed, in order to enable the complainants to proceed with their rebutting testimony.

[Adjourned to meet at same place, at 10 o'clock A. M., Saturday, September 15, 1877.]

SATURDAY, *September* 15, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

C. C. ARENSBERG, called on part of defendants, and being duly sworn, deposes as follows:

Int. 1. State your name, age, residence, and whether you are one of the defendants in this case.

A. C. C. Arensberg; I am thirty-seven years of age; I reside in Pittsburg, Pennsylvania; I am a member of the defendant firm.

Int. 2. How long have you been in the crucible business?

A. Since the organization of the firm. My impression is it was the spring of 1872. I am not sure whether it was the spring of 1872 or 1873.

Int. 3. Are you ever at the works in the ordinary course of your business?

A. I am there daily.

Int. 4. How did you make crucibles at first?

A. By hand, on a potter's wheel, shaped by hand without any mould.

Int. 5. When did you put in your machines and begin manufacturing by machinery?

A. I can't tell that without referring to the books. I think about six or eight months or a year after we commenced work.

Int. 6. Did you get the machines to operate in an entirely satisfactory way when you first began to operate them?

A. We did not. We had trouble until the workmen became familiar with the use of the machine and knew how to work it properly.

229 Int. 7. Look at the model now shown you, marked "Exhibit Smith Model," and state whether you ever saw a machine like that; and if so, when and where?

A. I have seen a machine like the Smith model before me, substantially the same, at our works during this week. In an unfinished state, I have seen it for the last ten days.

Int. 8. If there is any difference in construction between the model and the machine, state what it is.

A. The only difference is that in the machine the revolving former is attached to the spindle by a collar on the spindle and a cap on the former, and this cap is attached to the revolving former by four bolts screwed into the former, and that we have fast and loose pulley on the shaft in the machine, and the model has only a fast pulley.

Int. 9. Did you ever see the machine in operation; and if so, when?

A. I have seen it in operation Tuesday, Wednesday, Thursday, and Friday of this week.

Int. 10. Will you please state how it operated?

A. As the workmen became used to the machine it worked satisfactorily.

Int. 11. Were any crucibles made on it?

A. Yes, sir, in my presence.

Int. 12. Did you ever see the machine operate in the presence of J. N. McIntire?

A. I did.

Int. 13. Can you state how many crucibles you saw made in the presence of Mr. McIntire?

A. My impression is two or three. He came rather late in the afternoon, and was in a hurry to get away again. Mr. Dalzell, one of our firm, was waiting a train, and had to hurry off.

Int. 14. Was Mr. McIntire in a hurry to get away?

A. No. He wanted to thoroughly investigate the working of the machine.

Int. 15. How many times was he at the works, and state whether or not he made any examination of your method of manufacturing crucibles?

A. He was at the works twice. He made a thorough
230 examination of the manufacture of crucibles from the commencement of the making of the crucible until it was finished and burned. He also examined the working of the Wilkes machine, examined the kilns for burning them, and examined the crucibles in their different states of completion.

Int. 16. What was the quality of the crucibles made on the Smith machine?

A. Just as good as those made on the Wilkes machines, the other machines we have in use, or as good as any we make.

Int. 17. What do you mean by Wilkes machine?

A. The same as the model. Exhibit Defendants' Model.

Int. 18. Did you see any mark put on the crucibles made while Mr. McIntire was inspecting the operation of the Smith machine?

A. I did. I saw an *x* marked on the inside of a crucible, made in the iron mould, marked by him with his penknife, and also two others marked on the outside, near the top, *xi* and *xii*.

Int. 19. How many crucibles did you see made on the Smith machine yesterday?

A. I think about eighteen were made yesterday on it; the workman was not constantly engaged making crucibles on the machine.

Int. 20. Can you state who was present when the machine was operated yesterday, either during the whole or part of the time it was operated?

A. There were present John H. Dalzell, H. H. Wallace and Urban Mahrer, and the workman, H. E. DuBarry, our superintendent.

Int. 21. Do you know how long it took DuBarry to make a pot on the Smith machine, as compared with the length of time required by your workmen in the ordinary running of the other machines at your works?

A. DuBarry is not a potter; has little, if any, experience in the moulding of crucibles. He completed a crucible on the Smith machine in about the same time it required an experienced workman to make one on the other machine. John H. Dalzell timed it, and he made one in less than three-quarters of a minute, and this crucible was as good as any we ever made, being perfect. On an average it took DuBarry about a minute and a half to make the crucibles.

231 Int. 22. In what kind of moulds were these crucibles made?

A. In iron and plaster moulds. We used plaster moulds, because we only had one iron mould.

Int. 23. State whether or not that iron mould resembles the mould on the Exhibit Smith Model.

A. It does.

Int. 24. What do you propose to do with the Smith machine that you have at your works?

[Objected to as incompetent.]

A. We intend using it, and have ordered a workman to commence work on it next Monday, and by so doing throw one of our other machines out of use.

Int. 25. Is there any special use to which this Smith machine at your works is particularly applicable, by reason of its construction?

A. There is. It is better adapted to the making of large crucibles than our other machines, as it is more strongly built.

Int. 26. Please state of what material that Smith machine is built.

A. It is built entirely of iron, excepting the bottom of the iron mould, which is made of wood, and the three set screws of the hollow-headed chuck, which are made of steel. The belt is not iron.

Int. 27. How did the crucible produced on the Smith machine compare with those produced upon the other machines now in use at your works, when you first began to use them?

A. They compare very favorably. I consider they are better made than those made on the other machine when we commenced using it. In fact, they are as well made as those we make now on the old machine.

[The whole of the testimony objected to as irrelevant and immaterial, because the machine is clearly not that described in the Smith patent.]

232 Cross-examination by James E. Maynadier, Esq., counsel for complainants, without waving any objections:

Cross-int. 28. What prevented the material from sticking to and collecting upon the revolving former when you saw the machine used?

A. In the first place the stuff didn't stick to the revolving former, as soon as the operator became used to the machine. In the second place the ignorance of the workman in not knowing how to work the machine caused it. As soon as he understood how to use the lever properly, the material did not stick to the revolving former.

Cross-int. 29. What part of the machine do you call the lever?

A. The wheel that works the screw shaft of the revolving former from the center of the crucible to its side.

Cross-int. 30. Can you give any reason why the material didn't stick to and collect upon the revolving former every time the machine was used?

A. Because the workman, as he became experienced in the use

of the machine, understood better how to use the hand-wheel so as to guide the revolving former steadily against the material.

Cross-int. 31. Wasn't oil used upon the revolving former to prevent the material from sticking to it?

A. Oil was used at first, afterwards not. We found the oil no particular benefit.

Cross-int. 32. Was anything used to prevent the former from revolving, or did it revolve freely every time you saw it used?

A. Nothing was used to prevent the former from revolving. It revolved freely.

Cross-int. 33. I cannot understand why the manipulation of the hand-wheel affects the sticking of the material to the former. Can you throw any light upon this matter?

A. I can explain it only on the ground that when you turn the wheel too fast, thereby pressing the revolving former right into the thickest of the material, it causes it to stick.

Cross-int. 34. Do you believe that the polished metal surface of the former remained clean from the time it was let down into the batch until the pot was shaped, every time you saw the machine used, except on one occasion?

233 A. When properly worked it remained cleaned.

Cross-int 35. Did you notice any difference in the consistency of the material used on the Smith machine and that used on your other machines?

A. At first the material used was stiffer than that used on our other machines. After that the material used was softer than that used in the other machines. We then found that the machine required the same temper or consistency of material that our other machines required. We are now using the same material tempered to suit the other machines on the Smith machine.

Cross-int. 36. When the material did stick to and collect upon the revolving former, what did Mr. DuBarry do?

A. Cleaned the former and repeated the operation of making a crucible.

[The examination of this witness adjourned for the present, and the testimony adjourned to meet at same place, Monday, September 17, 1877, at 10 o'clock.]

TUESDAY, *Sept.* 18, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

C. C. ARENSBERG—examination resumed:

Cross-int. 37. Please explain how you can tell whether a pot is satisfactory or not when it comes from the mould.

A. By the general appearance of the material and its smoothness inside, without flaws when it leaves the machine. The inside of the crucible is always examined closely, because when the inside is perfect the outside is nearly always perfect.

Cross-int. 38. Did you ever know the melted metal to work into

the wall of a crucible, and make it scale off thin pieces from the size of a half dollar up to as big as the palm of your hand, flaking off from the inside of the pot?

A. I never did.

Cross-int. 39. Did you ever know pieces to flake off from the outside?

234 A. Yes, but the flaking or scalping was not caused by the melting of the metal in the crucible, but by too much heat being brought suddenly to bear upon the outside of the crucible. Scalping is also caused when a crucible is damp being placed in the furnace, or a drop of water upon it before placing in the furnace will cause scalping.

Cross-int. 40. Suppose you should divide the ball into two parts, and put the larger of the two parts in the mould, and shape it on the machines you use in your business, and then remove the rib, put in the rest of the ball, and complete the shaping of the pot; and state, first, whether you would be able to detect, by ocular inspection, any difference between the pot made in this way and one made in the usual way; and, secondly, whether you know of any difference in fact between them.

A. I don't know. I never saw it tried. It is not workmanlike.

Cross-int. 41. Do you know what the effect is when small particles of air get surrounded by the material, and remain in the material after it is shaped into the form of a crucible?

A. It would be an injury to the crucible.

Cross-int. 42. Would it produce what you call "scalping"?

A. I don't know.

Cross-int. 43. Did you ever see what is called a "blistered" crucible?

A. I never saw one.

Cross-int. 44. Do you know the meaning of that term?

A. I think it would mean a scale on the crucible detached in the center, but attached around the edges.

Cross-int. 45. Did you ever see a crucible with blisters upon it, such as you have just described?

A. I don't know. I have seen crucibles after burning with spots on them, but can't tell whether they were blisters or not.

Cross-int. 46. You are not a skilled workman in the manufacture of crucibles, are you?

A. I am not, although I understand the business.

Cross-int. 47. You never made a pot, either by hand or machinery, did you?

A. I did not.

Cross-int. 48. Do you know what "straining" the material is, and what the effect of it is upon the pot?

235 A. I can't say.

Cross-int. 49. Did you never know the melted metal to work its way in under the inner surface of the pot?

A. My impression is, not. I can't remember of such a case.

Cross-int. 50. Dou know why the revolving former, in that machine which you call the Smith machine, was made so long that its top always projected above the upper surface of the mould, instead of being below it, as shown in the Smith patent?

A. I don't know why. Accidentally, I suppose.

Cross-int. 51. You are not a machinist, are you?

A. I am not.

Cross-int. 52. Please look at the drawing of the Smith patent and state whether you can form any opinion or not as to what would become of the surplus material which was forced up between the flange of the mould and the top of the revolving former; and state any reason, if you know any, why the greater part of it, if not the whole of it, would not lodge upon the upper surface of the former for a moment, and be carried, by centrifugal force, away from the axis of the revolving former, and drop down between the former and the inner surface of the nearly-shaped pot, and then be carried round in the mould.

A. First, the surplus material would be thrown away from the iron mould altogether the moment it would reach the top of the [top of the] former, above the flange of the iron mould. I don't know that it would lodge in the former; and if any did, my impression is, it would throw it away free from the mould, and not fall into it.

Cross-int. 53. You did not assume, in your last answer, that the upper surface of the former, as shown in the Smith patent, is below, by nearly the entire thickness of the flange, the upper surface of the mould; why didn't you so assume?

[Objected to, first, because the witness is not called as an expert, with regard to the reading of drawings, etc., but, on the contrary, to testify as to certain facts; and, second, because if so qualified, he could not make an assumption which was entirely contrary to said drawing, as the drawing does not show such a state of facts.]

236 A. My impression is that the Smith patent requires the former should touch the flange of the mould. This being my impression, I couldn't assume that the upper end of the former went below the flange of the mould.

Cross-int. 54. What part of the former, when made as described in the Smith patent, do you think touches the flange of the mould, and what part of the flange does it touch? and isn't it perfectly clear from the drawing and specification of the Smith patent that the upper corner of the former touches the lower corner of the flange?

[The question is objected to, for the first reason given in the last objection; and, second, because the patent itself, a copy of which is in evidence, is the best evidence of matters contained therein.]

A. I think the upper part of the former touches the lower edge of the flange of the iron mould. I understand very little about drawings.

Cross-int. 55. Do you know why the former in that machine

the wall of a crucible, and make it scale off thin pieces from the size of a half dollar up to as big as the palm of your hand, flaking off from the inside of the pot?

A. I never did.

Cross-int. 39. Did you ever know pieces to flake off from the outside?

234 A. Yes, but the flaking or scalping was not caused by the melting of the metal in the crucible, but by too much heat being brought suddenly to bear upon the outside of the crucible. Scalping is also caused when a crucible is damp being placed in the furnace, or a drop of water upon it before placing in the furnace will cause scalping.

Cross-int. 40. Suppose you should divide the ball into two parts, and put the larger of the two parts in the mould, and shape it on the machines you use in your business, and then remove the rib, put in the rest of the ball, and complete the shaping of the pot; and state, first, whether you would be able to detect, by ocular inspection, any difference between the pot made in this way and one made in the usual way; and, secondly, whether you know of any difference in fact between them.

A. I don't know. I never saw it tried. It is not workmanlike.

Cross-int. 41. Do you know what the effect is when small particles of air get surrounded by the material, and remain in the material after it is shaped into the form of a crucible?

A. It would be an injury to the crucible.

Cross-int. 42. Would it produce what you call "scalping"?

A. I don't know.

Cross-int. 43. Did you ever see what is called a "blistered" crucible?

A. I never saw one.

Cross-int. 44. Do you know the meaning of that term?

A. I think it would mean a scale on the crucible detached in the center, but attached around the edges.

Cross-int. 45. Did you ever see a crucible with blisters upon it, such as you have just described?

A. I don't know. I have seen crucibles after burning with spots on them, but can't tell whether they were blisters or not.

Cross-int. 46. You are not a skilled workman in the manufacture of crucibles, are you?

A. I am not, although I understand the business.

Cross-int. 47. You never made a pot, either by hand or machinery, did you?

A. I did not.

Cross-int. 48. Do you know what "straining" the material is, and what the effect of it is upon the pot?

235 A. I can't say.

Cross-int. 49. Did you never know the melted metal to work its way in under the inner surface of the pot?

A. My impression is, not. I can't remember of such a case.

Cross-int. 50. Dou know why the revolving former, in that machine which you call the Smith machine, was made so long that its top always projected above the upper surface of the mould, instead of being below it, as shown in the Smith patent?

A. I don't know why. Accidentally, I suppose.

Cross-int. 51. You are not a machinist, are you?

A. I am not.

Cross-int. 52. Please look at the drawing of the Smith patent and state whether you can form any opinion or not as to what would become of the surplus material which was forced up between the flange of the mould and the top of the revolving former; and state any reason, if you know any, why the greater part of it, if not the whole of it, would not lodge upon the upper surface of the former for a moment, and be carried, by centrifugal force, away from the axis of the revolving former, and drop down between the former and the inner surface of the nearly-shaped pot, and then be carried round in the mould.

A. First, the surplus material would be thrown away from the iron mould altogether the moment it would reach the top of the [top of the] former, above the flange of the iron mould. I don't know that it would lodge in the former; and if any did, my impression is, it would throw it away free from the mould, and not fall into it.

Cross-int. 53. You did not assume, in your last answer, that the upper surface of the former, as shown in the Smith patent, is below, by nearly the entire thickness of the flange, the upper surface of the mould; why didn't you so assume?

[Objected to, first, because the witness is not called as an expert, with regard to the reading of drawings, etc., but, on the contrary, to testify as to certain facts; and, second, because if so qualified, he could not make an assumption which was entirely contrary to said drawing, as the drawing does not show such a state of facts.]

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[The question is objected to, for the first reason given in the last objection; and, second, because the patent itself, a copy of which is in evidence, is the best evidence of matters contained therein.]

A. I think the upper part of the former touches the lower edge of the flange of the iron mould. I understand very little about drawings.

Cross-int. 55. Do you know why the former in that machine

which you call the Smith machine was made of metal instead of wood?

A. I do not know why.

Cross-int. 56. Do you know why the former was made so much smaller in that machine, relatively to the mould, than is shown in the Smith patent?

A. So that it could be got in and out of the crucible.

Cross-int. 57. Can you give the relative diameter of the former and the inside of the mould in that machine?

A. I cannot.

Cross-int. 58. How many pots, all told, have you seen shaped on that machine with the metal mould in it?

A. I don't know how many.

Cross-int. 59. Mr. DuBarry operated the machine every time you saw it operated, did he not?

A. He operated the machine.

Cross-int. 60. Do you know why you put in that machine a rib such as you use in your other machines?

237 A. To satisfy ourselves that the machine could be worked with any kind of a rib.

Cross-int. 61. You were not at the works yesterday, were you?

A. I have not been out of the house since Saturday evening, on account of sickness. This prevented me from going to the works yesterday.

Cross-int. 62. Do you know why the bottom of the revolving former in that machine which you call the Smith machine was made with an unbroken surface instead of having a hole through it to receive the collar or nut which holds it upon the spindle?

A. Well, I don't know, without it be that we thought it should be so. That is the only reason I know.

Cross-int. 63. Under whose directions was that machine built?

A. Mr. Urban Mahrer, with the assistance of Mr. DuBarry.

Cross-int. 64. When was it begun and when finished, as near as you can now say?

A. I think it was begun September the 3d, or at least hurried up at that time; it may have been begun a little before that, and was finished the afternoon of September the 10th. This is my recollection of it.

Cross-int. 65. Was the metal revolving former about which you have spoken, the only one you had made?

A. It was the first and only one we had made.

Cross-int. 66. Who gave his instructions to Mr. Mahrer?

A. I gave the instructions to him to build the machine, but that he should consult with Mr. DuBarry.

Re-direct examination:

Int. 67. Can you produce the three crucibles made in Mr. McIntire's presence, and marked by him X, XI, and XII?

A. Yes; these are they.

[The above crucibles offered in evidence, and marked "Defendants' Exhibit, McIntire, X, XI, XII." James I. Kay, Examiner.]

Int. 68. Do you know whether the sponge which is ordinarily used for finishing the crucibles in the inside was used in connection with the crucibles Exhibit X and XI?

238 A. Positively it was not used in Exhibit X, and my impression is that it was not used in Exhibit XI.

Int. 69. Please state whether crucibles Exhibits McIntire X and XI are good crucibles.

A. They are good crucibles; as good as any made on our other machines.

[Last question objected to as immaterial, it being plain that the crucibles were not made on a machine constructed in accordance with the Smith patent.]

Re-cross-examination by counsel for complainants *de bene esse:*

Cross-int. 70. Do you know what produced the seamed or cracked appearance in several places upon the outside of crucibles Exhibit McIntire XI and XII. When I say seamed or cracked, I refer to that appearance just pointed out to you on crucible Exhibit XII, and which you have enclosed with four lines made with your knife.

A. I don't know what causes it exactly. The iron mould was made in a hurry, and not turned as smoothly as it might or should have been. I, however, consider this no objection to the crucible, as the outside finishing of it removes this appearance from the crucible, because the marks are not deep. Again, on our other machine all crucibles made in plaster moulds have a similar appearance before they are finished outside. This is no objection to the crucible, in my estimation.

Cross-int. 71. You can readily see the same appearance upon a large part of the outside surface of crucible Exhibit XI, which was made in the plaster mould, can't you?

A. Yes, somewhat similar; not quite so marked. Another reason the No. XII shows deeper indentations than No. XI is, that it was handled oftener than the other one, and before it should have been touched at all, and I have a distinct recollection that No. X had the same appearance before it was finished, and now it shows as perfect as any crucible; further, Mr. H. Wallace, superintendent for Gautier & Co.'s works, Jersey City, New Jersey, was taken through our works by Mr. DuBarry and I about three years ago, and he examined the making of our crucibles, and pronounced them as nice looking as any he had ever seen.

239 [The last part of the answer objected to as hearsay.]

Int. 72. Please state whether the crucibles Exhibit McIntire X, XI, XII, have been in any way affected by the handling to which they have been subjected, since produced this afternoon?

A. They have been. They are too green to handle much. When in this condition handling bruises them, marks them, and puts them

out of shape. I notice this upon the crucibles Exhibits No. X, XI, and XII, particularly on XI and XII.

C. C. ARENSBERG.

[Adjourned to meet at same place to-morrow, Sept. 19, 1877, at 3 o'clock P. M.]

MONDAY, *Sept.* 17, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

JOHN H. DALZELL, called on part of defendants, and being duly sworn, deposes as follows:

Interrogatory 1. State your name, age, residence, and whether you are one of the defendants in this case.

Answer. My name is John H. Dalzell; I am forty-three years of age; I reside in Pittsburgh, Pennsylvania; I am one of the defendants in this case, a member of the firm of McCullough, Dalzell & Co.

Int. 2. Please state whether you ever saw a machine like, or substantially like, in construction to the model Exhibit Smith Model?

[Objected to as immaterial, the model being substantially different from the machine described in the Smith patent.]

A. I have.

Int. 3. When and where.

[Objection continued as to this question, and all questions relating to that machine.]

240 A. Tuesday, Friday, and Saturday of last week, at our works.

Int. 4. Did you see it in operation?

A. Yes, sir.

Int. 5. State whether you saw any crucibles made on it?

A. I have.

Int. 6. How did it operate?

A. Very nicely, for a new machine.

Int. 7. Can you give the name or names of any persons present when you saw it making crucibles?

A. Yes; Mr. McIntire, Mr. Kerr, Mr. Arensberg, Mr. DuBarry.

Int. 8. How many crucibles did you see it make in Mr. McIntire's presence?

A. One.

Int. 9. Did you examine that crucible?

A. I did.

Int. 10. How was it as regards quality, as far as you could judge?

A. Entirely similar to the rest of the crucibles that we manufacture.

Int. 11. How was it with regard to the other crucibles you saw made on that machine—as to quality, I mean?

A. Like all the rest that we manufacture.

Int. 12. How many of these crucibles that you saw manufactured were made in an iron mould?

A. One, certainly.

Int. 13. In what kind of moulds were the others made?

A. Plaster.

Int. 14. Bilge-shaped?

A. Yes, sir.

Int. 15. Did you time the machine in forming crucibles on any occasion?

A. Yes, sir.

Int. 16. Please state the result.

A. On Friday last we finished one complete in a minute. I didn't time any but one.

Int. 17. How did the time of moulding the other crucibles on the Smith machine compare with that one, as far as you can estimate the same by your observations at that time?

241 A. I didn't time any but the one, and therefore I couldn't say, as I wasn't paying any attention.

Int. 18. In the crucibles you have been testifying about, what kind of a "former" was used, stationary or revolving?

A. Revolving.

Int. 19. Did you ever see the Smith machine operated with a stationary former?

A. Yes, sir.

Int. 20. When and where?

A. Saturday last, at our works.

Int. 21. How did it operate?

A. I seen it make five crucibles; I did not time the first one. It made the second in two minutes and a half, complete; the third in three minutes, complete; the fourth in three minutes, complete; and the fifth in a little less than three minutes, complete.

Int. 22. What do you mean by the word "complete," used in your last answer?

A. The top trimmed off with a knife; the top smoothed with a sponge, if necessary, and the mould stopped.

Int. 23. At what stage did you begin to time the machine?

A. When the former was plunged into the plumbago.

Int. 24. Where did you procure the stationary rib or former which you used on Saturday last?

A. In the works. It was similar to what we had been using on our other machines.

Int. 25. How did these crucibles compare with the crucibles made on your other machines. I mean those made with a stationary rib or former, on Saturday last?

A. Equally as good.

Cross-examination by James E. Maynadier, Esq., counsel for complainants, *de bene esse:*

Cross-int. 26. What was the diameter of the revolving former which you saw used, compared with the diameter of the mould inside?

A. I don't know; I never measured it?

Cross-int. 27. Do you think it was as much as half?

242 Cross-int. 28. Was there room to get the hand down alongside of the former into the mould when the former was pressed over as near the inside of the mould as it would be when the pot was shaped?

A. You will have to put that in another way. I don't understand it. I never made any pots.

Cross-int. 29. You had nothing to do with the building of this machine, did you?

A. Financially, I had; otherwise, I had not.

Cross-int. 30. Do you know how many crucibles can be made in an hour upon the other machines used by your firm, run as they usually are?

A. About thirty, I suppose.

Cross-int. 31. Do you know how many men it takes for each machine, making thirty an hour?

A. No, sir.

Cross-int. 32. Do you know any reason why it took three minutes nearly to shape a pot on the machine with a stationary rib that you saw on Saturday, instead of taking only the same time that is occupied on the other machines; that is, a little less than two minutes?

A. Yes. The party operating the machine on Saturday had not the experience that the others had.

Cross-int. 33. Who operated the machine every time you saw it run?

A. Mr. H. E. DuBarry, one of our firm.

Cross-int. 34. Do you know any reason why that revolving former was not made of wood?

A. I do not.

Cross-int. 35. Are you aware that the Smith patent states that the former is made of wood?

A. No, sir.

Cross-int. 36. You saw the material stick to and collect upon the revolving former, did you not?

A. No, sir.

Cross-int. 37. Don't you recollect that when that first pot was shaped on Tuesday in the iron mould, when Mr. McIntire was there, that Mr. DuBarry took the former out of the mould, scraped

243 off the material which had collected upon it, then cleaned the former and put it back again into the mould and pressed it sideways with the hand wheel and leading screw?

A. I don't recollect any such thing happening.

Cross-int. 38. Was the pot that you saw made on Tuesday, marked in any way while you were present. If so, how and by whom?

A. I heard Mr. McIntire say something about marking the pot.

Cross-int. 39. You were there on Tuesday only a few minutes after they began to operate the machine, and had to leave to catch a train?

A. Yes, sir.

Cross-int. 40. They used the plaster Paris mould, such as you use on the other machines, didn't they, when you saw the machine operated on Friday and Saturday?

A. They did, and also the iron mould.

Cross-int. 41. Do you recollect how many they made in the iron mould on Friday and Saturday?

A. Mr. DuBarry made one in the iron mould at my request. I am not sure whether it was on Friday or Saturday.

Cross-int. 42. Do you know whether anything was done to prevent the material from sticking to and collecting on the revolving former?

A. They kept it revolving.

Cross-int. 43. Do you know how they kept it revolving?

A. By contact with the material.

Cross-int. 44. Did the former get dirty at all?

A. You couldn't put it in there without getting dirty. When the former was brought out there was not as much material adhering to it as I have seen on the stationary knife or rib in the other machines.

Cross-int. 45. Did the operator keep his hand inside the mould while the machine was in operation with the revolving former?

A. Indeed I can't answer that, for I don't know.

Cross-int. 46. Was the material which adhered to the revolving former spread all over it, or did it stick to some parts of the former and not to others?

A. The instances that I remember appear to be evenly distributed all over very thinly.

244 Cross-int. 47. Did the operator put anything on the revolving former, or anything inside the mould after the revolving former was forced down as far as was meant to go?

A. No, sir.

Witness adds that he may have made a mistake as to the day of the week when he was present with Mr. McIntire and saw the machine used. It was either Tuesday or Wednesday, and was certainly the day when Mr. McIntire was testifying in this case, and came out with Mr. Kerr and Mr. Arensberg in a carriage to the works.

JOHN H. DALZELL.

H. E. DuBarry, called on part of defendants, and being duly sworn, deposes as follows:

Int. 1. State your name, age, residence, and whether you are one of the defendants in the case.

A. My name is H. E. DuBarry; I am thirty-seven years of age; I reside in Pittsburgh, Pennsylvania; I am one of the defendants.

Int. 2. What is your trade, and what is your present occupation?

A. I am a machinist by trade, and my present occupation is superintendent of the crucible works of the defendants.

Int. 3. How long have you had charge of defendants' crucible works?

A. Ever since it was built, about five and a half years ago, in the spring of 1872.

Int. 4. Have you had superintendence of the manufacture of crucibles?

A. I have.

Int. 5. In all of its stages?

A. Yes, sir.

Int. 6. How long have you been using machines like Exhibit Defendants' Model for moulding crucibles?

A. About four years.

Int. 7. Have you had any practical experience in the operation of these machines?

245 A. Very little, if any.

Int. 8. Are you as skilled in the use of them as the workmen in your employ who have been operating them?

A. No, sir.

Int. 9. Were the machines you have been using as satisfactory in their operation when you first began using them as they are now?

A. No, sir.

Int. 10. Did the workmen succeed in moulding as smooth and perfect a crucible upon them then as now?

A. No, sir; at that time the workmen made one hundred a day, and now they make one hundred and fifty.

Int. 12. How many hours does that employ them?

A. From nine to ten hours.

Int. 13. Does that include the finishing?

A. Yes, sir.

Int. 14. Is the finishing done on the same machine as the moulding?

A. No, sir.

Int. 15. Is the crucible formed by the rib alone in the machine Exhibit Defendants' Model, without assistance from the workmen?

A. No, sir; the workman feeds the stuff in with the hand, generally the right hand.

Int. 16. After the rib or former has been withdrawn from the moulded crucible, does the rib require to be cleaned or not?

A. It requires generally to be wiped off.

Int. 17. Does the crucible require any cleaning out after being moulded?

A. Yes, sponged out; sponging the water out of it and any particles that may have dropped in.

[Adjourned to meet at same place at 2 o'clock P. M.]

H. E. DuBarry—examination continued:

Int. 18. Did you ever see a machine like, or substantially like, in construction, to Exhibit Smith Model; and if so, when and where?

[This question, and all others in relation to the machine in-
246 quired about, objected to as immaterial, the Exhibit Smith Model being substantially different from the machine described in the Smith patent.]

A. Yes, at our works, this last week.

Int. 19. Did you ever use it for forming crucibles?

A. I have used it several times.

Int. 20. How were the crucibles which you made on it, with regard to quality?

A. Materially good.

Int. 21. Can you name any person or persons who were present when you used the machine?

A. Yes, sir. Mr. McIntire, Mr. Kerr, Mr. Dalzell, and Mr. Arensberg, and by brother-in-law, Mr. H. H. Wallace.

Int. 22. Was Mr. McIntire present on more than one occasion?

A. Yes, sir; on two occasions.

Int. 23. Did you have any difficulty on either of these occasions with the machine?

A. Yes, sir; on the first day, Tuesday. It was, as far as I can tell, on account of the stock being too stiff and the belt was too loose; it run too slow, and the material gathered on the former.

Int. 24. What did you do then to complete the crucible which Mr. McIntire saw made at that time?

A. I took out the former and cleaned it off and put it in again and finished the crucible.

Int. 25. Do you know whether Mr. Dalzell was present on that occasion?

A. He was not.

Int. 26. Can you mention what day it was that you last used the Smith machine?

A. Yes, sir; on last Saturday.

Int. 27. Did it have the revolving former in at that time?

A. No, sir; it had a rib of one of our other machines in at that time.

Int. 28. When did you last use it with the revolving former?

A. On last Friday.

Int. 29. Do you remember how many crucibles you made on it on that day with the revolving former?

247 A. I think I made sixteeen.

Int. 30. Was the forming of any of these crucibles timed; and if so, by whom?

A. Yes, sir; there was one timed by Mr. Dalzell.

Int. 31. Do you know how the length of time required by the operation of forming a crucible on the Smith machine compares with the time required with one of your other machines? Is it greater or less?

A. Practically, I can't say.

Int. 32. What is your opinion, from the experience you have had with the two machines?

A. I think by practice it, the Smith machine, will make crucibles in less time.

Int. 33. How did the machine operate on Saturday when you had a stationary former on it?

A. Very good.

Int. 34. How many crucibles did you make?

A. Five with that rib or former.

Int. 35. What kind of moulds did you make the crucibles in on Friday last on the Smith machine?

A. We made, I think, fifteen in the plaster moulds, and one in the iron mould.

Int. 36. Had you used the iron mould before at any time?

A. Yes, sir; I think three or four times.

Int. 37. Did you have any difficulty in removing the crucibles from the iron mould?

A. No, sir; not any more so than with the others.

Int. 38. In the use of the Smith machine, did you aid the revolving former in any way?

A. No, sir.

Int. 39. State whether it would be possible to insert the hand, closed, or partially closed, as is necessary in the operation of raising the material to feed to the former, in the metal mould of the Smith machine when the revolving former is inserted therein and operating upon the material.

A. Yes, sir; you could get it partially in, but not without danger of crippling your hand. I would not risk it at all when the material is in, as if the hand touched the material it would be drawn
248 right in between the former and the mould; that is, with the iron mould.

Int. 40. In your use of the Smith machine, whether with plaster or iron moulds, did you in any way feed the material to the revolving former?

A. No, sir; I did not.

Int. 41. Please state how these crucibles, made by you on the Smith machine with the revolving former, compared in quality, shape, and finish with the crucibles made by you when you began to use the other machines like Exhibit Defendants' Model?

A. I think they are better.

Int. 42. How do they compare with the crucibles you now make on the machines like Exhibit Defendants' Model?

A. I think they are equally as good.

Cross-examination by James E. Maynadier, Esq., counsel for complainants, *de bene esse:*

Cross-int. 43. Was this machine, which you have spoken of as the Smith machine, made under your direction?

A. It was not.

Cross-int. 44. Do you know under whose direction it was made?

A. Yes, sir; under the direction of the man who built the Exhibit Smith Model, Mr. Urban Mahrer.

Cross-int. 45. Are you familiar with the Smith patent?

A. Partially so.

Cross-int. 46. Do you know any reason why the revolving former was made of less diameter, with relation to the diameter of the mould in the machine made under Mr. Mahrer's direction, than is shown in the Smith patent, or why it was made of cast iron instead of being made of wood?

A. The reason that it was made smaller was to get it out of the pot, when formed; as to why it was made of iron instead of wood, I do not know what that was for.

Cross-int. 47. In that machine, you never press the carriage down until the under side of the carriage comes in contact with the top of the revolving mould, do you?

A. We press it down far enough to leave material enough to form the bottom of the crucible.

249 Cross-int. 48. But the carriage does not come in contact with the top of the mould, does it?

A. Not altogether.

Cross-int 49. Does it at all?

A. No, sir.

Cross-int. 50. What is there which prevents the carriage coming down far enough to make the bottom of the pot too thin?

A. There is nothing, except the counterbalance on the carriage.

Cross-int. 51. Couldn't you, if you had a mind to, press the carriage down until the top of the mould would grind against it?

A. Yes, sir.

Cross-int. 52. What is there in that machine which prevents moving the revolving former too close to the side of the mould, and thereby making the wall of the pot too thin?

A. The flange on the top of the mould gauges the thickness of it.

Cross-int. 53. Do you press the top of the former against this flange by means of the hand wheel and screw shaft?

A. I do.

Cross-int. 54. Doesn't that make the former revolve in a different way from what the material makes it revolve?

A. No, sir; not that I can see; not that I know of.

Cross-int. 55. Does this flange make any mark around the former?

A. Not that I have noticed.

Cross-int. 56. Then it isn't pressed against the flange, is it?

A. Yes, sir; it is.

Cross-int. 57. What is the speed of the mould in that machine?

A. About the same as our other machines. I can't tell exactly; it is about two hundred revolutions a minute, or thereabouts.

Cross-int. 58. Can you state positively that it is not nearer a hundred and fifty than two hundred?

A. I think it is nearer two hundred.

Cross-int. 59. What did you do to prevent the material sticking to the revolving former?

A. Well, I put oil on it one time, and wet it sometimes before I put it in.

Cross-int. 60. Did you try oil only once?

250 A. I put oil on it several times; that is, for making different crucibles; not several times for one.

Cross-int. 61. Please state how many pots you shaped each day last week when you ran this machine?

A. That I can't tell; I didn't keep an account of it.

Cross-int. 62. Do you recollect how many were made by you in the presence of Mr. McIntire?

A. I think there was two made on Tuesday in the presence of Mr. McIntire, and one on Wednesday evening.

Cross-int. 63. How were these three pots marked by him?

A. The ones we made on Tuesday were marked XI and one on the same day XII, and the one on Wednesday was marked X in the inside. The other two were marked on the outside. They are not finished on the outside. I did not see him mark them, but Mr. Arensberg told me he did so, and I saw the marks.

Cross-int. 64. Were these two moulded on Tuesday made one in the metal mould and the other in a plaster mould?

A. Yes, sir; they were.

Cross-int. 65. Do you know why those three pots have not yet been brought here for use in this case?

A. Yes, sir. Because they were not dry enough to handle or carry with safety without using them up.

Cross-int. 66. What is the habit in your factory as to finishing pots; that is, how long after they are moulded?

A. Generally two days in a plaster mould. We mould them on one day, empty them the next, and finish them on the third day.

Cross-int. 67. What is the fair hour's work on one of your machines with two men to run it?

A. About thirty an hour, without finishing; that is, just moulding.

Cross-int. 68. About how far are the moulds carried from the machine?

A. Well, on an average, about twelve feet; some a little further, some closer.

Cross-int. 69. How far do they have to carry the empty moulds?

A. They don't carry them at all. They set them right down on the floor, where they empty them, and when they use them get them there.

251 Cross-int. 70. The same man that makes the balls carries off the filled moulds, and brings the empty ones to the machine. Is this so?

A. Yes, sir.

Cross-int. 71. Can you form any idea as to how long it takes to take a filled mould from the machine and put on an empty one?

A. That I couldn't tell exactly. It ain't a minute, not more than half a minute, I suppose; I never timed it.

Cross-int. 72. Does it take both men to ship the mould?

A. Yes; the moulder merely gives it the start out of the pan, and the ball maker carries it away.

Cross-int. 73. Do you mean to be understood that the ball maker cuts off the stock, weighs it and wedges it, after he brings the empty mould, and before he takes away the filled one?

A. Yes, sir.

Cross-int. 74. What prevents the revolving former from being carried too near the side of the mould, thereby making the walls too thin when a plaster mould is used, in that machine which you call the Smith machine?

A. There is nothing. I have a scribe mark or scratch that I run it to.

Cross-int. 75. Can you form any idea when these three pots, made last Tuesday and Wednesday, will be dry enough to be produced here?

A. I think we will try and get them down to-morrow.

Cross-int. 76. Have they been finished, or are they now just as the were when they came out of the moulds, except dryer?

A. The one that he marked with the letter X in the inside is finished, and the other two are not.

Cross-int. 77. When was this pot finished?

A. Saturday morning.

Cross-int. 78. That was made in the metal mould, wasn't it?

A. Yes, sir.

Cross-int. 79. How long was it allowed to remain in the mould?

A. It was made on Wednesday evening and taken out Thursday morning.

Cross-int. 80. Which one of these three pots was the one where the material gathered on the rib while you were shaping it?

252 A. That I can't tell. I don't recollect.

Cross-int. 81. Did the revolving former remain clean and bright in all cases, except the single one where the material collected on it?

A. No, sir.

Cross-int. 82. Was there adhesion between the material and the revolving former to make it revolve about as fast as the mould did?

A. I don't see that it could be otherwise. The mould was the cause of its revolving, or the stuff, the material in the mould.

Cross-int. 83. What did you put in the metal mould to prevent the material from sticking to it?

A. Oil.

Cross-int. 84. Anything else?

A. No, sir.

Cross-int. 85. Did you throw water on the former while shaping the pot?

A. Yes, sir; sometimes a little; very little, though,—a few drops.

Cross-int. 86. Did you use a sponge for this purpose, or a vessel holding water?

A. I used a sponge.

Cross-int. 87. What became of the material which was forced out over the top of the former when you used the metal mould with the flange around the mouth?

A. It was thrown out into what we call the "crib," the box around the mould; but there was very little of it.

Cross-int. 88. Did the whole of it fly out?

A. All the surplus, yes; but there was very little of it.

Cross-int. 89. Then the top of the former must have been higher than the top of the mould. How is this?

A. It was, a little.

Cross-int. 90. Do you know why that change was made from the Smith patent?

A. No, sir; unless it was a mismeasurement. That is all I know.

Cross-int. 91. Where did the material collect the most on that revolving former?

A. From the middle of the former down to the bottom.

Cross-int. 92. Do you think that those three pots, made Tuesday and Wednesday, are all right?

253 A. One, I think, is; another, I think, would be if it was finished. The third was made in the iron mould, and was taken out too soon and settled down some. The pot was too soft. I did not know they intended to save it, or I would not have taken it out so soon.

Cross-int. 93. The Smith patent describes the crucible as being taken out of the mould immediately after it is formed. Do you know of any objection to this?

A. No, sir.

Cross-int. 94. Please explain what you meant by saying that one of the three pots, made by you during Tuesday and Wednesday of last week, was taken out of the mould too soon?

A. The reason was we wanted to use the mould, and the stuff may have been a little softer than usual; sometimes it is so.

Cross-int. 95. Can you give any reason why the material did not stick to and collect upon the former every time, as it did when you were making one of those three pots?

A. I can't tell any other reason, only the way I moved the former over.

Cross-int. 96. Do you know the diameter of the mould at its largest part, at the bottom, and at the mouth? I mean the metal mould?

A. I do not. I couldn't tell you the exact size of any of our moulds. I did know, but it is so long since I measured any of them.

Cross-int. 97. Do you know the diameter of the bottom of the former, or how it compares with the diameter of the bottom of the mould?

A. No, sir; I do not; nor the length of it. I never measured it.

Cross-int. 98. Do you know what the effect would be if the diameter of the bottom of the former were less than half the diameter of the bottom of the pot?

A. No, sir; I do not.

Re-direct examination:

Int. 99. How soon after finishing is it customary with you to bake pots?

A. That all depends on the atmosphere. I have had pots
254 that I could not kiln for five days after they were finished, and some I could not for ten days.

Int. 100. Why were not the two pots made on Tuesday finished?

A. Because Mr. McIntire marked them on the outside, and I couldn't finish them without rubbing off his marks.

Int. 101. Is it, or not, customary to use a sponge, and from time to time squeeze in or splash into the mould a few drops of water during the moulding of crucibles in the machines in your works?

A. Yes; they can't complete the moulding without throwing or splashing a little water in on the sides.

Re-cross-examination:

Cross-int. 102. Have those two pots—I mean two of the three made on Tuesday and Wednesday of last week, which were not finished—had anything whatever done to them since they were taken out of the moulds, except being marked as you described?

A. Not to my knowledge; that will be very easily seen when we see the pots to-morrow. H. E. DuBARRY.

[Adjourned to meet at same place to-morrow, Tuesday, September 18, 1877, at 10 o'clock A. M.]

WEDNESDAY, *Sept.* 19, 1877.

Met at same place pursuant to adjournment. Present: Counsel as before.

JAMES PARK, JR., called on part of defendants in rebuttal, and being duly sworn, deposes as follows:

Int. 1. State your name, age, residence, and occupation.

A. My name is James Park, Jr.; I am fifty-seven years of age; I reside in Allegheny City, Pennsylvania; I am a steel manufacturer, and a member of the firm of Park, Brother & Company.

Int. 2. Did you ever use any crucibles made by S. M. Kier, or any firm of which he was a member?

[Objected to because not properly in rebuttal, and incompetent.]

A. I did.

255 Int. 3. Please state whether those crucibles stood properly.

[Same objection to this and all other questions in relation to these crucibles.]

A. My recollection is that some of them did, and that some of them did not.

Int. 4. Please state to what, in your opinion, the failure of some of these crucibles to stand was due.

A. I think that the failure was due, as I have always found it to be with all other makes of crucibles, chiefly to the character or quality of the material used in them, or to the admixture of the materials.

Int. 5. Please state whether those crucibles were objectionable in form or finish.

A. In form and finish, my recollection is that they were about as good as any crucibles we ever had in use at our works.

Int. 6. Do you know anything about any change having ever been made in the material used in the manufacture of the Kier crucibles which were used by you?

A. I don't know that any change in the materials or admixtures thereof was made during the time we used the crucibles in question, but recollect of a person representing himself as the partner of Mr. Kier, and the practical maker of the crucibles, stating to me that he would make a change in the materials and admixtures thereof which would enable him to furnish us a better crucible.

[Counsel for defendants proceeds to examine the witness on matters relating to defendants' case.]

Int. 7. Please state whether you examined the crucibles Exhibit McIntire X and XI, and state whether, in your opinion, they are good crucibles, bearing in mind, of course, that they have not been burned.

A. I have examined the crucibles referred to, but cannot say whether they are good or bad; but can state that so far as
256 I can judge from their form and dimensions and general appearance, that if the materials of which they are composed are of good quality and properly admixed, they should be good crucibles.

Cross-examination by James E. Maynadier, counsel for complainants, *de bene esse:*

Cross-int. 8. Do you recollect when you last tried any of Kier's crucibles?

A. I could not name the year, but think it was in the neighborhood of 1864 or 1865. I could only tell that by reference to our books.

Cross-int. 9. Did you ever see an unburnt crucible in which the stock was so strained in shaping it as to make the crucible worthless, although the materials were of the best quality and properly mixed?

A. I never recollect seeing such a crucible.

Cross-int. 10. Are you now or have you ever been engaged in the manufacture of crucibles, or have you now or have you ever had anything to do with their manufacture?

A. I have never been engaged in the manufacture of crucibles, or interested in any establishment engaged in their manufacture, but have, with my own hands, made both by spinning in the ordinary

way, and in a gigging machine of my own construction, made some few, in all not exceeding a dozen crucibles, in the way of experiment.

JAMES PARKE, JR.

[*Stipulation.*—It is agreed that the motion for the taking of the foregoing testimony of James Park, Jr., in relation to the Kier crucibles, shall be made and argued at the hearing of this cause, with the same effect as if made and argued before taking the testimony, and the testimony be admitted, if found competent rebutting testimony, with the same effect as if leave had been granted before the taking of the same.]

257 EXTRACT FROM "LESSONS IN CERAMIC ART."

By M. A. Salvetat. Paris: 1857. 2 vols. Vol. 2, page 118.

HOLLOW WARE PRESSING IN PLASTER MOULDS.

The two methods of moulding and throwing are often combined to obtain at the same operation more nearly finished and certainly successful rough models.

The operation called hollow ware pressing in plaster moulds consists in making a rough model as nearly finished as possible, and completing it by pressing in a mould.

The rough model of the piece is, according to circumstances, sometimes placed upon the mould, which has the form of a chuck, and in that case may serve to mould ornaments visible at the interior of the pieces, and sometimes also it is placed in the interior of the hollow mould, which then by pressing gives the ornaments with which the outer surface of the piece may be decorated.

The thrower commences by roughing out his piece of ware as if a thrown piece were to be produced (fig. 228). A is the lathe head, B is the potter's wheel upon which the rough model C is formed by hand; it is then placed, while yet soft, either upon the moulding block or in the mould (fig. 229) to be pressed against it with a sponge, as is done with the batted clay.

Shaping by Pressure.—In speaking of plates, it has been stated that they were first pressed and then completed by means of profiles. It frequently occurs that the profile, instead of being movable, is fixed and rigid, which gives fewer inequalities of pressure to the piece. The name *of flat ware pressing* is given to this method, which in a measure combines a simultaneous moulding and throwing.

In flat ware pressing the mould sometimes gives the outside and sometimes the inside of the piece of ware. Different examples of this method of shaping by pressure are here presented, commencing with the description of flat ware pressing as performed in the manufacture of Sevres ware, which system appears the best.

258 *Pressing of Plates.*—When the clay is prepared as has been mentioned (fig. 190), it is transferred with great care to the mould which gives the interior part (fig. 194).

This mould is fastened upon the lathe A, whose head carries a tenon C, which fits into the mould D. The batted clay is placed

wrong side out on the mould; then, with a horn knife inserted between the two from circumference to center, the sheep skin is removed. The surface of the batted clay has been made even upon the skin itself, and upon the lathe in the first position with a rigid blade let down upon the profile (fig. 230) and strongly pressed against the batted clay.

In the immediate vicinity of the lathe, fixed upon the thrower's table, is a wooden frame, the profile carrier, composed of two uprights H, rising to a convenient height for the profile placed in position to exercise the desired pressure upon the mould. This profile can descend more or less on the bar B, pivoted at the point *c* by means of thumb screws, which set a shoulder piece N, capable of motion in two small slots.

The thickness of the plate is regulated before placing the batted clay on the mould, by means of a small gauge which is placed on the mould; the profile is lowered, put in contact with the gauge, then the shoulder piece is set; the profile is raised to place the batted clay upon the mould.

When the sheet of clay is detached from the sheep-skin drum on which it was prepared, it is pressed with a blade to make it adhere (to the mould); then the bar B is lowered to set the profile in position with the right hand by pressing lightly until the shoulder piece bears upon the bar, the surface of the clay in contact with the profile is at the same time, with the left hand, soaked with thick slip. In this manner very clean mouldings, F, are obtained, which form the base of the plates pressed with the profile. The form of the profile is given in fig. 231. Fig. 232 shows the carrier detached from the profile.

A very simple profile is used in Germany (fig. 233), which also gives the exterior of the pieces. The lathe A carries the mould which determines the interior surface of the plate, plain or decorated in light relief. B is the profile fixed upon a bar pivoted upon an axis C, loaded at its end with a weight D, which facili-
259 tates the manipulation, and sliding in slots G (fig. 234). It will be understood that in lowering the bar F (fig. 235) the profile compresses the clay placed on the mould A.

Sometimes the profile determines the interior form, when the piece is formed in a mould which gives the outside.

The weight acts at the end J (fig. 236) to facilitate the pressure of the wooden profile upon the batted clay placed in the mould. The bar F is perforated with holes which allow the adjustment of the profiles suitable for producing the different forms; they are fastened by means of wooden screws.

Yet again, the profile is sometimes fixed upon the mould itself, which simplifies the apparatus. In this arrangement the lathe head carries a sort of chuck, B, into which the mould C of the plate D sets. The interior of the piece of pottery is formed by a wooden profile, E, bearing on one of its ends a shoulder, the bevel of which rests upon the chuck and fits onto the mould itself.

Messrs. Bougon & Chalot have arranged the rib in a very ingenious manner for hollowing out hollow ware with the rib itself. The rib (fig. 238–239) is fastened upon an upright, H, jointed at G; the joints H and G execute all the necessary movements for hollowing or pressing out the vessel. Figs. 240 and 241 show the rib in the position which it occupies when the vessel is revolved by the motion imparted by the lathe A; the vessel is supported by the wheel D.

Taking off, or Delivery from the Mould.—The name "delivery" is given to the operation which consists in detaching the pressed or moulded piece from the supporting surface upon which it has taken its form.

Whatever may have been the method followed in pressing, it is advisable not to take the piece off until, by a sufficiently long rest, (which experience will teach for each form,) it has undergone a certain contraction; it is then sufficiently set to be easily detached.

When the mould is of one single piece, the separation is facilitated with a little ball of moist clay. When the mould is composed of several pieces, the top is removed, and all the parts of the mould in succession, until the moulded piece is entirely detached.

The pieces of ware taken from the moulds should dry
260 slowly. When flat they are placed on disks of plaster; they are often turned over, and, as they may get out of shape in warping, small balls of moist clay are placed upon them. Poor work seldom results when moulds in proper condition only have been used.

The use of *greasy* moulds must be avoided, *i. e.*, those which, from continued service, are covered inside with a sort of compact skin, thus lacking their original porosity or penetrability to water. This crust, especially for round vessels, is removed either by putting the mould in the lathe and gradually wearing it away with a cutter, or in diluting it by washings with water.

If the condition of a proper choice of moulds has been complied with, and the "ball," the "sheet clay," or the "roughed-out model" have not received any other than uniformly equal pressures in the moulding process, whatever that may have been, cracks and warpings will rarely occur; the skill of the workman must, however, be taken into account.

To sum up what has been said of the different methods by which pieces of pottery are roughed out, it will be remembered that "throwing" is adapted to the forming of pieces on a revolving surface; but that it gives opportunity for warping, irregularities, and cracks. Pressing or moulding is more generally used, because it is applicable to more varied forms. It never occasions warping, and when practiced with liquid clay, the irregularities of pressure—that is, warping and seams—are more surely avoided than by the ordinary pressing. But casting itself presents some inconveniences which limit the use of that method.

The clay should be well prepared, a considerable number of moulds

is required, slopping must be avoided, and the quality of the plaster must be carefully looked to.

For the rest, the entire intelligence of the workman consists in a judicious selection of the most suitable method of "roughing out" a piece of given form; and this recommendation extends not only to the rough model of the entire piece, but even to the first essay in modeling each of the different parts of which it is composed.

J. LE MON.

261 UNITED STATES CIRCUIT COURT,
Western District of Pennsylvania.

I, James Le Mon, of the city, county, and State of New York, being duly sworn according to law, do depose and say: That the foregoing copy of French text, and translation of the same hereunto annexed were made by me; that I am an expert in the translation into English of French specifications and descriptions of mechanical inventions, and other French writings upon mechanical subjects, and have had much experience in making such translations of French patents, and from books in French containing articles and descriptions of mechanism in various branches of the mechanic arts, and am and have been frequently employed to make such translations, to be used in patent cases in the U. S. courts; that the foregoing annexed copy of French text is a true and exact copy from the text of vol. 2, page 118 to 124 of a printed work in the Astor Library, New York city, entitled "Lecons de Ceramique, by M. A. Salvetat," published at Paris, France, in 1857; and that the foregoing annexed translation of said text is a true and correct translation, embodying the true and whole meaning of all of said text.

J. LE MON.

Subscribed and sworn to before me this 21st day of September, 1877. J. W. DUEL, *U. S. Comr., S. D. N. Y.*

262 [Here follows diagram marked page 262.]

263 WISE PATENT.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Jacob Wise and Freeman Wise, dated November 30, 1852, No. 9,437, for "improvement in the manufacture of stone and earthen ware."

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-third day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

No. 1067.
Pickering et al.,
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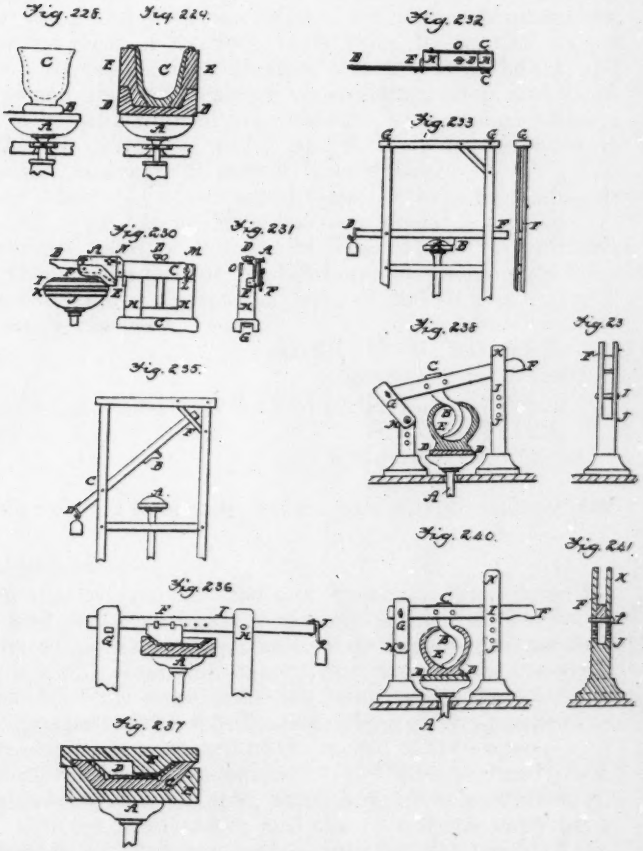
McCullough et al.
Page 262.

Leçons de Céramique,

Vol. 2, Page 119



THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas, Jacob Wise and Freeman Wise, of Fredericktown, Pa., have alleged that they have invented a new and useful improvement in the manufacture of stone and earthen ware, which they state has not been known or used before their application, have made oath that they are citizens of the United States; that they do verily believe that they are the original and first inventors or discoverers of the said improvement, and that the same hath not, to the best of their knowledge and belief, been previously known or used; have paid into the treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

264 These are therefore to grant, according to law, to the said Jacob Wise and Freeman Wise, their heirs, administrators, or assigns, for the term of fourteen years from the thirtieth day of November, one thousand eight hundred and fifty-two, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said improvement, a description whereof is given in the words of the said J. and F. Wise in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this thirtieth day of November, in the year of our Lord one thousand eight hundred and fifty-two, and of the independence of the United States of America the seventy-seventh.

[L. S.] ALEX. H. H. STUART,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

S. H. HODGES,
Commissioner of Patents.

The schedule referred to in these letters patent, and making part of the same:

To all whom it may concern:

Be it known that we, Jacob Wise and Freeman Wise, have invented a new and useful machine for making earthen or stone ware, being an improved potter's wheel; and we do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawing, making a part of this specification, which gives a perspective view of our machine, with one-half of the mould thrown open:

Our invention consists in the application to the usual head piece of a potter's wheel of a rotary mould, which is removable at pleasure, and revolves with the head piece; and also of a frame carrying a mandrel or plunger, which being inserted into the clay inside of the

mould shapes the interior of the vessel to be made and presses the sides thereof into the mould as it is revolving on the wheels.

265 To enable those skilled in the art to make and use our invention, we will proceed to describe its construction and operation.

In the figure *a a* represent the frame work of the wheel, differing from the ordinary construction of potters' wheels chiefly in the addition of the upright frame work marked *k k*, &c.; *c* is the head piece, made in the usual manner; *d* is the block of the head piece, or head block, which is a part peculiar to our machine. It is made of wood about one-fourth of an inch in thickness, and secured to the head piece by means of three or more screws, so as to be removable at pleasure to suit the various moulds. It is circular in shape, and will vary in diameter according to the size of the mould in use. The head piece is attached to the spindle or upright shaft, and on the spindle is a pulley, *f*, to which the power is applied by means of a strap from the steam engine or other motive power. The upper end of the spindle is a screw, which screws into the head piece, and by this means the head piece can be taken off when necessary for purposes hereafter described. The lower end of the spindle works in a socket on the cross tie *g* (see the figure). The mould (marked *h* in the figure) in which the earthenware is made is constructed of iron or other suitable materials. The interior of the mould is polished, and may be plain or figured, according to the article to be manufactured, and forms a matrix on which the pottery is shaped. The top of the mould is furnished with a collar, which, by lessening the diameter of the mould at the top, forms a resting place for the mandrel or plunger, and regulates the thickness of the earthenware when finished. The mould has no bottom, the place of which is supplied by the head block *d* (see figure), around which the lower edge of the mould fits accurately. This makes it necessary that the head block should be movable, as before stated, in order that it may be changed to correspond with the mould which it is desired to use. The mould is divided longitudinally into two equal parts, which are connected together by two hinges on one side and by a spring hasp or catch on the other (*q*), which keep it tight when closed. The mould is attached to the head piece by an iron rod, *i* (see figure), which passes through the head piece near its outer edge, and is secured by a screw nut underneath. The rod rising perpendicular to the head piece

266 passes through the hinges of the mould, forming the axis on which they turn. The mould may be removed from the head piece by simply lifting it up off the rod, when the two parts, having no longer any axis to their hinges, will separate. Another mould is attached to the head piece by putting it together and passing the rod through its hinges; but if the rod is higher than the top of the mould it will have to be unscrewed and a shorter one put in its place, otherwise it would interfere with the action of the mandrel, as hereafter described.

The mandrel frame is composed of two upright pieces, *k k* (see

figure), and two cross pieces, one above, marked *l*, and the other below, marked *m;* also the upright post *u*, which carries the mandrel lever, *o* (see figure). The post *u* is either square or round, and is so fixed as to turn round on its axis, and works in sockets, one of which is in the upper cross piece, *l*, and the other in the slide marked *p* (see figure) on the lower cross piece. The mandrel lever, *o*, projects from the post, *n* (see figure), at right angles to it, and is attached to the post by means of two holes, through which the post passes sufficiently loose to permit of the lever being readily slipped up and down the post, and yet tight enough to keep it steady. It is prevented from sliding too far down by a pin in the post, *u*, or by a collar and screw. The mandrel or plunger, *e*, is of wood or iron, and depends from the lever, at right angles to it and parallel with the post, so as to be immediately over the spindle, and consequently exactly in the center of the mould. From the end of the lever, beyond the mandrel or plunger, a handle, marked *s* (see figure), projects, by which the lever is worked. The mandrel or plunger is made to revolve freely on its own axis, (which is parallel to the axis of the mould,) and is attached to the lever by being placed in a groove and fastened with a pin, so as to be removable at pleasure. The mandrel is made slender, so as to sink easily into the clay, and will be either straight or curved, as may be required by the shape of the mould in use, the shape of the mandrel being similar to that of the interior of the piece of pottery to be made. The length of the mandrel will depend on the depth of the mould and the thickness of the bottom which it is designed to give to the article to be manufactured. The upper cross piece, *l*, is a separate piece from the rest of the machine, but is fixed on
267 the top of the uprights, *k k* (see figure), by means of a clamp with a screw to one side, and to the other by a screw which passes through a longitudinal slit in the piece *l*. By means of this slit and the clamp screw this cross piece may be shifted along its length, so as to throw the post, *u* (figure), out of the perpendicular. This deviation from the perpendicular may be increased by moving the sliding socket, *p* (see figure), on the lower cross piece, *m*. The object of this obliquity will be hereinafter explained.

Having thus described the various parts of our machine, we will proceed to show their operation and use. The mould (marked *w*) being shut and the mandrel raised out of it, and the clay to be made into the pottery is placed in the mould. The mould being caused to be revolved, the mandrel or plunger is lowered into the center of the mould and sunk into the clay. The action of the clay in the revolving mould against the sides of the mandrel, causes it to revolve on its own axis. The mandrel or plunger being inserted into the clay perpendicularly, the lever is moved by hand sideways and pressed outward from the center of the mould. Thus the hole made in the clay by the mandrel is gradually enlarged until it is left the requisite size for the interior of the earthenware, and the clay is raised in the mould till it completely fills it, leaving the sides of the vessel of uniform thickness. The

plunger is pushed out towards the circumference of the mould till it rests against the collar of the top, which serves as a gauge for the thickness of the earthenware and prevents it being made too thin. The inside is made by the rolling of the mandrel perfectly smooth and even. It is necessary to use a small quantity of oil on the mould and on the mandrel, in order to prevent the adhesion of the clay to their surfaces and to render the earthenware smooth. The mandrel is now brought back to the center and raised out of the mould and the mould thrown open, when the piece of earthenware will be left standing on the head block. All that is necessary now is to separate it from the head block in the usual manner. When the post is in a perpendicular position, the mandrel being so also, the sides of the article made in the mould will be, as stated before, of uniform thickness, but if desired to make the lower part of the vessel thicker or thinner than the upper part, it is to be effected by throwing the post, *u*, by the means before described, out of the perpendicular.

268 The mandrel, being attached to the post, will follow its inclination, and the same process being followed as before described, the result will be similar, excepting that the thickness of the manufactured article will no longer be uniform above and below. If the mandrel is thus set obliquely, the upper or lower part of the article will be the thicker, according as the lever is pressed to one side or the other.

What we claim as our invention, and desire to secure by letters patent, is—

1. We claim the mode of attaching the mandrel so that it may revolve on its axis by means of friction with the clay, and at the same time be moved from side to side within the mould.

2. The mode adopted for varying the relative thickness of the different parts of the manufactured article.

JACOB WISE.
FREEMAN WISE.

Witnesses:
JAMES MOFFITT.
JESSE CALVERT.

269 [Here follows diagram marked page 269.]

270 SMITH PATENT.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office, of the letters patent granted William Smith, dated November 3, 1863, No. 40,506, for apparatus for making plumbago crucibles.

In testimony whereof, I, Ellis Spear, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this

eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[L. S.] ELLIS SPEAR, *Commissioner.*

THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas, Wm. Smith, of Pittsburgh, Pennsylvania, has alleged that he has invented a new and useful apparatus for making plumbago crucibles, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said invention, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in said invention, and praying that a patent may be granted for that purpose:

These are therefore to grant, according to law, to the said William Smith, his heirs, administrators, or assigns, for the term of seventeen years from the third day of November, one thousand eight hundred and sixty-three, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said invention, a description whereof is given, in the words of the said Wm. Smith, in the schedule hereunto annexed, and is made part of these presents.

271

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this third day of November, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-eighth.

J. P. USHER,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[L. S.] D. P. HOLLOWAY, *Commissioner of Patents.*

Schedule referred to in these letters patent, and making part of the same.

To all whom it may concern:

Be it known, that I, William Smith, of the city of Pittsburg, in the county of Allegheny and State of Pennsylvania, have invented a new and useful improvement in apparatus for making plumbago crucibles; and I do hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawing forming part of this specification, which is a perspective representation of my improved machine.

The ordinary mode of making plumbago crucibles is to draw them up, and shape them by hand on a wheel, but this process is tedious and expensive, and requires the employment of expert mechanics. By my invention, however, I am enabled to make them in moulds by machinery, with very great rapidity and of any required shape, with the utmost exactness, and at the same time secure all the advantages of hand-made crucibles, as the plumbago is worked and drawn up in the moulds by means of a former, which presses the plumbago against the sides of the mould.

In the drawing, *a* is the upright frame of my machine, and *b* is the bed plate; *c* is a horizontal disc or wheel, the shaft of which revolves in bearings in the horizontal bracket *d*, *d'*, the lower
272 one of which *d'* may rest on the bed plate *b*, as in the drawing. Between the brackets *d*, *d'*, and attached to the shaft of the wheel *c* is a pully, *e*, which is caused to revolve rapidly by means of a belt, *f*, or otherwise, as may be convenient.

Near the circumference of the wheel *c* is a circular flange, *g*, which serves to hold in place centrally on the wheel the lower section of the iron mould *h* by means of the set screws *s*.

One set screw only is seen in the drawing, the other being diametrically opposite to it.

The mould *h* is made of cast iron, of any required shape; but if the crucible is designed to be of greater diameter in the middle than at the top and bottom, as is usual with crucibles employed in the manufacture of steel, the mould is parted horizontally at the point where the width or diameter of the crucible is greatest.

The upper section *h'*, in such case, is attached to the lower part by hooks *i* on one section passing over a pin, *k*, or through an eye in the other, there being a rebate or lap at the joint of the two sections *h* and *h'* of the mould (as shown in the drawing), to insure an exact fit.

In the drawing the mould is shown divided perpendicularly, but this is merely done to exhibit this rebate or lap of the sections of the mould, and to show the former, *l*, inside of it.

The mould is made open at the top, of course, and it has no bottom, the place of which is supplied by a circular plate of metal or wood, *m*, which is set on the wheel *e*, and which fits in the mould at its lower end.

A former, *l*, which revolves on its axis on a vertical spindle, *u*, serves to work the plumbago inside of the mould, and draws it upwards, at the same giving to the inside of the crucible the shape desired.

This former is made of wood, and the curve of its side is that required to be given to the interior of the crucible; but its diameter is less than that of the cavity of the crucible, so that it may be drawn up out of the mould when the crucible is finished. The length of the former *l* is equal to the inside height of the crucible. The spindle *n*, to which the former *l* is attached, and on which it revolves, is rigidly attached to the face plate of the sliding bracket *q*, which pro-

273 jects horizontally from the upright frame *a* of the machine, and slides up and down, on V slides *rr*, on the sides of the frame.

The bracket *q* is in two parts, it having a sliding face-plate, *t*, which is attached to the projecting extremity of the bracket by a doved-tailed tennon, *p*, working in a corresponding mortise, in the bracket, by means of which the face-plate can be moved horizontally on the bracket *q*. This motion is given by means of a hand-wheel, *v*, attached to a screw-shaft, *w*, which works in the bracket *q*, the screw-threads working in a female screw cut in a tongue which projects inwards from the face-plate *t* into a recess in the end of the bracket *q*. The sliding bracket *q* is counterpoised by two weights, *x*, at the end of ropes, *yy*, which pass over pulleys, *zz*, at the top of the frame *a*, and are fastened to the bracket *q*.

Having thus described the construction of my apparatus for making crucibles, I will briefly explain the mode of operating it.

The batch from which the crucibles are made is composed of pulverized graphite or plumbago, mixed with a suitable proportion of fire-clay, and formed into a dough with water in the ordinary way.

A lump of this batch, of sufficient quantity to form the crucible, is placed in the bottom of the mould, the upper and lower sections of the mould being united and secured to the wheel, as before described, the circular plate or false bottom, *m*, being in its place, and the bracket *q* being raised so as so lift the former, *l*, entirely out of the mould before the batch is inserted.

The wheel *c* is then rapidly revolved, which causes the mould also to turn on its axis, which is coincident with the axis of the wheel-shaft and center of the wheel *c*. The sliding face-plate *t* of the bracket *q* is then set so that the axis of the shaft or spindle *u* is vertically over the mouth of the mould, and with its axis in the same vertical line, which is done by turning the hand-wheel *v* until the ends of the face-plate *t* are flush with the sides of the bracket *q*.

The bracket *q* is then lowered, and the former, *l*, is pressed down into the plumbago batch in the bottom of the mould, the length of the former being such that when the bracket *q* is pressed down
274 as far as it will go, the lower extremity of the former *l* will be distant from the surface of the false bottom *m* of the mould, the thickness which is required for the bottom of the crucible.

The insertion of the lower end of the former *l* into the plumbago batch forces it up between the former and the inside of the mould, the batch being in a plastic condition. The hand-wheel *d* is then gradually turned, which moves the face-plate *t*, and with it the former *l* to one side, thereby pressing the batch sideways, reducing its thickness and forcing it to rise uniformly all around the mould, until it overflows at the top, if there be an excess of batch in the mould. This side motion of the former is continued until the surface of the former touches the top of the mould, which projects inwards towards the center, as seen at *o* in drawing, the projection *o* extending beyond the inner surface of the mould a distance equal to the thickness of the crucible at top. When the surface of the former

comes in contact with the projecting rim *o* of the mould, the overflow of the plumbago batch is thereby cut off, and the crucible is finished.

If it is desired to make the crucible of the same thickness throughout, the curve of the face of the former *l* is made exactly similar to that of the inside of the mould, allowing for the relative distance of the curves from the center of curvature; but if the thickness of the crucible is desired to be greater at one point than another, the curve of the face of the former *l* differs accordingly from that of the inner face of the mould.

As the former revolves on its spindle *n* by contact with the plumbago batch, there is no rubbing on the inside of the crucible, but a smooth and regular service is obtained, and the pressure of the batch between the former and the mould being gradually applied, and operating to draw up the batch between the pressing surfaces, makes the crucible without seams or faults, and is therefore greatly preferable to the process of moulding by direct pressure between two non-revolving surfaces.

When the crucible is formed, the former *l* is drawn back to the center of the mould and elevated out of it by throwing up the bracket *q*. The hooks *i* of the mould are loosened and the upper section lifted off, and the lower section being removed from the wheel *c* by loosening the set screws *s*, the finished crucible is raised up
275 by means of the false bottom *m*, and is then dried and annealed in the usual way.

By my machine a crucible may be made in two or three minutes.

What I claim as my invention, and desire to secure by letters patent, is—

Making plumbago crucibles in the manner substantially as hereinbefore described, by means of a mould attached to a revolving wheel or disc, and a former revolving freely on a non-revolving spindle attached to a slide rest susceptible of two motions, one parallel to the axis of the mould and the other at right angles thereto.

In testimony whereof the said William Smith has hereunto set his hand in presence of us. WM. SMITH.

Witnesses:

W. BAKEWELL,
J. C. ATTERBURY.

276 [Here follows diagram marked page 276.]

277 NIMMO'S ORIGINAL PATENT.

DEPARTMENT OF THE INTERIOR,
U. S. PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

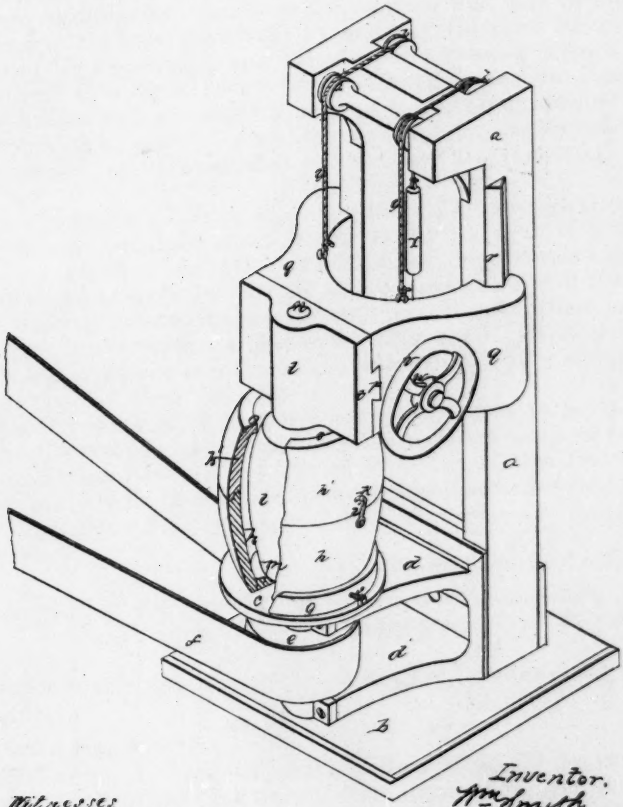
This is to certify that the annexed is a true copy from the records of this office of the letters patent granted George Nimmo, dated August 1, 1865, No. 49,140, for "improvement in moulding crucibles.'

No. 1067.
Pickering et al.,
vs.
McCullough et al.
Page 276.

W. Smith,

Making Plumbago Crucibles

No. 40,506. Patented Nov. 3, 1863.



Witnesses
S. H. Geyer
A Buckmaster

Inventor.
Wm. Smith
by his attorney
W. Bakewell

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this fifteenth day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas, George Nimmo, of Jersey City, New Jersey, has alleged that he has invented a new and useful improvement in moulding crucibles, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

These are therefore to grant, according to law, to the said George Nimmo, his heirs, administrators, or assigns, for the term of seventeen years from the first day of August, one thousand eight
278 hundred and sixty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said improvement, a description whereof is given, in the words of the said George Nimmo, in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this first day of August, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States of America the ninetieth.

W. T. OTTO,
[L. S.] *Acting Secretary of the Interior.*

Countersigned and sealed with the seal of the Patent Office.

D. P. HOLLOWAY, *Commissioner of Patents.*

The schedule referred to in these letters patent, and making part of the same:

To all whom it may concern:

Be it known that I, George Nimmo, of Jersey City, in the county of Hudson, and State of New Jersey, have invented, made, and applied to use a certain new and useful improvement in moulding crucibles and pots; and I do hereby declare the following to be a full, clear, and exact description of the said invention, reference

being had to the annexed drawing, making part of this specification, wherein

Figure 1 is a plan of my machine for moulding crucibles; and

Figure 2 is a section elevation of the same.

Similar marks of reference denote the same parts.

Crucibles have heretofore been made in a mould by a pressing instrument, as may be seen by reference to letters patent granted October 26, 1852, to John Akrill.

Difficulty has heretofore been experienced in removing these crucibles from the mould, in consequence of the adhesive nature of the black-lead compound or mixture employed for such crucibles. The amount of water also that is required to make the mixture sufficiently plastic causes the material frequently to crack and break, in shrinking as it dries.

279 The nature of my said invention consists in the manufacture of crucibles in a plaster mould, which gives shape to the pot externally, and absorbs the moisture from the pot, causing it to dry uniformly, and at the same time shrink away from the mould, preventing the air acting on the outside of the pot until after the moisture has been mostly absorbed, prevents the pot from splitting or cracking from unequal contraction in drying. I mount my plaster mould in a revolving chuck, and employ a rib attached to a lever for spreading the plastic crucible material on the inside of the mould, and at the same time hardening, consolidating, and polishing the crucible on the inside by means of said rib.

In the drawing *a* is a bed, carrying the vertical spindle *b*, on the upper end of which is the hollow chuck *c*, into which the plaster mould *d* fits, and these parts are revolved by a belt to a wheel *e*, and crank *f* (see fig. 1), or by any other competent means.

Near the chuck *c* is an upright frame *g*, with rollers, *h h*, over which the chain or rope *i* passes, on one end of which is the counter weight *k*, and on the other the lever *l*, having a handle *m* at one end and carrying the rib *n*; this lever *l* is guided by the upright frame *g*, and when not in use is drawn up by the weight *k*.

The crucible material is placed in the plaster mould *d*, and partially spread by hand or by a conical muller; the back end of the lever *l* is then brought beneath the stop or fulcrum *o*, and pressed down until the lever takes a stop *p*. The rib *n*, on the lever *l*, smooths, compresses, hardens, and polishes the interior of the mould, forming a perfect crucible, possessing great strength and beauty; at the same time there is great uniformity in the crucibles made in this manner. The crucibles and mould are to be lifted off the chuck, and another mould introduced in the chuck, and the operation repeated.

The crucible and mould are set aside when the plaster of the mould has absorbed the moisture from the crucible, and the crucible has contracted away from the mould and become sufficiently dry to be exposed to the air without risk of cracking; the crucible is to

be removed and dried in any usual manner, and may be baked or burned.

What I claim, and desire to secure by letters patent, is—

280 1. Manufacturing crucibles in a plaster mould in the manner and for the purposes specified.

2. I claim lever *l* and rib *n*, applied in the manner specified, to form the interior of a crucible contained within a revolving mould as set forth.

3. I claim the combination of the revolving chuck *c*, plaster mould *d*, lever *l*, and rib *n*, as and for the purposes specified.

4. I claim mounting the lever *l*, and rib *n*, in the frame *g*, in the manner specified, in combination with the counterpoise *k*, fulcrum *o*, and stop *p*, for determining the size of the interior of the crucible, as specified.

In witness whereof, I have hereunto set my signature this twentieth day of June, A. D. 1865. GEORGE NIMMO.

Witnesses:

CHAS. H. SMITH.
JAS. E. SERRELL, JUN.

281 [Here follows diagram marked page 281.]

282 SECOND DEPOSITION OF HENRY E. DUBARRY.

Present: James E. Maynadier, Esq., counsel for complainants; Thomas B. Kerr, Esq., counsel for defendants.

Direct examination by Thomas B. Kerr, Esq.

BOSTON, *October* 10, 1877.

Int. 103. Since testifying in this case, have you made any further use of the Smith machine at your works?

[Objected to, because it does not appear what the Smith machine, so called, is.]

A. Yes, sir; I have.

Int. 104. With what kind of a former have you made such further use?

[Same objection to this and all other questions as to this so-called Smith machine.]

A. With a wooden former.

Int. 105. A stationary one?

A. Revolving.

Int. 106. Can you state how many crucibles have been made on the Smith machine since your last deposition?

A. Six hundred and thirty-odd.

Int. 107. How many of these with the revolving wooden former?

A. All, except thirty-nine of the number formerly stated.

Int. 108. By what kind of a former were those thirty-nine crucibles made?

A. Revolving iron former.

Int. 109. Was that the former mentioned in your last deposition?

A. Yes, sir; it was.

Int. 110. Can you produce a model of a wooden former used in the Smith machine, as before mentioned by you?

283 A. Yes, sir; here it is. [Now put in evidence and marked "Defendants' Exhibit Wooden Former; C. F. S., Spl. Ex'r."]

Int. 111. Do you know what was done with the crucibles made on the Smith machine, as testified to by you?

A. Yes, sir; they were tested by the Pittsburg Steel Casting Co.; that is, eight of them.

Int. 112. Where are the rest?

A. They are in our works.

Int. 113. In what condition?

A. In a dry condition; fit for the kiln.

Int. 114. How do those crucibles, made on the Smith machine and mentioned by you in this deposition, compare with the crucibles made on your other machines?

A. Equally as good.

Int. 115. Can you state how many crucibles have been made on the Smith machine in a day's ordinary work?

A. One hundred and sixty-six.

Cross-examined by James E. Maynadier, Esq., of complainants' counsel, *de bene esse:*

Cross-int. 116. Who made these six hundred and thirty-odd crucibles on the machine you call the Smith machine?

A. Mr. E. Young, one of our workmen at the works.

Cross-int. 117. What kind of a mould were they made in?

A. A plaster mould.

Cross-int. 118. That mould had no flange projecting inwards around the mouth, had it?

A. No, sir.

Cross-int. 119. The revolving former was longer than the mould was deep, was it not?

A. No, sir.

Cross-int. 120. Was it the same revolving former (I mean the wooden one) which you used before you gave your first deposition?

A. I did not use a wooden former at that time; it was an iron one.

Cross-int. 121. Did the under side of the slide which carried this revolving former come in contact with the top of the mould as soon as the bottom of the former was at the right distance from the false bottom of the mould?

284 A. No, sir.

Cross-int. 122. What prevented the bottom of the pot from being made too thin?

A. The former not being pushed down further than required for the thickness of the bottom of the crucible.

Cross-int. 123. And how did the workman tell how far to pull down the slide?

A. By a mark make on the columns of the machine.

Cross-int. 124. How was the plaster mould secured to the jigger head?

A. In a pan, the same as our other machine.

Cross-int. 125. Was it the same pan used with the iron mould?

A. No, sir.

Cross-int. 126. You never have used the wooden former with the iron mould, have you?

A. Yes, sir; had one crucible made with it.

Cross-int. 127. Was that one of the six hundred and thirty-odd?

A. It was.

Cross-int. 128. Did one man make the whole of these six hundred and thirty-odd?

A. Yes, sir, with his assistant, the same as in the other machines.

Cross-int. 129. Did you notice whether it was more difficult to force the wooden revolving former into the material, when in the revolving mould, than it was the iron revolving former?

A. There was no difference whatever, that I could see.

Cross-int. 130. Did you notice any difference whatever in the tendency of the material to stick to and collect upon the two formers?

A. None, any more than the drying of the stock on the iron former—it dried faster; that is, when it was out of the mould, by the air.

Cross-int. 131. How did you form the tops of the pots made upon the so-called Smith machine, with the plaster mould?

A. There was no forming to do, merely to trim off what portion of the stock run above the mould.

Cross-int. 132. That is to say, you shaped the tops of these pots with a knife, the same as in your other machines?

A. Yes, sir.

285 Cross-int. 133. I have seen many attempts made to shape a crucible on a machine made as described and shown in the Smith patent, both at the works of the Phœnix Manufacturing Co. and by their workmen, and in one other place by skilled workmen not in their employ. In every trial the material stuck to and collected upon the revolving former, whether it was made of metal or of wood, for both kinds were tried; and I propose to repeat these trials to-morrow morning, and to take the depositions of the persons present when they are made. Can you now give me any information as to the means for preventing the material from adhering to and collecting upon the former, so that I may instruct the persons who will make the trials to-morrow morning what to do to prevent this?

[Counsel for defendants protests against the statements of complainants' counsel in the last question, and all other similar attempts to testify in regard to an alleged failure of a machine purporting to be made in accordance with the Smith patent.]

A. None but the skill and practice of the workman.

Cross-int. 134. Can you explain how the skill and practice of the

workman prevents this sticky material from sticking to the revolving former?

A. None but the practice that the workman has at the machine.

Cross-int. 135. Do you mean that the material did stick and adhere to the revolving former when Young first commenced, and until he got skill from practice?

A. Yes, sir; for the first and second day, more or less.

Cross-int. 136. What did he do, if anything, to prevent it?

A. Nothing that I could tell, but the care in working the machine.

Cross-int. 137. Did the former revolve freely, or was it prevented from revolving in any way?

A. It run as fast as the stock would drive it, from the time that it touched the material until he drew it off the material.

Cross-int. 138. Did you find that the speed at which the mould revolved made any material difference? If so, what is the proper speed?

286 A. I don't know. It always run at the same speed, with the exception of the one pot that I spoke of in the other deposition.

Cross-int. 139. What was this speed?

A. The speed I gave in the other deposition was two hundred per minute, as near as I could tell.

Cross-int. 140. Can you tell now any nearer than that?

A. I can; it runs two hundred and seventy-odd.

Cross-int. 141. Do all your other machines run at that rate?

A. I think they do, but I am not positive, because I haven't examined those as close as the other; they were meant to run two hundred when I put them up, but since that time I have increased the speed of the engines. This increase was made two or three years ago. I can't tell exactly when it was.

Cross-int. 142. How many pulleys to connect the main shaft with the machine; and the size of each?

A. Three fast and two loose. I can't give the size exactly. I had them down, but I forgot to bring the memorandum with me.

Cross-int. 143. What is the speed of the main shaft?

A. Well, I think it is from ninety to ninety-five; I can't tell positively the exact number of revolutions.

Cross-int. 144. Can you form any idea as what the speed of the revolving former would be, with the mould running at two hundred and seventy revolutions per minute, if the former was revolved freely by the stock?

A. No, sir; I cannot.

Cross-int. 145. The wooden and the metal formers which you used on the machine you call the Smith machine, were the same in size and shape, were they not?

A. They were the same shape; the wooden one is a little larger than the iron; I don't know how much.

Cross-int. 146. Can you give the diameter of either of these formers?

A. No, sir; I don't know the size of either one of them; neither one was made to any particular size.

Cross-int. 147. Did you never calliper either of them?

A. Yes, sir. I callipered the wooden one, merely to see whether it was round or not, but I didn't measure it.

Cross-int. 148. Do you know whether the diameter of the
287 former would make any difference in the working of the machine, assuming, of course, that its largest diameter is less than the diameter of the mouth of the crucible?

A. No, sir; I do not.

Cross-int. 149. Suppose the diameters of the former were only about one-third the corresponding diameters of the mould, as shown in the Wise patent, would this make any difference in the working of the machine, so far as you can tell?

A. I can't say. I don't know that it would.

Cross-int. 150. Do you know how many crucibles, in all, have been made at your works with the machine which you call the Smith machine, but having a rib substituted for the revolving former?

A. Only five; and those I made myself, as testified to before.

Cross-int. 151. Did the top of the former stand level with the top of the plaster mould and the top of the crucible after it was trimmed, or did it project an inch or so above it?

A. It projected a little above it; I don't think it was more than a quarter of an inch.

Cross-int. 152. Was there a metal cap on top of it, as in Exhibit Wooden Former?

A. There was an iron cap on it.

Cross-int. 153. What is that pin for which goes through the spindle in Exhibit Wooden Former?

A. To keep the spindle from turning round when put on the Smith model.

Cross-int. 154. How was the spindle fixed in the slide in your Smith machine?

A. It had a shoulder on it, so as to clamp tight by a nut on top.

Cross-int. 155. Is any different temper of material required, or desirable, when a revolving former is used, from that when a rib is used?

A. We have used it a little stiffer; it seemed to work better with this revolving former than the stuff we used in our other machines.

[Noon recess.]

288 Re-direct examination:

Int. 156. Please state which you found to be the best material for the revolving former, wood or iron?

A. Wood.

Int. 157. Who was the workman that in operating the machine was enabled, by experience, to remedy the sticking of the material in the former?

A. Mr. Edward Young.

Int. 158. Is he the man that made 166 crucibles on that machine in one day?

A. He is.

Int. 159. State whether this Smith machine has been in daily operation since you last testified; and if not, why not?

A. It has not. I could not spare the old machine long enough from making coke crucibles. Young had to work on the old machine for making coke crucibles, and the other (the Smith machine) made only gas crucibles. We had no former suitable for making coke crucibles on the Smith machine.

Re-cross-examination:

Cross-int. 160. What is the difference between a coke and a gas crucible?

A. The gas crucible is thinner at the bottom than the coke, and thicker at the top than the coke.

Cross-int. 161. The complainants are anxious to have you and Mr. Arensberg, and such other persons as you may desire, inspect the working of the Smith machine, built by the complainants at the works of the Phœnix Manufacturing Company, at Taunton. Are you willing to do so, and what day and hour will suit you after to-morrow? You may confer, of course, with your counsel and Mr. Arensberg, if you desire, before answering.

[Counsel for respondents objects to the question, on the ground that the respondents have no interest in the question of the operativeness of any machine complainants may choose to construct, especially about which there is no proof in the case to enable defendants to judge of the advisability of inspecting it; and, also, especially because the defense of these respondents, which cites the Smith
289 patent, is that of prior patent, and has no necessary reference to the ability of the complainants to prevent the Smith machine from working; the respondents preferring to depend, as far as that question is concerned, on the evidence of their witnesses already in the case, who have been exposed to a very searching and rigid cross-examination by complainants' counsel, than to a casual inspection of the machine alleged by complainants' counsel to have been constructed by them, about the operation of which they may be compelled to testify without such a careful examination as would enable them to ascertain the causes of the alleged failure of the alleged machine.]

A. My counsel advises me to decline the invitation.

[In view of the objection of their counsel, the defendants, DuBarry and Arensberg, both present, are here notified, as is also their counsel, that the Smith machine spoken of in the preceding question will be put in evidence in the case, and that after it is in evidence, and they have had an opportunity to examine it as fully as they wish, and to compare it with the Smith patent if they desire, the above invitation will be repeated. The parties are also notified that a portion at least of the testimony as to this machine will be taken at

Taunton, and within a few yards of the place where the machine is put up ready for trial.]

H. E. DUBARRY.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

SECOND DEPOSITION OF CONRAD C. ARENSBERG.

BOSTON, *October* 10, 1877.

Int. 73. State whether, since your former deposition, the machine at the defendants' works, known as the Smith machine, has been used. If so, with what result?

[Objected to, as it does not appear what the Smith machine, so called, is, and also because it is clear, from the deposition of
290 Mr. DuBarry, that the machine is not constructed as shown and described in the Smith patent.]

A. It has been used almost constantly, as much as our business would allow, and with the very best results.

Int. 74. Please state how many crucibles have been made on it since your last deposition, and with what kind of a former it has been used.

[Same objection to this and all other questions in relation to that machine.]

A. Between 630 and 640. These were all made with a revolving wooden former, by one of our workmen named Young, excepting 39. These were made with an iron revolving former.

Int. 75. How did these crucibles compare with those made on your other machines?

A. They were just as good; the appearance of them was better than those made on our other machines.

Int. 76. Do you know how many crucibles have been made on the Smith machine in an ordinary day's labor.

A. One hundred and sixty-six was made in one day.

Int. 77. Do you know whether any person besides your firm and workmen has seen that machine in operation since your last deposition?

A. I invited Messrs. Dravo and Wallace, of the firm of Hussey & Co., crucible manufacturers, of the city of Pittsburgh, to see the working of the Smith machine at our works. They accepted the invitation, and saw it in operation one afternoon. They saw quite a number made, and expressed themselves to me as perfectly satisfied with the working of the machine. They examined the crucibles closely, and said they were as good as those usually made on machines.

[All after the words "expressed themselves" objected to as hearsay, and as incompetent and improper.]

291 Int. 78. Please state how the machine operated when they inspected it.

A. It worked perfectly satisfactory.

Int. 79. Please state whether you have had any of the crucibles made on the Smith machine used, and whether you know the result of such use, and inspected the crucibles after the said use.

A. Eight of the crucibles made on the Smith machine with a revolving former, were sent to the Pittsburgh Steel Casting Company, of Pittsburgh, for trial. After the fifth heat they were examined by me, and Mr. Hainsworth, the foreman of said company, expressed himself to me as perfectly satisfied with the result of the trial of the said crucibles, as did also the melter. He also stated (Mr. Hainsworth) that they were as good as any of the others made by us that were used by them.

[Same objection as before.]

Int. 80. Please state whether there was any difference in the operation of the revolving iron former and the revolving wooden former in the said Smith machine.

A. None that I know of.

Cross-examination by James E. Maynadier, Esq., of counsel for complainants, *de bene esse:*

Cross-int. 81. Can you give us any information which will aid us in making the Smith machine work properly, or in preventing the material sticking to or collecting upon the revolving former?

A. I am no machinist; I understand very little about machinery; am consequently unable to give you any information that will make your machine work.

Cross-int. 82. Were you aware that Mr. Dravo and Mr. Wallace had examined the workings of the Smith machine, made by the complainants before you invited them to your works?

A. I was not aware that they had examined the workings of your Smith machine, but I know that Mr. Dravo, of Hussey & Co., asked me whether we would have any objection to the putting
292 up of a Smith machine in their works by complainants. I answered certainly not, he could put up as many as he pleased. He then requested that if they allowed the machine to be put up, that I would not subpœna any of the firm of Hussey & Co. in this case, stating also that the complainants had promised not to subpœna them in the case if they allowed it to be put up. I answered him by saying I would promise nothing of the kind, but that they could put up as many machines as they pleased.

[Same objection as before as to what Mr. Dravo said.]

Cross-int. 83. Did you never see the complainants' Smith machine, or one that you understood to be the complainants'?

A. I never did. CONRAD C. ARENSBERG.

[It is agreed that the extract and translation from the work entitled "Lecons de Ceramique," by M. A. Salvetat, is properly in evidence, subject to all exceptions as to mistranslation.]

[Counsel for defendants offers in evidence a certified copy of the file wrapper and contents from the United States Patent Office, in

the matter of reissued letters patent granted George Nimmo, assignor to Arthur Pickering and others, dated December 8, 1874, No. 6,166, improvement in moulding crucibles.]

Respondents' counsel now states that the respondents' testimony is closed, except as to the testimony of William Hainsworth, manager of the Pittsburgh Steel Casting Company, and the melter who used the eight crucibles referred to by Mr. C. C. Arensberg in his last deposition.

Attest: CHAS. F. SLEEPER, *Special Examiner.*

Stipulation as to Wm. Hainsworth and Wm. Weiyer.

ARTHUR PICKERING *et al.* *vs.* M. MCCULLOUGH, JR., *et al.*	United States Circuit Court for the Western District of Pennsylvania, No. 53, May Term, 1877.

It is hereby stipulated that William Hainsworth, superintendent of the Pittsburgh Steel Casting Company, and William
293 Weiyer, steel melter for said company, if called and sworn on behalf of respondents in the above entitled suit, would testify and say that, on the 26th day of September, 1877, they received, at the works of said company, eight crucibles from McCullough, Dalzell & Co., the above named respondents, with the request that the said eight crucibles be tried and used in their works, just as other crucibles were used at said Pittsburgh Steel Casting Company's works, and not to favor them in any manner in their use. That said Hainsworth and Weiyer gave said eight crucibles a fair test, and that they averaged four and one-eighth heats each, some running five heats, and that they were as good in all respects as the crucibles they (said witnesses) have been using for the last two or three years, and better than some they have been using at said works. That they had been using McCullough, Dalzell & Co.'s crucibles, and that they regard the said eight crucibles that they tried, as above stated, as being good crucibles.

J. E. MAYNADIER,
Solicitor for Complainants.
BAKEWELL & KERR,
Solicitors for Respondents.

294 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file wrapper and contents in matter of reissue letters patent granted George Nimmo, ass'or by mesne ass'ts to Arthur Pickering, Charles R. Vickery, Charles R. Atwood, and Phœnix Manufacturing Company, dated December 8, 1874, No. 6,166, for "improvement in moulding crucibles."

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto

affixed, this first day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

W. H. DOOLITTLE,
Acting Commissioner.

295 BOSTON, *November* 26, 1872.

Hon. Commissioner of Patents.

SIR: I enclose appl'n for reissue of letters patent No. 49,140, granted to George Nimmo August 1, 1865; also, old patent, abstract of title, and check $30.

Very respectfully, J. E. MAYNADIER.

296 *To the Commissioner of Patents:*

Your petitioners, Arthur Pickering, of Boston, Charles R. Vickery, Charles R. Atwood, and the Phœnix Manufacturing Company, all of Taunton, in the State of Massachusetts, pray that they may be allowed to surrender the letters patent for an improvement in moulding crucibles, granted to George Nimmo August 1st, 1865, whereof they are now sole owners, by assignment of the entire interest, and that letters patent may be issued to them for the same invention upon the annexed amended specification. Accompanying this petition is an abstract of title, duly certified, as required in such cases.

And they hereby appoint James E. Maynadier, of Boston, Massachusetts, their attorney, with full powers of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

ARTHUR PICKERING.
C. R. VICKERY.
CHARLES R. ATWOOD.
PHŒNIX MANUFACTURING CO.,
By C. R. VICKERY, *Prest.*

297 Specification describing certain improvements in moulding crucibles, invented by George Nimmo, then in Jersey City, in the county of Hudson, and State of New Jersey [letters patent for which were granted August the 1st, 1865, numbered 49,140, and assigned to Arthur Pickering, of Boston, in the county of Suffolk, Charles R. Vickery and Charles R. Atwood, both of Taunton, in the county of Bristol, and the Phœnix Manufacturing Company, a corporation duly established under the laws of the State of Massachusetts, and having its principal place of business at Taunton aforesaid, all in the said State of Massachusetts].

Erased by Amend Oct 31, 74

~~Prior to the invention of the said Nimmo, crucibles were almost universally made by hand with the common potter's wheel, both outside and inside being shaped by the hand of the workman, and although many attempts had been made to produce crucibles by~~

~~machinery, it being very desirable to have crucibles of the same size~~ uniform, especially inside, none of them had been practically successful. Erase and insert a copy 6/73

Long prior to said Nimmo's invention many articles of pottery ware with flaring walls had been made in plaster molds of
298 the required shape to form the outside of the articles, and so mounted in a revolving chuck as to properly present the clay to and support it under the action of a rib or former of the required shape to form the inside of the articles, but all these "jiggers," as such machines are called, were inapplicable to the manufacture of any vessel having a bilge, (as is the case in the common crucible,) for the reason that the inner diameter of the bilge is materially longer than that of the mouth. (See fig. 3.)

The invention of the said Nimmo consists in an improvement in the art of manufacturing such crucibles, and similar vessels, by the use of a rib, such as is fully described below, to form the interior, and a revolving vessel or mould to support the "ball" (as the tempered material is called by potters) against and present it to the action of the rib, and also, if desired, to form the exterior of the vessel. The rib or former used by said Nimmo differs from all such ribs theretofore known in having has that part of it which formed the upper part of the crucible nearer the axis of revolution of the ball than that part of it which formed the bilge of the cruci-
299 ble, as will be clear from figure 3, where x x represents the axis of revolution, y y the distance from that axis to the upper joint on the working face of the rib, and z z the distance from this axis to the farthest part of the rib, whereas in every other jigger known prior to said Nimmo's invention the line y y, and every other line drawn from the axis to the exterior of the rib above the lines z z was necessarily longer than z z, and every such line was also longer than any such line below it or nearer than it to the bottom of the vessel; distinguishing principle of said Nimmo's invention being the use of such a rib, in connection with a revolving vessel, to properly present the clay, or similar material, to the rib, and sustain it against the action of the rib, in the manufacture of vessels having a bilge, or of less diameter at a given point than below that point.

In the drawing fig. 1 is a plan of a "jigger" adapted to the manufacture of a crucible whose mouth is less in diameter than its diameter near the middle. Fig. 2 is a sectional elevation of the same, and fig. 3 an enlarged section for illustration. A central spindle, b, mounted in a suitable frame, a, carries on its upper end the hollow chuck, c, into which the plaster mould, d, fits, and
300 these parts are revolved by a belt to a wheel, e, and crank, f (see fig. 1), or by any other competent means, none of these parts differing either in construction or arrangement from those of the common "jiggers." The rib, n, is mounted upon a lever, l, which has a handle, m, at one end, and none of these parts differ from the corresponding parts of the common "jigger," except the relation of the working face of the rib to the axis of revolution of the

~~revolving chuck above pointed out. By this mode of manufacturing~~ crucibles, the plastic material is properly presented to and firmly supported against the action of the rib; and as the rib can always be brought into precisely the same relation to the axis of revolution of this material for any number of crucibles can thus be manufactured of uniform capacity, and also that the walls will be much more smooth, and the material much more compact than when made by hand, as the pressure between the rib and the supporting vessel compresses the material, and the working face of the rib, which
301 is a smooth-curved surface of metal, imparts its smoothness as well as its shape to the inside of the crucible. In the machine used by said Nimmo this definite relation of the working face of the rib to the axis of revolution of the crucible material is obtained by mounting the rib, that it will be controlled by suitable stops, *o* and *p*, the stop *o* serving as a fulcrum for the lever *l*, and the stop *p* arresting the motion of that lever when fulcrumed at *o*, as soon as the inside of the crucible is shaped, by the working face of the rib being brought into the desired position with relation to the axis of revolution. The lever, *l*, is hung by the chain, *i*, between two uprights, *g g*, so that when it is drawn outwards until its end clears the cross piece, *q*, it will be lifted bodily, and guided by the cross piece, *q*, and the uprights, *g g*, in such a way that the rib will not mar the mouth of the crucible as it is drawn out of it.

When the mould is in one piece the surplus material above the bilge is trimmed off, after the crucible is removed from the mould. This mould should be made of plaster, as the pot can be readily removed from a plaster mould.

We disclaim as the invention of said Nimmo, any and all processes for manufacturing from clay or similar material vessels
302 with flaring walls; nor do we claim broadly a rib or former, but limit ourselves to a rib with the distinguishing characteristic above specified.

What we do claim as the invention of said Nimmo, is—

1st. That rib, *n*, for jiggers, when so constructed that points upon its working face shall be nearer the axis of the vessel, the interior of which it is designed to form, than other points below such first-named points as above described.

2nd. The improved jigger above described, consisting essentially of a vessel *d*, rib *n*, and suitable mechanism to insure their proper joint action as above described, but only when said rib is constructed as above described and specified in the first clause of claim, and when the whole machine is organized as above described, for use in the manufacture of crucibles having a bilge, or similar vessels having a series of diameters which decrease towards the mouth.

3rd. As a special means of determining the size of the interior of the vessel, the stops *o* and *p*, in combination with the lever *l* and the rib *n*, but only when said rib is constructed as above described and specified in the first clause of claim.

303 4th. As a special means for operating said rib the counter-

~~poise *k*, and chain *i*, in combination with the lever *l* and the guides *g g* and *q*, the bottom of the latter serving as the fulcrum for the lever *l*, all substantially as described.~~

ARTHUR PICKERING.
C. R. VICKERY.
CHARLES R. ATWOOD.
PHŒNIX MANUFACTURING CO.,
By C. R. VICKERY, *President.*

Witnesses to C. R. V. and C. R. L.:
B. C. VICKERY.
EDWARD KING.

Witnesses to A. P.:
J. E. MAYNADIER.
J. E. KNOX.

304 STATE OF MASSACHUSETTS, } *ss.*
City of Taunton,

Charles R. Vickery, for himself and as President of the Phœnix Manufacturing Company, and Charles R. Atwood, being duly sworn, depose and say, that they verily believe that by reason of an insufficient specification the aforesaid letters patent granted to George Nimmo are inoperative; that the said error has arisen from inadvertence, accident, or mistake, and without any fraudulent intent or deceptive intention, to the best of their knowledge and belief; that the entire title to said letters patent is vested in them and said Arthur Pickering and said Phœnix Manufacturing Company, and that they verily believe the said George Nimmo to be the first and original inventor of the invention set forth and claimed in the foregoing amended specification.

C. R. VICKERY.
CHARLES R. ATWOOD.

Sworn to and subscribed before me this ninth day of November, 1872. G. E. WILLIAMS, *Justice of the Peace.*

305 STATE OF MASSACHUSETTS, } *ss.*
City of Boston,

Arthur Pickering, one of the above named petitioners, being duly sworn, deposes and says, that he verily believes that by reason of an insufficient specification the aforesaid letters patent granted to George Nimmo are inoperative; that the said error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, to the best of his knowledge and belief; that the entire title to said letters patent is vested in him and the said Charles R. Vickery, Charles R. Atwood, and Phœnix Manufacturing Company, and that he verily believes the said George Nimmo to be the first and original inventor of the invention set forth and claimed in the foregoing amended specification.

ARTHUR PICKERING.

Sworn to and subscribed before me this thirteenth day of November, 1872. J. E. MAYNADIER, *Justice of the Peace.*

306 THE U. S. PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the digests of this office of all assignments, agreements, licenses, powers of attorney, and other instruments of writing found of record under or relating to letters patent granted to George Nimmo, No. 49,140, dated August 1, 1865, for "moulding crucibles."

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

J. M. THACHER, *Acting Commissioner.*

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
George Nimmo.	A. Pickering. C. R. Vickery. C. R. Atwood.	June 12, '65.	July 12, '65.	Crucibles and others.	One undivided half of the right in said Patent and Invention, or in any reissue or extensions. (One undivided sixth part to each, and any improvements thereon.)	X 7	318
George Nimmo. A. Pickering. C. R. Vickery. C. R. Atwood.	Phœnix Manufacturing Corporation.	June 13, '65.	July 12, '65.	Same.	The right to make, use, and sell said crucibles, pots, &c., under said Patents and Inventions, hereby transferring one undivided half of said Patents, &c., upon the conditions mentioned.	X 7	321
George Nimmo.	A. Pickering. C. R. Vickery. C. R. Atwood.	June 15, '65.	July 12, '65.	Same.	His remaining rights in said Patents and Inventions, also the stock, tools, materials, &c., in Jersey City, in the manufactory under the superintendence of said Nimmo, and known as the Jersey City Crucible Manufacturing Company, upon conditions mentioned. See record.	X 7	323
George Nimmo.	Arthur Pickering. Charles R. Vickery. Charles R. Atwood.	June 12, '65.	Jan. 20, '69.	Manufacturing Crucibles in a revolving plaster mould with a lever sticking instrument, and others.	"Assigned to said parties (in equal proportions of one undivided sixth part to each) one undivided half part of the right he has in said Letters Patent and Inventions that have been or may be granted for the same in all countries, and any extensions or renewals, and any improvements upon said inventions, but not to exclude any improvements on glass-maker's pots; also assigns one undivided half of said John Akill's Patent.	M 11	11

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
George Nimmo. Arthur Pickering. Charles R. Vickery. Charles R. Atwood.	Phœnix Manufacturing Corporation.	June 13, '65.	Jan. 20, '69.	Same and others.	The right to make, use, and sell, or caused to be made, used, and sold crucibles or pots or similar articles under any or all said patents or said inventions for the United States, hereby assigning and transferring to said parties of second part one undivided half part of all and every interest, right, and title in connection with each and all said Inventions and Patents for full term same are or may be granted or extended. (See record for agreements and conditions named.)		
309					310		
George Nimmo.	Arthur Pickering. Charles R. Vickery. Charles R. Atwood.	June 15, '65.	Jan. 20, '69.	Revolving plaster m'ld and lever striker, and others.	His remaining right, title, and interest in said Patents and Inventions for the United States, and in the stock, tools, materials, machinery, and fittings in Jersey City, in the manufactory heretofore under the superintendence of said Nimmo, and known as the Jersey City Crucible Manufacturing Company. (See record for the conditions of this assignment.)		

311 [No. 1.] U. S. PATENT OFFICE,
WASHINGTON, D. C., *Dec.* 16, 1872.

ASSIGNEES OF G. NIMMO & CO.,
Care J. E. Maynadier, 33 School St., Boston, Mass.

SIR: Please find below a copy of communication from the examiner, relative to your application, filed complete December 10, 1872, for a reissue of letters patent granted to G. Nimmo August 1, 1865, No. 49,140, for "moulding crucibles."

Very respectfully,
(447) M. D. LEGGATE, *Commissioner.*

EXAMINER'S ROOM, No. 98.

The above application has been carefully exami e of
ings filed exhibit new matter, which can in no man s
found in the model, original specification, or drawin Erase and
given to the "rib *n*," which differs *widely* from the c w
which latter accurately delineates the model. t
As all the claims relate to this *interpolated* co ed Oct 17/72 t
clearly shown in a subsequent patent to P. G. Fren r
1865, ["Crucible Moulds,"]) the applicatio b
312 amined on its merits until the drawing is corrected so as to conform to the original case.

Z. F. WILBER, *Exr.*
Per L. P. FREUND, 2*d Asst.*

[No. 1.] U. S. PATENT OFFICE,
WASHINGTON, D. C., *Dec.* 30, 1872.

ASSIGNEES OF G. NIMMO,
Care J. E. Maynadier, 33 School St., Boston, Mass.

SIR: Please find below a copy of communication from the examiner relating to your application, filed complete December 10, 1872, for a reissue of letters patent granted to G. Nimmo August 1, 1865, No. 49,140, for "moulding crucibles."

Very respectfully,
M. D. LEGGATE, *Commissioner.*

EXAMINER'S ROOM, No. 98.

The request for a return of the drawings dated the 27th inst. cannot be complied with, in view of section 37 of the office "Rules of Practice."

The office can make a copy of the original drawing, which
313 will do for the reissue, if so desired.

Z. F. WILBER, *Exr.*
(849) Per L. P. FREUND, 2*d Asst.*

BOSTON, *Dec.* 27, 1872.

Hon. Commissioner of Patents.

SIR: The office letter of December 16, relating to application of George Nimmo's assigness for reissue of patent No. 49,140, moulding crucibles, duly received.

Please return the drawings decided to be inadmissible, that they may be corrected.

Very respectfully,

J. E. MAYNADIER, *Att'y.*

314 *To the Honorable Commissioner of Patents:*

SIR: In the matter of an application for reissue of letters patent No. 49,140, granted to George Nimmo August 1, 1865, for an improvement in manufacturing crucibles, we hereby amend our specification as follows:

By erasing all that part of the specification after the words "it being very desirable to have crucibles of the same size uniform, especially inside, none of them had been practically successful," and substituting therefor the following, viz.:

Erase and marked ed. Oct. 17/72

~~Long prior to said Nimmo's invention certain articles of pottery~~ ware had been made in plaster vessels of the required shape to form the outside of the articles, and so mounted in a revolving chuck as to properly present the clay to and support it under the action of a rib or power of the required shape to form the inside of the articles, but none of these jiggers (as such machines were so called) were applicable to the manufacture of crucibles, as will be plain to all skilled in the arts of crucibles making and of manufacturing jiggers.

"The invention of said Nimmo consists in an improvement in the art of manufacturing crucibles, namely, by the use of a rib or
315 former to form the interior, and a revolving plaster vessel or mould to receive the 'ball' (as the tempered material is called) and present it to and support it under the action of the rib, and also, if desired, to form the exterior of the vessel. By this mode of manufacturing crucibles much labor and expense is saved, and, what is still more important, crucibles are produced which are superior to those made by any practical mode known prior to said Nimmo's invention in many very important respects." "Fig. 1 is a plan and figure 2 a sectional elevation of the best form of apparatus known to said Nimmo for practising his mode of manufacture. In these drawings is a bed carrying the vertical spindle *b*, on the upper end of which is the hollow chuck *c*, into which the plaster mould *d* fits, and these parts are revolved by a belt over a wheel, *e*, and crank. (See fig. 1.)

"Near the chuck, *c*, is an upright frame, *g*, with rollers, *h h*, over which the chain, *i*, passes, on one end of which is the counter-weight *k*, and on the other the lever *l*, having a handle, *m*, at one end, and carrying a rib, *n*. This lever *l* is guided by the uprights *g g* and cross piece *q*, and when not in use is drawn up by the weight *k*. The rib *n* can always be brought into precisely the same rela-
316 tion to the axis of revolution of the mould *d*; consequently crucibles can be thus manufactured with very great uniformity. The material is also compressed between the rib and the supporting vessel, and the inside of the crucible is smoothed by the smooth surface of metal which constitutes the working face of the rib. The stop *p* arrests the motion of the lever when fulcrumed at *o* as soon

as the working face of the rib is brought into the desired relation with the axis of revolution of the mould—that is, as soon as the crucible is shaped. The rib must then be withdrawn, and to prevent its marring the interior of the crucible it must be properly guided. For this purpose the lever *l* is hung by the chain *i* between two uprights, *g g*, so that when it is drawn outwards until its end clears the cross piece *q* it may be readily lifted bodily and guided by the cross piece and the uprights *g g* in such a way that the rib will not strike against the interior of the crucible. The mould *d*, with the crucible in it, is when taken from the chuck and a second substituted. The crucible will soon shrink so that it can be removed from the plaster vessel, when it is to be finished in the usual manner." What we claim as the invention of said Nimmo is "the iron-proved mode of manufacturing crucibles above described."

ARTHUR PICKERING.
CHARLES R. VICKERY.
CHARLES R. ATWOOD.
PHŒNIX MANUFACTURING CO.
By J. E. MAYNADIER, *their Attorney.*

317 BOSTON, *January* 3*d*, 1873.

Hon. Commissioner of Patents.

In the matter of application of George Nimmo's ass'ees for reissue of patent No. 49,140, imp't in manufacture of crucibles, filed Dec. 10, 1872, I enclose an amendment striking out from the specification all reference to what the office holds to be new matter.

Admitting for the present the correctness of the decision of the office, (see office letter of Dec. 16th, 1872,) I respectfully suggest that the present drawings are admissible, in view of the amendment sent herewith, as it is well known to the office that crucibles differ in shape from that shown in the drawings, and as the model maker made a mistake in the form of the rib. The working machines used by Nimmo were in all respects like the present drawings; but in making the model on such a greatly-reduced scale, it is not surprising that such a mistake should occur. As the application is now amended, the claim does not relate to any interpolation; in fact, the sole purpose at present for desiring this change in the shape of the crucible shown (for the shape of the working face of the rib
318 necessarily depends upon that of the crucible) is to prevent a defendant, in case of suit, forwarding an objection to the patent, upon the ground that the drawing is erroneous in fact.

There is unquestionably a mistake in the original drawings in the form of the interior of the crucible, and consequently in the form of the working face of the rib, as will be plain on inspection of a crucible. (See the miniature crucible in the model, and making part of the model.) Why may not this mistake be corrected, especially if no claim is based upon the correction?

Very respectfully,
J. E. MAYNADIER, *Att'y.*

319 [No. 1.] U. S. PATENT OFFICE,
WASHINGTON, D. C., *Feb'y* 8, 1873.

ASSIGNEES OF G. NIMMO & Co.,
Care J. E. Maynadier, 33 School St., Boston, Mass.

SIR: Please find below a copy of communication from the examiner relative to your application, filed complete Dec. 10, 1872, for a reissue of letters patent granted to G. Nimmo August 1, 1865, No. 49,140, for "moulding crucibles."

Very respectfully,
M. D. LEGGATE, *Commissioner.*

EXAMINER'S ROOM No. 98.

The communication of the 6th ultimo has been received, but it does not remove the objections raised in the office letter of Dec. 16, 1872; and the consideration of this application is a *second time* postponed, to await the correction required.

Z. F. WILBER, *Ex'r.*
per L. P. FREUND, 2*d Ass't.*

320 BOSTON, *April* 1, 1873.

Hon. Comm'r of Patents.

SIR: In the matter of our application for reissue of letters patent No. 49,140, granted to George Nimmo August 1st, 1865, for improvement in manufacturing crucibles, we hereby amend our specification as follows:

By inserting immediately after the concluding words of the sentence describing the mode of guiding the rib out of the crucible, namely, immediately after the words "in such a way that the rib will not strike against the interior of the crucible," in the amendment last filed, the following:

"We are now aware that this mode of guiding the rib so that it will not strike against the interior of a vessel with a narrow mouth, or which is deep in comparison with its diameter, was described in a French work published in 1857, entitled "Lecons de Ceramique, par M. A. Salvetat," (volume second, page 121–2,) but the apparatus there described was capable of use in the manufacture of crucibles in the mode above described, for the reason that no vessel to receive the material and present it to and support it under the action of the rib is shown, the material being placed upon an ordinary pot-
321 ter's wheel and presented to and supported under the action of the rib by the hand of the workman in the well-known way familiar to all potters."

We also amend by correcting the drawings as required by the office letters of December 16th, 1872, and February 8, 1873, and accordingly enclose herewith a request that the office make a copy of the original drawing and file it with this application.

CHARLES R. ATWOOD,
CHARLES R. VICKERY,
ARTHUR PICKERING,
PHŒNIX MANUFACTURING CO.,
Assignees of Geo. Nimmo.
By J. E. MAYNADIER, *their Att'y.*

322 BOSTON, *June* 9, 1873.

Hon. Com'r of Patents.

SIR: In the matter of the application of Pickering and others, assignees of G. Nimmo, for a reissue of letters patent granted to the said Nimmo August 1, 1865, and numbered 49,140, for "moulding crucibles"—

In answer to the office letter of February 8, 1873, an amendment was mailed on April 1st, 1873, and an amendment of the drawings ordered.

I shall be greatly obliged if further action in the matter be taken by the office without delay. Yours respectfully,

J. E. MAYNADIER, by H. W. H.

323 BOSTON, *July* 1, 1873.

Hon. Comm'r of Patents.

SIR: In the matter of the application of G. Nimmo, for the reissue of the letters patent granted to him Aug. 1, 1865, (No. 49,140,) for moulding crucibles, the reissue being filed of date Dec. 11, 1872—

I feel compelled to remind the office that the last official action was the letter of Feb'y 8, 1873, and that no action has yet been had upon the amendment mailed Apr. 1, 1873, although in a letter mailed June 9, 1873, I especially requested further action; and I must respectfully but urgently now repeat that request.

Very respectfully,

J. E. MAYNADIER, by H.

324 U. S. PATENT OFFICE, *July* 12, 1873.

GEROGE NIMMO'S ASSIGNEES,

Care J. E. Maynadier, No. 33 School street, Boston, Mass.

App'n for reissue of patent for "moulding crucibles," granted to Nimmo August 1, 1865.

App'n for reissue filed Dec. 10, 1872.

a

ROOM 98.

As amended, this app'n has been re-examined. The referenh, (Salvetat) shows, as app't acknowledges, the curved jigger applied i- the manufacture of articles of this general shape, etc., on page 1it of the volume of Salvetat cited, a mould is shown rotated upon th, lathe, the interior of the article being formed by a jigger of differek. shape, however, from Nimmo's. On page 119 is shown a mould of different shape, no jigger being shown. These references, however, clearly show that there is no invention (and was not at the date of Nimmo's original app'n) in merely applying any particular form of mould and jigger to the manufacture of special articles from plastic material. For this reason the claim presented is rejected.

This claim covers broadly, construed by the specification, the manufacture of crucibles by the mould and jigger, the article
325 differing only in shape from those calculated to be made on the references cited, and in this there was no invention, any invention lying only in special machinery.

Moreover, were such claim allowable, an interference would be declared with patent of T. J. French, Nov. 7, 1865, the margin of time between the two patents being so small as to entitle him to some consideration in the matter. The claim is objectionable in that what is intended to be covered is indicated only by "substantially as described." The decisions of the Comm'r have been to the effect that such claims are not explicit—that the claim itself must give some idea of what is meant to be covered thereby.

Z. F. WILBER, *Ex'r.*

33 SCHOOL ST., ROOMS 22 & 23, BOSTON, *October* 15, 1873.

Hon. Comm'r of Patents.

SIR: In the matter of the application of George Nimmo's assignees for reissues of the letters patent for "moulding crucibles," granted to Nimmo Aug. 1, 1865, application for reissue filed Dec. 10, 1872, I enclose herewith an amendment, which I hope will obviate the objections of the examiner stated in the official letter of July 12, 1873. Very respectfully,

JAS. E. MAYNADIER, by H.

326 BOSTON, *Oct.* 13, 1873.

Hon. Comm'r of Patents.

SIR: In view of the office letter of July 12, 1873, relating to an application for reissue of patent for moulding crucibles granted to George Nimmo Aug. 1, 1865, filed Dec. 10, 1872, we amend as follows: (1.) By erasing all amendments now on file, except such as relate solely to correcting the drawings. (2.) By erasing all that part of the specification including the claims after the words, "it being very desirable to have crucibles of the same size uniform, especially inside; none of them had been practically successful," and substituting therefor the following, viz.: ~~Long prior to said Nimmo's invention, the mode of manufacturing certain articles of~~ pottery by means of a rib or former, to give the desired shape to the inside of the article, and a revolving plaster vessel to properly present the ball (as the lump of tempered clay is called) to support ~~it~~ under the action of the rib, was well known, but this mode of manufacture was not applicable in the manufacture of crucibles, as will be to all skilled in the art of crucible making, and acquainted with the mode of manufacture above referred to. Another mode of manufacturing certain articles of pottery ware by means of a rib or former for the inside of the article and a revolving table,
327 a common potter's wheel which partially presented the ball to and supported it under the action of the rib, the workman using his hands to aid in presenting the ball and to support it under the action of the rib, is described in a French work published in 1857, entitled "Lecons de Ceramique, par M. A. Salvetat," (volume second, pp. 121–2.) This last-named mode of manufacture was applicable to the manufacture of crucibles; but, even if useful at all

Amend B.B. Dec. 73 Insert

~~in that manufacture, it is without doubt very much inferior to the~~ mode of manufacture invented by Nimmo and hereinafter described, the distinguishing difference between them being that the ball is presented to the rib and supported under its action, not by a flat revolving metal disk, but by a vessel made of plaster, which takes the place of both the flat revolving disk and the workman's hands, performing all the functions performed by this disk and the hands of the workman, but in a much more perfect manner and in less time.

The invention of said Nimmo is in fact an improvement on the mode of manufacture described in Salvetat's work, the improvement consisting in the different mode of presenting and supporting the ball, but we do not wish to be understood as claiming this
328 mode of presenting and supporting the ball as the invention of said Nimmo, as his improved mode of manufacture is new solely because it is as a whole substantially different from the mode described by Salvetat, and from the mode first above referred to; indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat, so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to, so far as presenting the ball to and supporting it under the action of the rib is concerned. By Nimmo's improved mode of manufacture, such labor and expense is saved, and, what is still more important, crucibles are produced which are superior to those made by any practical mode known prior to said Nimmo's invention in many very important respects.

Figure 1 is a plan, and figure 2 is a sectional elevation of the best form of apparatus known to said Nimmo for practising his improved mode of manufacture. In these drawings, *a* is a bed carrying the vertical spindle, *b*, on the upper end of which is hollow chuck *c*, into which the plaster mould, *d*, fits, and these parts are revolved by a belt to a wheel, *e*, and crank. (See fig. 1.)

329 Near the chuck *c* is an upright frame *g*, with rollers, *h h*, over which the chain *i* passes, one end of which is the counter weight, *k*, and on the other the level, *l*, having a handle, *m*, at one end, carrying rib *n*. This lever, *l*, is guided by the uprights, *g g*, and cross piece, *g*, and when not in use is drawn up by the weight *k*. The rib *n* can always be brought into precisely the same relation to the axis of revolution of the mould *d*; consequently crucibles can be thus manufactured with very great uniformity. The material is also compressed between the rib and the supporting vessel, and the inside of the crucible is smoothed by the smooth surface of metal which constitutes the working face of the rib. The stop *p* arrests the motion of the lever when fulcrumed at *o*, as soon as the working face of the rib is brought into the desired relation with the axis of revolution of the mold; that is, as soon as the crucible is shaped. The rib must then be withdrawn, and to prevent its marring the interior of the crucible it must be properly guided. For this purpose the lever *l* is hung by

the chain *i* between two uprights, *g g*; so that when it is drawn outwards until its end clears the cross piece, *g*, it may be readily lifted bodily, guided by the cross piece *q* and the uprights *g g* in such
330 a way that the rib will not strike against the interior of the crucible. The mould *d* with the crucible in it is then taken from the chuck, and a second mould substituted; the crucible will soon shrink so that it can be removed from the plaster vessel, when it is to be finished in the usual manner.

We disclaim as the invention of said Nimmo the mode above described of shaping the inside of the crucible, including as an essential part so guiding the rib that it will not mar the vessel as it is withdrawn; and also the mode above described of presenting and supporting the ball, when used separately.

What we do claim as the invention of said Nimmo is the improved mode above described of manufacturing crucibles, consisting of the mode of shaping the inside, including the guiding of the rib as it is withdrawn, and presenting and supporting the ball as above described, when used together, and constituting together one mode of manufacture, substantially such as is above described.

ARTHUR PICKERING,
CHARLES R. VICKERY,
CHARLES R. ATWOOD,
PHŒNIX MANUFACTURING CO.,
Assignees of Geo. Nimmo.
By J. E. MAYNADIER, *their Att'y.*

331 [No. 1.] COMMISSIONER'S ROOM, No. 98,
U. S. PATENT OFFICE,
WASHINGTON, D. C., *Oct.* 30, 1873.

GEORGE NIMMO'S ASSIGNEES,
Care J. E. Maynadier, 33 School st., Boston, Mass.

"Moulding Crucibles."—Reissue applied for Dec'r, 1872.

For amended claim presented Oct. 17, 1873, for an "improved mode of manufacture," is held to be anticipated by the reference in Salvetat's work, previously cited and noticed also by app'ls.

It is held, if Nimmo invented anything, it was devices for carrying a "mode" into effect, and not a "mode."

The application is accordingly again rejected.

Z. F. WILBER, *Ex'r.*

332 BOSTON, MASS., *Dec.* 11, 1873.

Hon. Comm'r of Patents.

SIR: In the matter of the application of George Nimmo's assignees for reissue of patent for manufacture of crucibles, filed Dec. 18, 1872, I respectfully submit the following, in view of office letter of Oct. 30th, 1873:

Your honor holds (1) that the amended claim is anticipated by Salvetat's work, and (2) that Nimmo did not invent any mode of manufacture. In view of this second ruling, no reference is of course

needed; but as a reference is given, I necessarily conclude that the second ruling is based upon the first, *i. e.*, that Salvetat describes a mode; that this mode is the same as now claimed by Nimmo (not as matter of fact, of course, but in law); that, therefore, Nimmo invented no mode (there being but one mode described in his original patent, viz., the mode claimed).

I can find no flaw in this reasoning, if the first ruling be correct; but before I take advantage of your honor's suggestion, by limiting my clients to devices, I feel bound to ask your honor's careful attention to the grounds of this first ruling, premising that the
333 case is close and difficult, in view of Salvetat, but trusting nevertheless that I can succeed in satisfying your honor that my clients, who owns the right of the man whose ideas have *in fact* wholly revolutionized an important art, are entitled to protection, in some degree commensurate with the very great services which is necessarily rendered to the community by such a revolution. I wish to take broad ground, not (as I am sure your honor will readily admit) with a view of getting a patent which ought not to be granted, but because the underlying principle of the patent law is to reward by a monopoly the origination and practical application of just such ideas. The lead pipe case (Tatham *v.* Le Roy, 22 of Howard, and see Judge Nelson's very noble dissenting opinion in the same case, in the 14th of Howard) is an illustration of that sound sense which is the basis of all law, and establishes the fact that *some* patent *must* in *some* way be found of such vessels as crucibles. Now, however, I am made aware, by Salvetat's work, that this problem had been fully solved before Nimmo solved it.

We have, then, first, the saucer and wash bowl made where this problem did not exist; and, secondly, the mode described by
334 Salvetat where this problem did exist and was solved. But—and this is the *only* ground upon which I urge Nimmo's claim, and therefore I pray your honor's careful attention—in the first mode one essential element of Nimmo's is lacking, (for I assume that your honor does not doubt that Nimmo's mode is clearly patentable over the saucer and wash bowl mode,) and in the Salvetat mode *one* essential element of Nimmo's is lacking; therefore neither of these modes is in *fact* the same as Nimmo's; and the whole question is one of law; *i. e.*, given two modes of manufacture, one containing elements A and B, the other element A and B (A being in lieu of A′ and inferior to it) can a patent issue for a third mode, new solely in the substitution of B′ for B in the first mode, in all cases where an art is in fact greatly improved?

I do not suppose that your honor differs from me as to what Salvetat's work in fact describes, nor as to the state of the art prior to Nimmo's improvement; but to make my argument clear, I will describe briefly what ground, as I understand it, had been occupied, and then attempt to make clear what ground was left for Nimmo.

I have not been able to find any patentable distinction be-
335 tween the manufacture of crucibles and that of other pot-

tery, and do not of course have any claim upon any such distinction. I am aware, also, that very many articles of pottery ware—wide at the mouth, and of little depth compared to their width, such as saucers, wash bowls, &c., &c., where there was no difficulty in getting the rib out—were manufactured in a mode and by an apparatus not differing from Nimmo's, excepting as to this matter of getting the rib out. When I filed this application, I was not aware that any person before Nimmo had ever solved this problem of getting the rib out, or (what is precisely the same thing) the substitution in the second mode of A for A′, the third mode consisting (in either case) of elements A and B′; B′ representing the forming the inside, including the getting the rib out, in Salvetat's manner A, the supporting and presenting the ball by means of a proper vessel, and A′ presenting and supporting it by means of a wheel and the workman's hands.

It may be said that it is a simple and obvious improvement, but this may also be said of many of the most valuable patents ever issued; it was in fact said and very strongly urged in the 336 case of Forbush *v.* Cooke, 2 Fisher, p. 668; but Judge Curtis wholly disregarded it in view of the great value which resulted, and it is now a fundamental principle of the patent law, that it matters not how seemingly simple and obvious the improvement be if the result be large and valuable.

Suppose a suit be brought upon French's patent, and that the defendant should set upon as his defense a saucer jigger (which has been known for half a century) and Salvetat's jigger, and I certainly am absolutely confident that there is not a judge upon [upon] the bench who would hold that these made out a defense, nor do I believe that there is a patent lawyer of any eminence who would so advise.

In the amended specification, I have carefully disclamed both the old modes, and distinctly pointed out that all that is claimed is the new mode produced by the substitution of A for A′ in Salvetat's mode, or the substitution of B′ for B in the saucer and wash bowl mode. It is clear that the use of the saucer and wash bowl mode (A and B) would not infringe the reissue sought (A and B′), and equally clear that the use of the Salvetat mode (A′ and B′) would not infringe 337 it, because both are distinctly disclaimed; and the inevitable conclusion, as it seems to me, is, that neither of these modes is a good reference, unless it be that the substitution of the feature A of the saucer and wash bowl mode for the feature A′ of Salvetat's mode be held not patentable. I understand your honor so to hold, and therefore pray a reconsideration, trusting that your honors will feel justified in view of the novelty *in fact* of applicant's mode, and of the further fact that the practical result of this novelty has been to revolutionize this business, giving not only a larger profit to the crucible manufacturer, but a much better article to the consumer; that your honor will feel justified, in view of these facts, in holding that the mode claimed is new in law as well as in fact.

To recapitulate: As a matter of fact, the mode A and B′ was unknown till Nimmo used it. As matter of fact, it differs from the old mode A and B by just so much as B differs from B′; and from the old mode A′ and B′, by just so much as A differs from A′. As matter of fact, the difference between A and B′ and A and B or A′ and B′ is such that the first is the very highest value both to makers and consumers of crucibles, while the others are of no value
338 whatever to them. Now, why is it that the originator of A and B′ is not entitled to the monopoly of what he originated under our laws, whose main, if not only, purpose it is to encourage just such improvements in the acts of giving a brief monopoly to the person orginating them?

I have assumed that your honor finds a patentable difference between the saucer and wash bowl mode and Nimmo's; but it may be that I am mistaken in this assumption, as Salvetat's work describes not only what I have called the Salvetat mode A′ and B′, but also the saucer and wash bowl mode A and B; and a third mode, where the ball is supported and presented by an outside vessel, but shaped inside by the potter's hand—still largely used in the manufacture of pottery.

If I am not mistaken in my assumption, the only question is, as stated above, viz.: Do the admitted differences in *fact* between Nimmo's mode A and B′ and Salvetat's mode A′ and B′ amount to a patentable difference?

If I am mistaken in my assumption, there is a further question, viz.: Do the admitted differences in fact between the saucers and wash bowl mode (also described by Salvetat) A and B and Nimmo's mode A and B′ amount to a patentable difference?

339 This question is of precisely the same kind as the one already argued, and its solution depends upon precisely the same principles. In the office letter of July 12, your honor intimates that Nimmo's supposed invention may be found to consist in merely "applying a PARTICULAR FORM of mould and jigger to the manufacture of special articles." If this be so, of course this reissue should not be granted; and I am not arguing that a mere change in the form of the mould entitles him to a patent. Now, what is it that Nimmo did? Assuming, as the law compels, that he was familiar with A and B and A′ and B′, the idea of manufacturing crucibles with a mould and jigger occurred to him; and when this idea occured to him the form of the mould also necessarily was determined; so that it is clear that no invention resides in determining the form of the mold, and it is equally clear that no invention resides in the idea of manufacturing *one* kind of pottery ware by a mode well known for manufacturing other kinds. *But this kind of ware had never before been manufactured save in* two, *or perhaps* three, *modes*, viz.: (1) On a potter's wheel, outside by hand and wheel, and inside by hand; (2) Mode A′ and B′, outside by hand and wheel, inside by a rib
340 so guided that the bottom part of the rib would be intersected by the axis of the pot as the rib left the mouth of the pot;

(3) In a revolving mould; outside by mould, inside by hand. *Another* kind of pottery ware, saucers, wash bowls, etc., was made by a mode A and B, in which the rib was *not* so guided that its bottom part would be intersected by the axis of the pot as the rib left the pot.

But before Nimmo could make a crucible by his mode it was necessary for him to modify this mode A and B, which was not adapted for his purpose, by dispensing with the mode B of guiding the rib, and substituting in its stead the mode B′ for guiding the rib. In the kind of ware Nimmo desires to make it *is essential* that the rib be so guided, and therefore this kind of ware cannot be made by the mode A and B′. Now, it can be and is made by Nimmo's mode A and B′. Can it be doubted, then, that Nimmo's mode is an improved mode relatively to mode A and B? Again, in every instance of the manufacture of any ware, no matter of what shape, by means of a mould to present and support the ball, and a rib to draw it, the rib was guided as in the mode A and B; but in Nimmo's mode the rib cannot be so guided, but *must* be guided as in the mode
341 A′ and B′. Is it not clear, then, that Nimmo's improvement consists in something more than "merely applying a particular form of mould and jigger?" Take an ordinary machine, such as is used in manufacturing by mode A and B; remove the mould and the rib or jigger; substitute for the mould and rib removed the mould and rib shown in Nimmo's drawing, and the apparatus becomes worthless for the use of the mould A and B, and is not at all adapted for use in Nimmo's mode; and to adapt it for use in Nimmo's mode it is absolutely essential to substitute B′ for B.

Nimmo was the first to make a crucible (or any similarly-shaped vessel) by this mode. Is it just to confine him to the mechanical devices he may have invented? It is true that he invented certain mechanical devices, but before it was even possible to invent these devices, it was absolutely essential that he should have invented his improvement in the art; that is to say, supposing (as is the fact) that he knew nothing of Salvetat's mode A′ and B′. Had he a full knowledge of both A and B and A′ and B′, he needed to invent no mechanical devices, but needed only to invent the improved mode A and B′.

This is in fact the novelty which the community owes to
342 him, and for which he is, by both the letter and the spirit of the patent law, entitled to be rewarded.

Very respectfully,

J. E. MAYNADIER, *Atty.*

343 EXAMINER'S ROOM, U. S. PATENT OFFICE,
WASHINGTON, D. C., *Dec.* 23, 1873.

GEORGE NIMMO,
Care of J. E. Maynadier, 33 School street, Boston, Mass.

Moulding Crucibles.—Filed Nov. 29, 1872.

The claim submitted by way of amendment is too indefinite to meet with favorable action, even were the subject-matter determined

to be a new mode, as asserted by applicant. It is shown in the references formerly cited that open vessels with flaring sides were produced by the following persons: Upon the upper end of a spindle is formed a hollow chuck; within the same is secured a plaster mould, made in the desired form of the article to be produced; clay is then introduced into the mould, and while the spindle is revolving the clay is evenly spread against the bottom and sides of the mould, by means of a rib secured to a lever, which is manipulated by the operator.

Now, upon an examination of this case it appears that the
344 crucibles made by applicant are produced by this same process, and the slight changes in the mechanism does not of necessity nor in reality render this a new or different mode of manufacturing earthenware, but the patentable novelty, if any exists, consists simply in the novel devices whereby a certain part of the process is effected. The claim is therefore rejected. subject to an appeal on former references.

A. SCHOEPF, *Prin. Examiner.*
Per H. A. SEYMOUR, 1*st Asst.*

345 BOSTON, *Dec.* 29, 1873.

Hon. Comm'r of Patents.

SIR: The office letter of Dec. 23, 1873, relating to application of George Nimmo's assignees for reissue of patent for moulding crucibles, filed Nov. 29, 1872, was duly received.

Your honor now describes, now *for the first time*, what the amended claim presented Oct. 17, 1873, is too indefinite; and now that my attention is brought to it, I feel that this objection is so well founded as to make it unwise to appeal from the main decision of your honor; that is to say, there would be two issues on the appeal, viz.: (1) Is the claim too indefinite? (2) Supposing the claim were indefinite, is it for a patentable subject-matter? As to the first of these issues there has been but one action of your honor. I trust, therefore, that your honor will find it within your yower, under the rules, to allow the enclosed amendment.

It is within your honor's power, in my opinion, because it is the wise policy of the office to settle all preliminary questions before an appeal is allowed as to the merits. I have some doubts as to my *strict* right, under the present circumstances, to do more by amendment than to make the present claim *definite;* but I take the
346 liberty, in view of your honor's suggestions, to add a second claim for the apparatus, and trust that your honor will admit the entire amendment, under a liberal construction of the rules; and in order to save time and expense, it will certainly injure no one should your honor give this liberal construction to the rules, and will undoubtedly expedite matters and enable my clients to present their *whole case;* that is, to present the *broad* question whether there is not some way by which this invention (whether it be an improved art or an improved apparatus) can be adequately protected. Your honor knows that all I seek by this reissue is a patent which shall give my

clients the monopoly of what I have thought to to be a new mode, viz., the use of a mould with what I have called "the Salvetat mode, or the use of a guide *the equivalent of Salvetat's* with what I have called the "saucer and wash bowl mode." But so that they get this monopoly practically, I am, of course, indifferent whether it be by claiming a *new mode* or a new apparatus; and your honor will readily see that they are either entitled *to this* or else must be limited to *mere devices*, and that should it be decided that they are so limited, the better course for them would probably be to abandon all idea of reissue and stand on the old patent.

Very respectfully, J. E. MAYNADIER, *Att'y.*

347 BOSTON, *Dec. 29th*, 1873.

Hon. Commissioner of Patents.

SIR: In view of the office letter of Dec. 23d, 1873, relating to application of George Nimmo's assignees for reissue of patent for moulding crucibles, dated August 1st, 1865, we amend as follows:

(1.) By erasing all amendments now on file, except such as relate solely to correcting the drawings. (2.) By erasing all that part of the specification, including the claims after the words, "it being very desirable to have crucibles of the same size uniform, especially inside; none of them had been practically successful," and substituting therefor the following, viz.:

Amend't. Filed Dec. 31, 1873.

"Long prior to said Nimmo's invention the mode of manufacturing certain articles of pottery, by means of a rib or former to give the desired shape to the inside of the article, and a revolving plaster vessel to properly present the 'ball' (as the lump of tempered clay is called) to and support it under the action of the rib, was well known; but this mode of manufacture was not applicable in the manufacture of crucibles, because the apparatus was such that the crucible would be injured or destroyed in removing the rib,
348 by the end of the rib striking the upper part of the crucible, as will be plain to all skilled in the art of crucible making, and acquainted with the mode of manufacture above referred to.

Another mode of manufacturing certain articles of pottery ware, by means of a rib or former, for the inside of the article, and a revolving table—a common potter's wheel—which partially presented the ball to and supported it under the action of the rib, the workman using his hands to aid in presenting the ball to and supporting it under the action of the rib, is described in a French work published in 1857, entitled "Lecons de Ceramique, par M. A. Salvetat" (volume second, pp. 121–2). This last named mode of manufacture was applicable to the manufacture of crucibles, the apparatus being such that the rib was guided so as to cause it to approach the axis of the pot, when it was necessary that it should do so, in order to prevent injury to the pot; but even if useful at all in that manufacture, it is without doubt very much inferior to the mode of manufacture

invented by Nimmo, and hereinafter described; the distinguishing difference between them being that the ball is presented to the
349 rib and supported under its action, not by a flat revolving metal disk, but by a vessel made of plaster, which takes the place of both the flat and revolving disk and the workman's hands, performing all the functions performed by this disk and the hands of the workman, but in a much more perfect manner and in less time.

The invention of said Nimmo is, in fact, an improvement on the mode of manufacture as well as on the apparatus described in Salvetat's work, the improvement consisting in the different mode of presenting and supporting the ball; but we do not wish to be understood as claiming this mode of presenting and supporting the ball as the invention of said Nimmo, as his improved mode of manufacture is new, solely because it is as a whole substantially different from the mode described by Salvetat, and from the mode first above referred to; indeed, as a short general description of Nimmo's improved mode, it may be said to be substantially the same as that described by Salvetat, so far as shaping the inside of the crucible is concerned, and substantially the same as the mode first above referred to, so far as presenting the ball to and supporting it under the action of the rib is concerned.

350 By Nimmo's improved mode of manufacture much labor and expense is saved, and, what is still more important, crucibles are produced which are superior to those made by any practical mode known prior to said Nimmo's invention, in many very important respects.

Figure 1 is a plan, and figure 2 is a sectional elevation of the best form of apparatus known to said Nimmo for practising his improved mode of manufacture. In these drawings *a* is a bed carrying the vertical spindle *b*, on the upper end of which is the hollow chuck *c* into which the plaster mould fits; and these parts are revolved by a belt to a wheel *e*, and crank. (See fig. 1.). Near the chuck *c* is an upright frame, *g*, with rolls, *h h*, over which the chain *i* passes, on one end of which is the counter weight *k*, and on the other the lever *l*, having a handle *m* at one end, and carrying rib *n*. This lever *l* is guided by the uprights, *g g*, and cross piece *q*, and when not in use is drawn up by the weight *k*. The rib *n* can always be brought into precisely the same relation to the axis of revolution of the mould *d*; consequently crucibles can be thus manufactured with very great uniformity; the material is also compressed between
351 the rib and the supporting vessel, and the inside of the crucible is smoothed by the smooth surface of metal which constitutes the working face of the rib. The stop *p* arrests the motion of the lever when fulcrumed at *o* as soon as the working face of the rib is brought into the desired relation with the axis of revolution of the mould; that is, as soon as the crucible is shaped. In all these respects this apparatus does not differ from that first mentioned. The rib must then be withdrawn, and to prevent its marring the interior

of the crucible it must be so guided that it will travel in a path materially different from that of the rib in the apparatus first above described, and substantially the same as that of the rib in Salvetat's apparatus. For this purpose the lever *l* is hung by the chain *i* between two uprights, *g g*, so that when it is drawn outwards until its end clears the cross piece *q*, it may be readily lifted bodily, and guided by the cross piece *q* and the uprights *g g* in such a way that the rib will not strike against the interior of the crucibles. The mould *i*, with the crucible in it, is then taken from the chuck and a second mould substituted. The crucible will soon [soon] shrink so that it can be removed from the plaster vessel, when it is to
352 be finished in the usual manner.

We disclaim as the invention of said Nimmo both the modes and both the apparatus above mentioned, and we also distinctly disclaim any and all modes of manufacture which can be carried on by any apparatus which lacks either the mechanism for guiding the rib in the manner above described or the vessel for presenting and supporting the ball as above described; said Nimmo's invention residing wholly in the combined use of both these features. "What we do claim as the invention of said Nimmo is"—

Erase by amend't filed Sept 20, 1874

~~The improved mode of manufacturing crucibles above described, consisting in presenting the ball to and supporting it under the action of the rib as above described, when used in conjunction with the mode above described of guiding the rib as it is withdrawn, and only when so used.~~

Erase and insert "b" by amend't filed Jan 5/74

~~Second. The improved apparatus above described, consisting of a rib (n) mechanism for supporting the ball under and presenting it to the action of the rib (chuck c, and mould d); and mechanism for guiding the rib in the manner above described, (lever l, upright g g, and cross piece q,) when combined and operating together as set forth, and constituting together an apparatus substantially
353 such as is above described.~~

ARTHUR PICKERING,
CHARLES R. VICKERY,
CHARLES R. ATWOOD,
PHŒNIX MANUFACTURING CO.,
Ass'ees of Geo. Nimmo.
By J. E. MAYNADIER, *their Att'y.*

354 [No. 1.] EXAMINERS' ROOM, No. 102, U. S. PATENT OFFICE,
WASHINGTON, D. C., *Jan'y 2d*, 1874.

GEORGE NIMMO,
Care J. E. Maynadier, 33 School st., Boston, Mass.

Moulding Crucibles.—Filed Nov. 29th, 1872.

The second claim of amendment last filed has been considered; the claim is a little mixed, and it is respectfully suggested the following be inserted therefor: The combination of rib *n*, lever *l*, uprights g g, cross piece q, and counter weight, with chuck c and mould *d*, substantially as and for the purpose set forth.

The first claim is in proper shape for an interlocutory appeal to the Commissioner of Patents. A. SCHOEPF, *Prin. Examiner.*
Per H. A. SEYMOUR, 1*st Ass't.*

355 BOSTON, *January* 5, 1874.

Hon. Commissioner of Patents:

SIR: The office letter of January 2d, 1874, George Nimmo, reissue of patent for moulding crucibles, filed November 29th, 1872, duly received.

As to your honor's suggestion (for which I am obliged) in regard for the claim for the apparatus, it seems to me that the claim suggested is narrower than the claims of the original patent, and also that the claim is drawn upon the hypothesis that Nimmo's *real* invention is *nothing more* than his special mechanism for guiding the rib. Now, I believe I have been entirely frank in this matter. Certainly, I meant to make it clear that the *sole* object of this reissue was to so broaden the patent that it would cover any and all apparatus which contained a revolving chuck to present and support the ball, a rib to shape the inside, and mechanism (whether uprights, *g g*, cross piece, *q*, and counter weight, or any substitute; *e. g.*, Salvetat's mechanism) for so guiding the rib that it would approach the axis of revolution substantially as Nimmo's and Salvetat's ribs do,
356 and thereby enable the apparatus to be used in the manufacture of crucibles and similar vessels.

Now, as matter of fact, Nimmo did invent "the combination of rib *n*, lever *l*, uprights *g g*, cross piece *q*, and counter weight," etc. But all this he found with the exception of the cross piece; and all that Nimmo did, so far as the apparatus is concerned, was to dispense with a bolt, and substitute the cross piece (changing, of course, the form of the chuck mould, and rib). He is undoubtedly entitled to a patent for this, and has, in fact, got one.

But it seems to me a gross hardship to confine him to such a patent, and that any construction of the patent laws which compels your honor to so confine him renders these laws a reproach, for it amounts to giving him the shell and leaving the oyster to infringers.

It also seems to me entirely clear that the patent laws, construed with the proper breadth and liberality, (as all our courts have construed them since the Supreme Court rectified, in 22d Howard, Tatham *v.* Le Roy, the cruel injustice they were guilty of in 14th Howard, same case,) that is, construed with the purpose [that is,
357 construed with the purpose] of giving to the inventor a monopoly commensurate with his real invention; that these laws thus construed do not compel your honor so to confine him, but do both authorize and require your honor to ascertain, first, what is his real invention, and, secondly, to allow any properly-drawn claim which is not broader than that invention.

But surely it is to mistake form for essence to hold that Nimmo

invented *nothing more* than certain *special* mechanism, for before he could even so much as *begin* to conceive of his *special* mechanism, it was necessary that he should have conceived the idea of making crucibles by a mould and rib and have clearly apprehended the reason why the old apparatus ("saucer and wash bowl" apparatus) was useless for his purpose. *After* he had clearly apprehended this, *all* that remained to be done was within the ability of any ordinary mechanic. Precisely as in the lead pipe case, *after* the patentee had a clear knowledge that lead would weld just as clay or dough would weld, *all* that remained to be done was to make the clay or dough pipe machine strong enough for lead.

Again, suppose Nimmo with both the "saucer and wash bowl" apparatus and the "Salvetat" apparatus before him. Now, after
358 he had conceived the idea of making crucibles by a mould and rib, and after he had clearly apprehended the reason why he could not use either of these apparatus, no invention of *means* was requisite, for all he had to do was to secure his mode to Salvetat's wheel; his mode and chuck (in that case) being identical in everything but form with the like parts in the "saucer and wash bowl ap" apparatus, and the remainder of his apparatus being identical, even in form, with the like parts of the "Salvetat" apparatus. If he had combined a mould and chuck with the Salvetat apparatus, his *real* invention would have been precisely the same as I now believe it to be, namely: The combination of a mould and chuck, a rib and SUITABLE mechanism for so guiding the rib that it will approach the axis of the pot as it is withdrawn, although he had in fact invented *no* mechanism for so guiding the rib.

Your honor will see that both the amended claims are in effect for *this* invention; and I beg your honor to consider, First: Is not this the real invention of Nimmo? Secondly: If so, is it not a
359 mockery to give him a patent for an invention which is contemptible in comparison with his real invention? And thirdly, why should he not have a patent for his real invention?

I feel that I am trespassing on your honor's patience; and yet I am so anxious to make my meaning clear, that I crave indulgence while I still further define my ground.

I do not assert that Nimmo is entitled to monopolize any or all means of so guiding the rib; nor having invented but one means, he can cover all means of so guiding the rib. But I do assert that his real invention is very much more than a means of so guiding the rib; that it has in fact no necessary connection with any *particular* means of so guiding the rib; that he is the very first man who ever used *together*, so as to constitute *one* apparatus, the three elements of (1) the [the] mould and its chuck, (2) the rib, and (3) means for so guiding the rib; that he was the first to practice the new mode of manufacture carried on with this new apparatus; and that the only patent which will properly protect him as a patent for this new
360 mode, or else a patent for this new apparatus, the latter NOT

being limited to ANY SPECIAL MEANS for guiding the rib so that it will approach the axis as it is withdrawn.

To make my meaning clear, and to obviate the objection pointed out by your honor, I enclose an amendment of the second claim.

Very respectfully, J. E. MAYNADIER, *Atty.*

361 [No. 1.] EXAMINER'S ROOM, No. 102, U. S. PATENT OFFICE, WASHINGTON, D. C., *January* 8, 1874.

GEORGE NIMMO,
Care J. E. Maynadier, 33 School st., Boston, Mass.

Moulding Crucibles.—Filed Dec. 10, 1872.

The second claim as presented is too indefinite and faulty in several particulars, and cannot be allowed. Additional reference is made to figure 82 in Feldspath-Porzellan, which shows a device for moulding crucibles very similar to applicant's.

If applicant still persists in presenting claims of this character, he will be obliged to make an interlocutory appeal to the Commissioner, and there ascertain whether he or the examiner is in fault.

A. SCHOEPF, *Prin. Examiner.*
Per H. A. SEYMOUR, 1*st Ass't.*

362 BOSTON, *January* 5*th*, 1874.

Hon. Comm'r of Patents.

SIR: In view of office letter of January 2d, relating to application of George Nimmo's assignees for reissue of patent for moulding crucibles, filed Nov. 29th, 1872, we amend as follows:

"*C*" *Insert. Cancelled by Amend't filed Sept.* 25, 1874. *Insert* "*G.*"

"Second. The improved apparatus above described, consisting of a rib for shaping the inside of the crucible, as above described; mechanism for supporting the ball under and presenting it to the action of the rib, as above described; and mechanism for operating and guiding the rib, as above described, when these three elements are combined and operated together substantially as and for the purpose specified."

ARTHUR PICKERING.
CHARLES R. VICKERY.
CHARLES R. ATWOOD.
PHŒNIX MAUFACTURING CO.,
By J. E. MAYNADIER, *their Att'y.*

363 BOSTON, *Feb'y* 4, 1873.

Hon. Comm'r of Patents.

SIR: The office letter of January 8, 1874, relating to application of George Nimmo's assignees for reissue of patent for improvement in manufacturing crucibles, duly received.

I have just received from the office a copy of the last reference, fig. 82 in Feldspath-Barzellan, (as it is written in the office letter,) or "plate 7, fig. 82, Feldspath-Porzellan" (as on the copy from the office).

This device is no doubt "very similar" to applicant's, but so are all the well-known "jiggers." This device is in fact one of the apparatus referred to in that part of applicant's specification beginning "long prior to said Nimmo's invention," and one of the apparatus which is distinctly disclaimed in these words: "We disclaim as the invention of said Nimmo both the modes and both the apparatus above mentioned; and we also distinctly disclaim, &c., &c., for it 'backs * * * the mechanism for guiding the rib in the manner above described.'"

I intended in my specification to make it perfectly clear that three elements were each absolutely essential in Nimmo's apparatus, namely (1) a rib, (2) a vessel to support and present the ball,
364 (3) mechanism for guiding the rib, so that it would approach the axis of the vessel as it was withdrawn. As I understand it, your honor admits that this third element is not found in the last reference, nor in any other "jigger" except that one described by Salvetat, which lacks the second element.

I understand, of course, that applicants are entitled to a patent for the combination of the first and second of these elements, with Nimmo's *special* mechanism so guiding this rib; but the original patent, now sought to be surrendered and reissued, fully covers that combination. But in my opinion they are entitled to a much broader patent than this, as I feel confident that Nimmo's special mechanism was only a very small part of his real invention, and that it was impossible for Nimmo to even conceive of his special mechanism until after he had fully grasped the broad idea which is the soul of his real invention, viz.: the combination of the vessel and rib, with suitable mechanism to guide the rib, so that it would approach the axis of the vessel as it was withdrawn. After he had conceived this idea, and thought it out fully, it was a very simple and easy thing (as I have once before argued, to the best of my ability) to devise
365 his special mechanism for so guiding the rib, and he need not have devised any special mechanism for this purpose, had he known of Salvetat's jigger. To confine him to a patent for this special mechanism is a mere mockery, for any mechanic of ordinary ability can readily devise a different mechanism for thus guiding the rib, as soon as he has fully comprehended the construction and operation of Nimmo's apparatus.

Thus your honor will see that in fig. 82, Feldspath-Porzellum, the rib has only a vertical motion; or, to express it more exactly, one point in the rib moves in a line coincident with the axis of the vessel, and every other point in lines parallel with that axis. It is clear, therefore, that with this apparatus a class of work *cannot* be done which *can* be done with the apparatus described in Nimmo's patent. Now, how would the ordinary mechanic proceed who desired to make this fig. 82 apparatus capable of use in that class of work for which Nimmo's apparatus was devised? All that is necessary is to so mount the supports of the rod B (to which the rib *a* is attached) that they can be moved horizontally, and any mechanic can readily do

366 this; for instance, by attaching these supports to horizontal rods, moving in ways, forming a rack upon these rods, and actuating them, by segmental pinions.

This would make the apparatus not only "very similar to applicant's," but substantially the same as applicant's, and get the special mechanism for guiding the rib as described; *i. e.*, the rod B, its supports, the rached arms, and the segmental pinions are undoubtedly quite different from the special mechanism described in Nimmo's patent.

I respectfully ask your honor to consider these questions: First. Is not Nimmo the first who ever made an apparatus consisting of (1) a rib, (2) a vessel, &c., and (3) *any* mechanism *for so guiding the rib*, &c.? Second. Is it not a reproach upon the patent laws if he is not entitled any other patent than one which is in reality only for *certain special mechanism* for so guiding the rib, &c.; which gives him no protection whatever against the use by others of *all that constitutes the real value of his apparatus*; which allows the manufacture and use of an apparatus embodying the main feature of his invention, provided the precaution be taken to instruct the mechanic who builds it to resort to some other means than those described by Nimmo
367 for guiding the rib towards the axis as the rib is withdrawn?

Of course, if your honor can give a reference to an apparatus having (1) a rib, (2) a vessel, &c., and (3) *any* mechanism for so guiding, &c., my whole argument is answered, and Nimmo is entitled only to his special mechanism.

But in the absence of such a reference I cannot believe that my clients should be restricted so narrowly.

Your honor will readily see that it is my duty to do my utmost to make my clients' rights clear to your honor's mind; and will also admit that there is no personal question as to which is "in fault" when counsel and court differ. I assume that your honor will at once grant the reissue, if it shall appear to you that under a true and liberal construction of the law my clients are entitled to it, and that you will pardon seeming prolixity, in view of the very great importance of the question, as matter of law and also of the large pecuniary interest involved; for, as I have before frankly admitted, the object of this reissue is to compel all manufacturers of crucibles either to pay tariff for using Nimmo's real invention, or, failing to do that, to manufacture them by hand, as they did before
368 Nimmo revolutionized this art.

The exact issue is, I think, as to what is Nimmo's real invention. Your honor has described that it is the combination with a rib and mould of *certain special* mechanism for guiding the rib toward the axis as it is withdrawn from the vessel. In accordance with my right as counsel, I do my utmost to convince your honor that his real invention is the combination with the rib and mould of *suitable* mechanism for guiding the rib as *above described*.

I have carefully re-examined the second claim; and while it is undoubtedly "too indefinite," and also "faulty in several particu-

lars," if Nimmo's invention be restricted as above, yet I feel sure that your honor will agree with me that is the proper claim *if* Nimmo's real invention be not so restricted. I have, therefore, respectfully to request farther action.

Very respectfully, J. E. MAYNADIER, *Attorney.*

369 [No. 1.] EXAMINER'S ROOM, No. 102, U. S. PATENT OFFICE, WASHINGTON, D. C., *Feb'y* 7, 1874.

GEO. NIMMO,
Care J. E. Maynadier, 33 School street, Boston, Mass.

Moulding Crucibles.—Filed Dec. 10, 1872.

The office rules require that a claim shall be clear and definite, so that the public may be fully informed as to the scope of the same. If applicant produces an article by substantially the same process of former manufacturers, but employs new mechanism in some particular for so doing, the examiner holds that he is not of necessity entitled to the process, but is limited to his improved mechanism. Again, if applicant has invented a device consisting in the combination of A, B, and C, and the examiner refers him to other devices having the parts A and B and a substitute for C, applicant cannot be allowed to claim for the combination of A, B, and suitable mechanism for doing a certain thing, but is limited to the combination of A, B, and C, and the latter device must be so defined that the difference between device C, in applicant's machine, and that of the reference cited will be apparent.

A. SCHOEPF, *Prin. Examiner.*
Per H. A. SEYMOUR, 1*st Asst.*

370 In the matter of the application of George Nimmo, assignee, &c., for reissue of patent No. 49,140, granted August 1, 1865, for improvement in moulding crucibles.

Appeal from the Primary Examiner.

The applicant proposes the following claims:

"First. The improved mode of manufacturing crucibles, above described, consisting in presenting the ball to and supporting it under the action of the rib, as above described, when used in conjunction with the mode above described, of guiding the rib as it is withdrawn, and only when so used."

"Second. The improved apparatus, above described, consisting of a rib for shaping the inside of the crucible, as above described; mechanism for supporting the ball under and presenting it to the action of the rib, as above described; and mechanism for operating and guiding the rib, as above described, when these three elements are combined and operated together substantially as and for the purpose specified."

The examiner objects to the first, that the subject-matter is not such as contemplated by law to be patented as a mode or process. This is an objection to the merits of this claim. The claim is re-

jected because its subject-matter is held not to be patent-
371 able. The form of the claim is not questioned, but it is demurred to generally on the merits as bad in law. If a reference were cited to anticipate it, that would be a traverse of the applicant's right to the claim, because of the fact that he was not the first inventor of the subject-matter. It would raise an issue of fact, or, perphaps, of law and fact, on the merits, which would be applicable to the board. To hold that the subject-matter claimed is not within that clause of the statute authorizing the grant of a patent for a "new and useful art," raises an issue of law, going not to the former, but to the subject-matter or merits of the claim, which is also appealable to the board.

The second claim is objected to because it is held not to be sufficiently explicit in terms.

The decision of the Commissioner, Rubens & Co., 1869, p. 107; Henry Watterman, 1870, p. 70; John M. Cornell, 1872, p. 121; and The Collins Company, 1872, p. 251, correctly indicate the office practice under the 26th section of the patent act.

If there is a substantial difference between the references which have been heretofore cited against other claims filed in this application and applicant's invention, it can be made to appear distinctly and unequivocally in the claim itself, and such is the require-
372 ment of the law. In applicant's argument he very clearly distinguishes the specific character, objects, and functions of his device. His specification and drawing accurately exhibit its construction in all its parts.

When he makes his claim equally explicit, the cause will be in condition for treatment upon its merits.

In glancing over the case, which has been in the hands of different examiners, I observe the line between what is and what is not "new matter" has not been all the time accurately drawn on the part of the office, which may have embarrassed the applicant. While he is not at liberty to alter his drawing, model, or even specification, so as to show or describe any different *device* from that originally exhibited, it is perfectly proper for him to set out fully all of the appropriate functions and modes of operation of *the* device he originally presented. In fact, this is one of the objects of a reissue. A description of the manner of using a machine, which was omitted in the original patent, is not an interpolation of "new matter" in a reissue application, but is legitimate instruction to the public,
373 which the patent ought to contain.

Inasmuch as it appears that this application has been some time pending before the office, the examiner is enjoined to special promptness to facilitate its final disposition, both as to matters of form and upon the merits.

The examiner's decision is affirmed. M. D. LEGGATE,
April 10, 1874. *Com. of Patents.*

all, is very little in advance of the old mode of turning them by hand on a potter's wheel. It seems obvious NOW that all that is necessary to adapt a common jigger (A B C′) to the manufacture of vessels narrowed at the mouth, is to provide means for so guiding the rib that it will approach the axis as it is withdrawn; and equally obvious that all that is necessary to adapt the Salvetat apparatus (A B′ C) to the practical manufacture of such vessels by unskilled labor, and with absolute uniformity, is to secure to the revolving wheel a vessel for presenting and supporting the clay. But the examiner can find no reference showing that either of these seemingly simple changes were ever made, until made by Nimmo. If it could be shown that any apparatus existed prior to Nimmo's which had a MOULD and RIB, and which was capable of use in the manufacture of vessels NARROWED AT THE MOUTH,—that is to say, which had in addition to the mould and rib ANY mechanical means for so guiding the rib as it was
381 withdrawn that it would approach the axis of revolution,—the present claims would be preposterous.

BUT NIMMO'S INVENTION HAS REVOLUTIONIZED THE ART; IT WAS MUCH NEEDED FOR MANY YEARS BEFORE 1865; IT IS HIGHLY VALUABLE TO THE MANUFACTURERS OF CRUCIBLES, AS IT CHEAPENS THE COST OF CONSTRUCTION, AND EQUALLY VALUABLE TO THE CONSUMERS OF CRUCIBLES, AS IT MAKES THE CRUCIBLES ABSOLUTELY UNIFORM AND OTHERWISE BETTER.

I submit, therefore, with great confidence, that Nimmo's assignees are entitled to the monopoly of the use of a rib and mould, IN CONNECTION with mechanism for guiding the rib TOWARDS THE AXIS OF REVOLUTION AS IT IS WITHDRAWN, and thus both under the letter and spirit of our laws, especially under the liberal construction which has been given them of late years, of which the lead pipe case is a noble illustration.

The only question, as it seems to me, as to which there can be any doubt, is as to the proper form of claim. It is obvious that the claim which the examiner is willing to allow—namely, the monopoly of the use of the rib and mould in connection ONLY WITH A SPECIAL
382 of mechanism for so guiding the rib—is utterly inadequate to reward the inventor; for any ordinary mechanic can devise different mechanism for this purpose, or can use that shown in Salvetat's apparatus (A B′ C).

It seemed to me at first that the only claim which would give adequate protection was a claim for the improvement in the art, more commonly called a claim for the process. This is the first claim, and it is believed to be most carefully limited, not only in its terms, but also by the specification. Special attention is called to the fact that BOTH THE PROCESSES A B C′ AND A B′ C ARE CAREFULLY DISCLAIMED, and that much care has been used to make it absolutely impossible for any man of average intelligence to suppose that anything more is claimed than the use of a mould and rib IN CONNECTION with, and only in connection with, suitable mechanical means for guiding the rib IN THE MANNER DESCRIBED.

But on more mature reflection it seems clear that the claim for an apparatus consisting of the mould, the rib, and suitable mechanical means for guiding the rib towards the axis of revolution, was
383 clearly within well-established rules, and embraced nothing more than Nimmo's real invention, namely, the substitution of C for C′, in the apparatus A B C′, or the substitution of B for B′, in the apparatus A B′ C. It is clearly not a claim for a result or a principle, and I conceive of no other objection which can be urged. Such claims are common, and are often absolutely essential, in order that the inventor may be properly protected, WHICH IS THE TRUE TEST OF THE PROPRIETY OF ANY CLAIM.

Am I not justified in assuming than invention of a highly-valuable improvement, capable not only of general use in the manufacture of pottery, but especially in the manufacture of a certain class of vessels, viz., vessels with a narrowed mouth, by means of which that class of pottery whose shape had, up to that time, depended upon the skill of the potter, can be manufactured, by workmen of little skill, more cheaply and of a better quality, is clearly entitled to a patent of some kind?

Is it not giving him a stone instead of bread to limit him as suggested by the examiner?

384 Can he be protected in the enjoyment of his real invention by any other claims than those now made, or by claims substantially the same?

These, I submit, are the questions in this case, in view of the state of the art as shown by the references, and in view of the fact, UNDISPUTED, that Nimmo was the first to devise a process or an apparatus CAPABLE of use in the manufacture not only of vessels with flaring mouths, but also of vessels with contracted mouths, without requiring the potter's hand to shape the clay.

I know that your honor will give full weight to the fact that BEFORE NIMMO'S INVENTION NO APPARATUS OR PROCESS WAS KNOWN CAPABLE OF USE IN THE MANUFACTURE OF THAT LARGE CLASS OF VESSELS WITH A BILGE, (having a narrow mouth of greater area in cross section below the mould than at the mouth,) except only the Salvetat process and apparatus, (A B′ C,) and the older process of hand-turning on a common potter's wheel, in both of which the uniformity of thickness of wall and outside shape depended solely upon the potter's eye and hands,—THIS THE FUNDAMENTAL FACT IN THIS CASE.

The examiner rules very properly that the claims should be "clear and definite, so that the public may be fully informed as to
385 the scope of the same," but he does not rule that the claims presented are not "clear and definite."

The examiner does not hold that the process claimed is substantially the same as that used by former manufacturers, and could not so hold, in view of the distinct disclaimer of these former processes. One old process consisted in forming the outside of the vessel by a mould and the inside by a rib, which was NOT so guided that it would approach the axis of the vessel as it was withdrawn; another old

process consisted in forming the outside BY HAND and the inside by a rib, which WAS so guided that it would approach, etc., etc., and the question is,—Does forming the outside by a mould and the inside by a rib which is so guided that it will approach, etc., etc., constitute a "new and useful improvement" of an art? It is obvious that there is a difference as compared with the first old process in the MODE OF GUIDING THE RIB, and that this difference is essential in the manufacture of vessels with narrowed mouths, and so compared with the second old process in the MODE OF shaping the outside of the vessel, and this difference is ESSENTIAL when uniformity of shape
386 and of thickness of wall is requisite. In the lead pipe case an old machine was applied for the first time to the manufacture of lead, and this was held that this was an improvement in the art, or a process. Much is said in the opinion about the discovery that lead would weld, but it cannot be doubted that the patent would have been sustained even if there had been no such discovery. I reissue the Hayward patent, (in suit in Carew *vs.* Boston Elastic Fabric Company, 5 Fisher,) and claimed only processes or improvements in the art, simply because the apparatus was very similar to old apparatus used for heating cloth and hat-brims in other arts. THE GREAT PRINCIPLE IS, THAT A MAN WHO HAS MADE AN IMPROVEMENT OF VERY GREAT VALUE IN ANY ART IS ENTITLED TO A PATENT ADAPTED TO SECURE HIM A PROPER REWARD.

In nearly all cases where a new apparatus is invented, in order to practice this improved art or process it is better for the inventor to take out a patent for the new apparatus; but when the invention consists merely of a new way of using old apparatus, (and no new apparatus is invented,) then the only patent the inventor can
387 have is for a process, as in the lead pipe case. So, when it is doubtful whether a patent for the apparatus will give adequate protection to the inventor in the exclusive enjoyment of his real invention, it is clear that he is entitled to a patent for his process, if that will protect him better. Often he is entitled to claim both his improved art or process and his improved apparatus. The true and only test is: ARE THE CLAIMS FOR HIS REAL INVENTION? If for more, they are bad, whether they be for an art, or process, or for an apparatus; if for less, they are defective; if for the real invention only, they are valid not only in law, but in all other respects. The purpose of the PATENT LAWS IS NOT TO ESTABLISH A SYSTEM OF RULES BY WHICH ONE CLASS OF INVENTIONS CAN BE LABELLED AS PROCESSES, ANOTHER CLASS AS MACHINES OR COMBINATIONS, AND SO ON, BUT TO SECURE TO EACH INVENTOR THE MONOPOLY OF HIS OWN INVENTION, provided that invention relate to an "art, machine," etc., etc.

The examiner argues thus, as to the claim for the apparatus: "If applicant has invented a device consisting in the combination of A, B, and C, and the examiner refers him to older devices having the parts A and B, AND A SUBSTITUTE FOR C, applicant cannot be
388 allowed a claim for the combination of A, B, and suitable mechanism for doing a certain thing, but is limited to the

combination of A, B, and C, and the latter device must be so defined that the difference between device C in applicant's machine and that of the reference cited will be apparent."

The first error in this argument, as it seems to me, is found in the examiner's assumption that he has referred "to older devices having the parts A and B, and a substitute for C." It is entirely clear that if the examiner had found a reference "having the parts A and B, and a substitute for C," his conclusion would be sound. His error, I submit, lies in assuming that mechanical means for so guiding the rib that it would *recede from* the axis as it was withdrawn, (as in common jiggers,) or retain an unwarying relation to the axis, (as in Feldspath-Porzettan,) are a SUBSTITUTE FOR mechanical means for so guiding the rib that it will APPROACH the axis as it is withdrawn. "A substitute," as I understand it in this connection, is a different mechanical device FOR ACCOMPLISHING SUBSTANTIALLY THE SAME PURPOSE; and a reference to an older device "having the parts A and
389 B, and" *any* mechanical device for guiding the rib, the axis of the mould as it is withdrawn, would clearly be a decisive answer to both claims, no matter how different this mechanical device for thus guiding the rib in the reference was from the mechanical device for performing the same function in applicant's apparatus.

It seems to me that the examiner is clearly in error when he calls a mechanical device which so guides the rib that it cannot APPROACH the axis as it is withdrawn, "a substitute for" a mechanical device whose functions it is to so guide the rib that it SHALL approach the axis as it is withdrawn.

In fact, the only reference he has given which shows an apparatus having any "substitute for C," is the Salvetat apparatus (A, B′, C); but this apparatus lacks the part B. Yet it is certainly as correct to say that this apparatus has the parts A and C and a substitute for B, as it is to say that the older forms of jiggers have the parts A and B and a "substitute for C," for the reason that the potter's hands and wheel, as means for presenting and supporting the clay, are no more a substitute for the revolving mould, than a mechanical device which so guides the rib that it cannot approach the axis is a substitute for a device which so guides it that shall approach the
390 axis. The error lurks in the difference between the meaning of the verb and the noun. I may "substitute for" the powder in a shell black sand, but no one would call black sand a "substitute for" powder in a shell.

Secondly. The reasoning of the examiner, when correctly applied to the facts, inevitably results in the conclusion that the second claim must be allowed. Correctly applied, that reasoning is this: Applicant has invented a device consisting in the combination of A, B, C; the examiner refers him to older devices having the parts A, B, and a substitute for C, so far as the general function of connecting together the rib and mould are concerned; but not a substitute so far as guiding the rib towards the axis as it is withdrawn is concerned. Applicant cannot, therefore, be allowed a claim for the combination

process consisted in forming the outside BY HAND and the inside by a rib, which WAS so guided that it would approach, etc., etc., and the question is,—Does forming the outside by a mould and the inside by a rib which is so guided that it will approach, etc., etc., constitute a "new and useful improvement" of an art? It is obvious that there is a difference as compared with the first old process in the MODE OF GUIDING THE RIB, and that this difference is essential in the manufacture of vessels with narrowed mouths, and so compared with the second old process in the MODE OF shaping the outside of the vessel, and this difference is ESSENTIAL when uniformity of shape
386 and of thickness of wall is requisite. In the lead pipe case an old machine was applied for the first time to the manufacture of lead, and this was held that this was an improvement in the art, or a process. Much is said in the opinion about the discovery that lead would weld, but it cannot be doubted that the patent would have been sustained even if there had been no such discovery. I reissue the Hayward patent, (in suit in Carew *vs.* Boston Elastic Fabric Company, 5 Fisher,) and claimed only processes or improvements in the art, simply because the apparatus was very similar to old apparatus used for heating cloth and hat-brims in other arts. THE GREAT PRINCIPLE IS, THAT A MAN WHO HAS MADE AN IMPROVEMENT OF VERY GREAT VALUE IN ANY ART IS ENTITLED TO A PATENT ADAPTED TO SECURE HIM A PROPER REWARD.

In nearly all cases where a new apparatus is invented, in order to practice this improved art or process it is better for the inventor to take out a patent for the new apparatus; but when the invention consists merely of a new way of using old apparatus, (and no new apparatus is invented,) then the only patent the inventor can
387 have is for a process, as in the lead pipe case. So, when it is doubtful whether a patent for the apparatus will give adequate protection to the inventor in the exclusive enjoyment of his real invention, it is clear that he is entitled to a patent for his process, if that will protect him better. Often he is entitled to claim both his improved art or process and his improved apparatus. The true and only test is: ARE THE CLAIMS FOR HIS REAL INVENTION? If for more, they are bad, whether they be for an art, or process, or for an apparatus; if for less, they are defective; if for the real invention only, they are valid not only in law, but in all other respects. The purpose of the PATENT LAWS IS NOT TO ESTABLISH A SYSTEM OF RULES BY WHICH ONE CLASS OF INVENTIONS CAN BE LABELLED AS PROCESSES, ANOTHER CLASS AS MACHINES OR COMBINATIONS, AND SO ON, BUT TO SECURE TO EACH INVENTOR THE MONOPOLY OF HIS OWN INVENTION, provided that invention relate to an "art, machine," etc., etc.

The examiner argues thus, as to the claim for the apparatus: "If applicant has invented a device consisting in the combination of A, B, and C, and the examiner refers him to older devices having the parts A and B, AND A SUBSTITUTE FOR C, applicant cannot be
388 allowed a claim for the combination of A, B, and suitable mechanism for doing a certain thing, but is limited to the

combination of A, B, and C, and the latter device must be so defined that the difference between device C in applicant's machine and that of the reference cited will be apparent."

The first error in this argument, as it seems to me, is found in the examiner's assumption that he has referred "to older devices having the parts A and B, and a substitute for C." It is entirely clear that if the examiner had found a reference "having the parts A and B, and a substitute for C," his conclusion would be sound. His error, I submit, lies in assuming that mechanical means for so guiding the rib that it would *recede from* the axis as it was withdrawn, (as in common jiggers,) or retain an unwarying relation to the axis, (as in Feldspath-Porzettan,) are a SUBSTITUTE FOR mechanical means for so guiding the rib that it will APPROACH the axis as it is withdrawn. "A substitute," as I understand it in this connection, is a different mechanical device FOR ACCOMPLISHING SUBSTANTIALLY THE SAME PURPOSE; and a reference to an older device "having the parts A and
389 B, and" *any* mechanical device for guiding the rib, the axis of the mould as it is withdrawn, would clearly be a decisive answer to both claims, no matter how different this mechanical device for thus guiding the rib in the reference was from the mechanical device for performing the same function in applicant's apparatus.

It seems to me that the examiner is clearly in error when he calls a mechanical device which so guides the rib that it cannot APPROACH the axis as it is withdrawn, "a substitute for" a mechanical device whose functions it is to so guide the rib that it SHALL approach the axis as it is withdrawn.

In fact, the only reference he has given which shows an apparatus having any "substitute for C," is the Salvetat apparatus (A, B′, C); but this apparatus lacks the part B. Yet it is certainly as correct to say that this apparatus has the parts A and C and a substitute for B, as it is to say that the older forms of jiggers have the parts A and B and a "substitute for C," for the reason that the potter's hands and wheel, as means for presenting and supporting the clay, are no more a substitute for the revolving mould, than a mechanical device which so guides the rib that it cannot approach the axis is a substitute for a device which so guides it that shall approach the
390 axis. The error lurks in the difference between the meaning of the verb and the noun. I may "substitute for" the powder in a shell black sand, but no one would call black sand a "substitute for" powder in a shell.

Secondly. The reasoning of the examiner, when correctly applied to the facts, inevitably results in the conclusion that the second claim must be allowed. Correctly applied, that reasoning is this: Applicant has invented a device consisting in the combination of A, B, C; the examiner refers him to older devices having the parts A, B, and a substitute for C, so far as the general function of connecting together the rib and mould are concerned; but not a substitute so far as guiding the rib towards the axis as it is withdrawn is concerned. Applicant cannot, therefore, be allowed a claim for the combination

of A B, and suitable mechanism for connecting together the rib and mould, for that is not his invention; but is limited to the combination of A, B, and C, and the latter device must be so defined that it shall embrace only such mechanical devices as shall guide the rib towards the axis as it is withdrawn, and not embrace any device that shall not so guide the rib. That is, the mechanical device of applicant must be so defined that the difference between device C in applicant's machine, and that of the reference cited, will be apparent; for in this way only can applicant's claim be limited to
391 his real invention;—no more and no less.

I have taken special pains in the specification to clearly define the difference between device *c* in applicant's machine and that of the references, and have so expressed the claim as it is. I feel sure, perfectly clear, that APPLICANTS DO NOT CLAIM THE COMBINATION OF A RIB, MOULD, AND APPARATUS FOR GUIDING THE RIB SO THAT IT SHALL EITHER RECEDE FROM THE AXIS, as in some of the references, OR SHALL ALWAYS RETAIN THE SAME RELATION TO THE AXIS as in another reference; and, also, that THEY DO NOT CLAIM THE COMBINATION OF A RIB (without a mould) AND MECHANISM FOR GUIDING IT SO THAT IT SHALL APPROACH THE AXIS AS IT IS WITHDRAWN; and perfectly clear that they must limit their claims to the rib and mould only when used in combination with mechanism for guiding the rib so that it shall approach the axis as it is withdrawn, and also limit their claim to such mechanism for so guiding the rib only when used in combination with a rib AND MOULD.

It is not denied that NIMMO WAS THE FIRST TO USE THE COMBINATION OF THE MOULD, THE RIB, AND ANY MECHANISM FOR GUIDING THE RIB AS IT WAS WITHDRAWN TOWARDS THE AXIS; nor that HE WAS THE FIRST TO THUS MAKE THE MOULD AND RIB CAPABLE OF USE IN THE MANUFACTURE OF A LARGE CLASS OF VESSELS; nor that
392 HE THEREBY VERY GREATLY BENEFITED THE COMMUNITY.

He is clearly, therefore, within the letter and spirit of the law. Surely it is within your honor's power to grant such a patent as shall prevent the unlicensed use of what Nimmo originated.

Very respectfully,

ARTHUR PICKERING,
CHARLES R. VICKERY,
CHARLES R. ATWOOD,
PHŒNIX MAN'F'G CO.,
Assignees of George Nimmo.

By their attorney: J. E. MAYNADIER.

393 U. S. PATENT OFFICE,
WASHINGTON, D. C., *Feb'y 7th*, 1874.

GEORGE NIMMO,
Care J. E. Maynadier. 33 School st., Boston.

Please find below a communication from the examiner, relative to your application for patent for alleged improvement in moulding crucibles, filed December 10th.

Very respectfully, M. D. LEGGET, *Commissioner.*

ROOM No. 102.

The office rules require that a claim should be clear and definite, so that the public may be fully informed as to the scope of the same. If applicant produces one article by substantially the same process of former manufacturers, but employs new mechanism in some particulars for so doing, the examiner holds that he is not of necessity entitled to the process, but is limited to his improved mech-
394 anism.

Again, if applicant has invented a device constituting in the combination of A, B, and C, and the examiner refers him to older devices having the parts A and B and a substitute for C, applicant cannot be allowed a claim for the combination of A, B, and suitable mechanism for doing a certain thing, but is limited to the combination A, B, and C, and the latter device must be so defined that the difference between device *c* in applicant's machine and that of the reference cited will be apparent.

395 PATENT OFFICE,
WASHINGTON, D. C., *March 13th*, 1874.

In the matter of the application of George Nimmo, filed Dec. 10, 1872, for reissue of letters patent No. 49,140, dated Aug. 1st, 1865, for moulding crucibles.	Before the Honorable Commissioner of Patents on an Interlocutory Appeal.

In answering applicant's reasons for appeal, it will be necessary, first, to give a brief history of the case, that your honor may fully comprehend the points in dispute.

In the original patent, the specification, drawing, and model failed to shadow the idea that applicant then intended to make; nor was his machine, as at that time constructed, capable of making a crucible having a *contracted mouth.*

A machine adapted to make this style of crucible was patented by T. G. French, Nov. 7th, 1865, three months subsequent to the date of applicant's patent, and has proved to be a valuable invention.

In this reissue application an attempt was made to interpolate new matter into the same, which would entirely cover the French patent; two sheets of drawings in this case will show that applicant has there clearly shown crucibles with a contracted mouth, and a rib specially adapted to from a crucible of this shape. These drawings were
396 objected to by the examiner, and applicant was obliged to erase them.

The examiner therefore objects to so much of the argument as relates to a crucible having a *contracted mouth*, as it is based on a premise which applicant has no right to assume, and has therefore noted in pencil in applicant's argument certain portions which should be entirely disregarded by your honor in considering the questions of law involved in this appeal.

The first claim reads as follows:

The improved mode of manufacturing crucibles above described,

consisting in presenting the ball to and supporting it under the action of the rib as above described, when used in conjunction with the mode above described of guiding the rib as it is withdrawn.

The first question in order is not merely whether applicant is or is not entitled to this particular claim in view of the references cited, as this would be a question of novelty, to be first submitted to the Hon. Board of Examiners-in-Chief, but it is a broader question, and it is this: Is applicant entitled to any claim for a process for making crucibles, in view of the state of the art, or is he limited to claims for his *mechanism?*

The examiner holds that he is limited to his mechanism,
397 and in support of this ground gave his idea in the matter in the following letter of Dec. 23d, 1873:

The claim submitted by way of amendment is too indefinite to meet with favorable action, even were the subject-matter determined to be a new mode, as asserted by applicant. It is shown, in the reference formerly cited, that open vessels with *flaring sides* were produced by the following process:

Upon the upper end of a spindle is found a hollow chuck; within the same is secured a plaster mould, made in the desired form of the article to be produced; clay is then introduced into the mould, and while the spindle is revolving the clay is evenly spread against the bottom and sides of the mould by means of a rib secured to a lever, which is manipulated by the operator. Now, upon an examination of this case, it appears that the crucibles made by applicant are produced by this same process, and the slight change in the mechanism does not of necessity nor in reality render this a new or different mode of manufacturing earthenware, but the patentable novelty, if any exists, consists simply in the novel devices whereby a certain part of the process is effected.

398 Your honor's attention is called to the original drawings, (which still appear to differ slightly from those presented in the reissue application,) where it is plainly shown that the only style of crucible that could be made by that machine has a *flaring mouth.* The device referred to in Feldspath-Porzellan, plate 7, fig. 82, also has a *flaring mouth,* and the process of making this kind of a crucible is fully shown in the reference. The slight difference in the construction and arrangements of the levers to which the rib is secured does not appear to change the *process* of making a crucible having a *flaring mouth* in the slightest. One machine does it equally as well as the other, and by almost the identical means.

In view of these facts, the examiner fails to see wherein he has erred in deciding that was not entitled to a process claim.

The second claim reads as follows: "The improved apparatus above described, consisting of a rib for shaping the inside of the crucible as above described, mechanism for supporting the ball under and presenting it to the action of the rib as above described, and mechanism for operating and guiding the rib as above described,

when these three elements are combined and operated together
389 substantially as and for the purpose specified."

The reason why the examiner refused to allow this claim is clearly set forth in his letter dated Feb'y 7, 1874. A copy of the same may be seen on page 11 of applicant's reasons of appeal.

Respectfully submitted, A. SCHOEPF, *Prin. Examiner.*
per H. H. SEYMOUR, 1*st Ass't.*

400 BOSTON, *Sept.* 23*d*, 1874.

Hon. Comm'r of Patents.

SIR: In the matter of the application for reissue of George Nimmo's patent No. 49,140 for moulding crucibles, dated August 1st, 1865, I enclose an amendment which will be found, I trust, in conformity with the decision of the Commissioner on appeal. I refer especially to that part of it before cited:

"If there is a substantial difference between the references which have been heretofore cited against other claims filed in this application and applicant's invention, it can be made to appear distinctly and unequivocally in the claim itself, and such is the requirement of the law. In applicant's argument, he very clearly distinguishes the specific character, objects, and functions of his device. His specification and drawing accurately exhibit its construction in all its parts.

"When he makes his claim equally explicit, the cause will be in condition for treatment upon its merits."

The claim as now amended is absolutely incapable of any construction which will make it cover either the old jigger (A B *C'*)
401 or Salvetat's jigger (A *B'* C), or any other jigger except that invented by Nimmo (A B C). I enclose a copy of my agreement on appeal to the Commissioner, in order that my meaning may be clear.

The Commissioner cites the case of Henry Watterson, (1870, p. 70,) in which the claim was for "the mechanism substantially as described, by means of which, &c., &c.; and this claim is clearly unobjectionable in form, (except as to term "surface,") and there could have been no objection to it except as to substance; *i. e.*, it covered an old machine. A claim of the same form in this application would read: The mechanism, substantially as described, by means of which the ball is presented to and supported under the action of the rib which gives the interior form to the crucible, and the rib is guided towards the axis of revolution as it is withdrawn, as set forth. "No machine which previously existed could possibly be included within the terms of this claim, even without the words "substantially as described"; for no other mechanism is found by means of which the ball is presented and supported and the rib guided towards the axis.

Should your honor think the claim presented by the amendment inadmissible, and the form above suggested admissible, I
402 trust that you will so inform me. Should you think neither admissible, you will oblige applicant if you will suggest a form covering Nimmo's real invention.

Very respectfully, J. E. MAYNADIER, *Atty.*

BOSTON, *Sept.* 23, 1874.

Hon. Comm'r. of Patents,

SIR: In the matter of the application of George Nimmo's assignees for reissue of patent for moulding crucibles, dated August 1st, 1865, and in view of the decision of the Commissioner rendered April 10th, 1874, we amended as follows, viz.: By erasing the claims now on file and substituting the following:

Erase and insert "Z" by amendm't "by" Oct. 31, '74.

The chuck ~~mould and~~ rib organized and combined together in one apparatus substantially such as ~~is described~~, and so that the rib may be guided towards the axis of revolution as ~~it is withdrawn~~ from the mould, and the ball be properly presented to and ~~supported under~~ the action of the rib, all as and for the purpose specified.

CHARLES R. ATWOOD,
CHARLES R. VICKERY,
ARTHUR PICKERING,
PHŒNIXM ANUFACTURING CO.,
Assignees of Geo. Nimmo.
By J. E. MAYNADIER, *Atty.*

403 EXAMINER'S ROOM, No. 102, U. S. PATENT OFFICE,
WASHINGTON, D. C., *Sept.* 28, 1874.

ASSIGNEES OF GEORGE NIMMO,
Care J. E. Maynadier, 33 School st., Boston, Mass.

Reissue.

The application has been reconsidered, and in view of the references previously cited, the reissue must be again refused.

In reply to their request to suggest a claim, they are informed that it is not within the province of the office to do so, the law requiring applicant to present the case, and the office to pass upon its merits.

Should they deem it proper to bring the case again before the office, it will be necessary to amend it, by erasing the first paragraph on p. 1, beginning with "prior" to "successful," it not being in harmony with facts. A. SCHOEPF, *Examiner.*

404 BOSTON, *Oct.* 29, 1874.

Hon. Comm'r of Patents.

SIR: The office letter of Sept. 28, 1874, relating to application of George Nimmo's assignees reissue of patent for moulding crucibles, dated August 1st, 1865, duly received.

As to your honor's suggesting a form of claim. This request was made in view of the concluding paragraph in the opinion of the Commissioner, and also because, as a matter of fact, it is, and has long been, quite common for the examiner to suggest a proper form of claim. I respectfully call your honor's attention to the fact that it does not clearly appear from the office letter upon what grounds the application is now rejected. It is certain that one of the prior references lacks the mould, and that the other lacks the mechanism for guiding the rib, etc. And the question to which I doubt, is

whether your honor meant to decide that *both* the references embodied substantially the same invention claimed, or that *one* of them embodied it, or that the reissue must be again refused for some other reason.

I amend as required by your honor, and also present a new claim, with the hope that, on farther action, your honor will find it unobjectionable; but should I be in error, I trust that your honor
405 will kindly point out fully and clearly wherein, so that I may be able to determine what farther step to take, if any.

I submit to your honor that, as matter of law, and under the paragraph in the opinion of the Commissioner above referred to, I am entitled to a statement of your honor's reasons for rejection; but apart from this, and as a matter of courtesy merely, I beg that your honor will favor me with such explanation as will advance justice and be consistent with your honor's other duties.

Very respectfully, J. E. MAYNADIER, *Att'y.*

406 BOSTON, *Oct.* 29, 1874.

Hon. Comm'r of Patents.

SIR: In view of the office letter of Sept. 28, 1874, relating to application of George Nimmo's assignees for reissue of patent for moulding crucibles, dated August 1st, 1867, we amend as follows:

(1) By erasing the paragraph beginning with the words "prior to the invention of the said Nimmo, crucibles were almost universally made by hand," and ending with the words "none of them had been practically successful."

(2) By erasing the present clause of claim and substituting the following:

"Z" *Insert. Erase and insert* "P" *by Amend't filed Nov.* 27, '74.

"The mechanism substantially as described, by means of which the ball is presented to and supported under the action of the rib, and the rib is guided towards the axis of revolution as it is withdrawn, as set forth."

ARTHUR PICKERING,
CHARLES R. ATWOOD,
CHARLES R. VICKERY,
PHŒNIX MANF'G CO.,
Assignees of Geo. Nimmo.
By J. E. MAYNADIER, *their Att'y.*

407 [No. 1.] EXAMINER'S ROOM, No. 102, U. S. PATENT OFFICE,
WASHINGTON, D. C., *Nov.* 2, 1874.

ASSIGNEE OF G. NIMMO,
Care J. E. Maynadier, 33 School St., Boston, Mass.

The amended claim is found to be the same in substance with the one filed Sept. 25, 1874. It must be again rejected; the invention as claimed being substantially the same with devices referred to in previous letters.

A claim has been suggested in off. letter of January 2, '74, which applicant has not deemed proper to adopt, and as it is the only form

of claim upon which the examiner can act favorably, no farther suggestions can be made by him.

Applicant has the choice of either adopting the suggested claim, or appeal to examiners-in-chief. A. SCHOEPF, *Examiner*.

408 BOSTON, *Nov. 25th*, 1874.

Hon. Comm'r of Patents.

SIR: In view of office letter of Nov. 2, 1874, relating to application of George Nimmo's assignees for reissue of patent for moulding crucibles, dated August 1, 1865, we amend as follows:

By erasing the present clause of claims and inserting the following:

The improved apparatus above described, having the specific character, objects, and functions above explained, and consisting of the rib, the revolving mould, and the mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn, as set forth; these elements being claimed only in combination each with all the others; and no claim is made to any combination of any of them less than the whole.

ARTHUR PICKERING,
CHARLES R. ATWOOD,
CHARLES R. VICKERY,
PHŒNIX MANF'G CO.,
Assignees of Nimmo.
By J. E. MAYNADIER, *their Att'y.*

409 BOSTON, *Nov. 25th*, 1874.

Hon. Com'r of Patents.

SIR: The office letter of Nov. 2nd, 1874, relating to application of George Nimmo's assignees for reissue moulding crucibles duly received.

Your honor now holds that "the invention, AS CLAIMED, is substantially the same as the references." Heretofore I had supposed that your honor's objection lay wholly to the *form* of the claim; and this is the first time that I have understood the ground of your honor's decision.

The only reference given are "Salvetat" and "Feldspath-Porzellan." As to Salvetat, he has no mould, and therefore his mechanism is clearly *not* substantially the same as that claimed, unless the claim be construed in direct contradiction to the whole specification and to the words of the claim.

As to Feldspath-Porzellan, no mechanism is there shown by means of which "the rib is guided towards the axis of revolution as it is withdrawn, as set forth." And this mechanism, also, is clearly *not* the same in substance as that claimed, unless the claim be
410 construed in direct contradiction to the whole specification and to the words of the claim.

Furthermore, the two mechanisms referred to are distinctly dis-

claimed, and to construe the claim to be for a mechanism substantially the same would make a nonsense of the disclaimer.

It is, of course, entirely clear that the real question is as to the *form* of the claim. Your honor admits, as I understand it, that the combination of the mould, the rib, and the mechanism for guiding the rib so that it will approach the axis of revolution as it is withdrawn, is new in fact with Nimmo; that is, that it differs from Salvetat's in having a mould, and from Feldspath-Porzellan in having means by which the rib is guided *towards* the axis, &c.

The Commissioner was kind enough to state that the printed argument "very clearly [clearly] distinguishes the specific character, objects, and functions of" the device, and requires only that the claim shall be made "equally explicit." This is what I have been trying to do, and, in the hope of doing it to your honor's satisfaction, I enclose an amendment, which I trust will be considered acceptable; if not, I trust that your honor will in your decision explain wherein it is not as explicit as the decision of the Commissioner requires.

411 It seems to me impossible that any appeal can lie to the examiners-in-chief, for it is not certain that applicants are entitled to their reissue when they can present a claim which is *in form* satisfactory to the office.

The claim suggested in the office letter of January 2d, 1874, is, as I believe, very much too narrow to cover Nimmo's real invention, especially when limited, as it must be, by the fact that rib, upright, counter weight, chuck, and mould are all found in Feldspath-Porzellan, and an equivalent for the lever is also found, the only substantial difference being that in Nimmo's there is mechanism for guiding the rib toward the axis as it is withdrawn, while there is no such mechanism in Feldspath-Porzellan. Very respectfully,

J. E. MAYNADIER, *Atty.*

412 ROOM NO. 102, DEPARTMENT OF THE INTERIOR,
U. S. PATENT OFFICE,
WASHINGTON, D. C., *Mch. 17th*, 1877.

GEORGE NIMMO,
Care George Maynadier, Boston, Mass.

Moulding Crucibles. Patent No. 49,140, Aug. 1, 1865; appl'n filed June 26, 1865. Reissued Dec. 8, 1874. No. 6,166.

Your case, above referred to, is adjudged to interfere with the reissue application of William Smith, filed March 13th, 1877, for imp't in apparatus for making plumbago crucibles (old patent No. 40,506, Nov. 3, 1863; app'n filed Sept. 1, 1863); address, Pittsburgh, Pa.; att'ys, Bakewell & Kerr, same place; the patent of Thomas G. French, Jersey City, New Jersey, (att'y, Joseph P. Pirsson, No. 11 Wall st., New York city,) dated Nov. 7, 1865, No. 50,812, for imp't in making crucibles (app'n filed Sept. 16, 1865); the patent of Robert Taylor and Frederick Strow, of Philadelphia, Pa., (no att'y,) dated Dec. 1, 1868, No. 84,593, (app'n filed April 7, 1868,) for improvement in apparatus for moulding pots and crucibles; and the patent of Joseph

Winkle, of Pittsburgh, Pa., (att'y, J. J. Johnston, Allegheny City, Pa.,) dated Jan'y 12, 1869, No. 85,775, (app'n filed Aug. 26, 1868,) for improvement in machines for making crucibles; and the
413 question of priority will be determined in conformity with the rules accompanying this. The preliminary statement demanded by rule 53 must be sealed up and filed on or before the 15th day of April, 1877, with the subject of invention and name of party filing it indorsed on the envelope.

The subject-matter involved in the interference is contained in Smith's five claims, covering features shown but not claimed in the patents.

The features embraced in the first claim being shown in the patents of Nimmo and Taylor & Strow.

The features embraced in the 2nd claim being shown in the patent of Taylor & Strow.

The features embraced in the third claim being shown in the patent of Winkle.

The features embraced in the 4th and 5th claims being shown in the patents of French, Nimmo, Taylor & Strow, and Winkle.

A. SCHOEPF, *Examiner.*
W. H. CHADSEY, 1*st Asst.*

414 ROOM NO. 102, DEPARTMENT OF THE INTERIOR,
U. S. PATENT OFFICE,
WASHINGTON, D. C., *March* 27, 1877.

GEORGE NIMMO,
Care of J. E. Maynadier, 33 School St., Boston, Mass.
Also care S. W. Sherrell, N. Y. City.

Moulding Crucibles.—Patent Reissued December 8, 1874, No. 6,166.
Old Patent 47,140, August 1, 1865.

Upon reconsideration, the interference declared the 17th instant has been dissolved. A. SCHOEPF, *Examiner.*

415 [U. S. Postage, three cents.] [U. S. Postage stamp.] [Boston, Dec. 14. Mass.]

Hon. Commissioner of Patents,

For Mr. Grinnell, Chief Clerk. *Washington, D. C.*

416 U. S. Patent Office:—Reissue; application of George Nimmo filed November 29, 1872.

Contents of this file: Fifty-four papers.—Application; office letter, December 16, 1872; attorney's letter, December 30, 1872; office letter, December 30, 1872, filed January 6, 1873; amendment A, filed January 6, 1873; attorney's amendment; office letter, February 8, 1873, amendment filed April 3, 1873, cancelled, and letter of office January 13 and July 3, 1873; rejection, January 12, 1873, filed April 19, 1873, (cancelled); amendment B, filed October 17, 1873; attorney's letter; office letter, October 30, 1873; attorney's letter, December 13, 1873; rejection filed December 23, 1873; amendment filed December 31, 1873; office letter, January 2, 1874; attorney to

office, January 8, 1874; amendment "C," January 8, 1874; office letter filed January 8, 1874; attorney's letter February 6, 1874; office letter, February 7, 1874; interlocutory appeal, March 11, 1874; examiner's reply, March 13, 1874; Commissioner's decision,
417 April 10, 1874; copy of notice of above, April 10, 1874; attorney to office, argument, September 25, 1874; amendment "G," filed September 25, 1874; rejection filed September 28, 1874; attorney to office letter, October 31, 1874; amendment "Z," October 31, 1874; office letter, November 2, 1874; attorney to office letter, November 27, 1874; amendment P, November 27, 1874.

418 1872.

Reissue. 36–73. Divis. 12.

No. 6,166.

George Nimmo, ass'or by mesne assignments to Arthur Pickering, Charles R. Atwood, Charles R. Vickery, and Phœnix Manufacturing Company. Of Jersey City, county of Hudson, State of New Jersey. Moulding Crucibles.

Rec'd Nov. 29, 1872; petition, Nov. 29, 1872; affidavit, Nov. 29, 1872; specification, Nov. 29, 1872; drawing 2 sheets, Dec. 10, 1872; old patent, No. 49,140, Aug. 1st, 1865; Cert. dep.; cash $30, Nov. 29, 1872; examined Dec. 3, 1874, A. Schoepf; issue Dec. 4, 1874, Grinnell; patented Aug. 1, 1865; reissued Dec. 8, 1874; recorded vol. , page ; letter to attorney, Dec. 2, 1872. J.

419 1872.

Letter Dec. 16th, 1872; letter Dec. 30th, 1872; letter Feb. 8th, 1873; rejected July 12th, 1873; rejected Oct. 30th, 1873; rej. 11, Dec. 23d, 1873; letter Jan. 2d, 1873; letter Jan. 8th, 1873; letter Feb. 7th, 1874; ret. Sep. 28, 1874; November 2d, 1874; intf. March 17th, 1877; intf. dissolved March 27, 1877.

Improvement in Moulding Crucibles.

15 clay (115) crucible moulds.

(Endorsed:) Pickering *et al. vs.* McCullough *et al.* Exhibit file wrapper and contents; C. T. S., sp'l exr; filed Dec. 10, 1877; H. D. Gamble, clerk.

420 In the Circuit Court of the United States in and for the Western District of Pennsylvania.

PICKERING *et al.*
vs.
McCULLOUGH, DALZELL & Co. } In Equity. Opinion.

McKENNAN, CIR. J.—In deciding this case it is unnecessary to go beyond the proofs presented by the respondents touching the existence and use of a machine at Kier's works, in Pittsburgh, for the manufacture of plumbago crucibles. That such machine was constructed before the date of Nimmo's patent, is clearly established by the proofs. That it was capable of successful operation, is the result of a decided perponderance of the evidence. That it was so con-

structed as to perform the distinguishing function of Nimmo's machine, viz., the guidance of the rib towards the axis of revolution of the mould so that it could be withdrawn therefrom without touching the sides of the mould, is manifest from the drawing prepared from the description of those who operated and saw the machine. In a word, in the mechanical forces employed in mode of operation, in so far as the essential feature of Nimmo's machine is concerned, and in the results produced, the machines are undistinguishable.

421 Why, then, is not the Kier machine an effectual anticipation of Nimmo's?

The argument against this hypothesis is that it is an abandoned experiment. But the proof is that it was a complete machine; that it was operated for nearly a year; that crucibles were made upon it without any imperfection in form, and that the rib was removed from the mould by guiding it to the center and thence withdrawing it without touching the sides. True it is that the use of the machine was discontinued, that it was not produced in evidence, and it was not shown what had become of it. But these considerations tend rather to discredit the testimony touching the existence, construction, and operation of the machine, than to impress upon it the character of a mere experiment. If that testimony is believed, there can be no doubt that the machine was neither incomplete in construction or in effective adaptation to the work for which it was intended; and it is now too well settled to admit of controversy, that an abandonment of the use of a mechanical structure which has been brought to such a degree of maturity, and whose operative merit has been demonstrated by trial, will enure to the benefit of the public, and not to that of even an original but subsequent inventor. Bedford *vs.* Hunt, 1 Mass., 305; Reid *vs.* Cutter, 1 Story, 600; Gayler *vs.*

422 Wilder, 10 How., 498; Coffin *vs.* Ogden, 18 Wall., 124. There is no sufficient reason to reject that testimony, and the result necessarily is, that

The bill must be dismissed with costs.

(Endorsed:) No. 53, May Term, 1877; Pickering *et al. vs.* McCullough, Dalzell & Co.; Opinion of the Court; filed May 13th, 1878; H. D. Gamble, Clerk.

Order for Decree.

423 In the Circuit Court of the United States for the Western District of Pennsylvania.

ARTHUR PICKERING *et al.* *vs.* MICHAEL MCCULLOUGH, JOHN H. DALZELL, *et al.*	No. 53, May Term, 1877. In Equity.

Pickering *et al. vs.* McCullough & Co. No. 53, May Term, 1877. Decree per opinion.

(Endorsed:) No. 53, May Term, 1877; Pickering *et al. vs.* McCullough, Dalzell & Co.; order allowing decree to be entered; filed May 13th, 1878.

424 *Decree.*

In U. S. Circuit Court, Western District of Pennsylvania.

No. 53, May Term, 1877.

ARTHUR PICKERING *et al.* *versus* McCULLOUGH, DALZELL & Co.	In Equity.

And now, to wit, May 13th, 1878, this case having been heard on bill of complaint, answer, replication, proof, and argument of counsel for the complainants, and counsel for the defendants, and thereupon on consideration thereof, it is hereby adjudged and decreed that letters patent reissue No. 6,166, granted to said complainants for improvement in moulding crucibles on Dec. 8th, 1874, in said bill of complaint mentioned, and on which this suit is brought, are invalid and of no effect to grant any exclusive right or privilege to said complainants, and thereupon the said bill of complaint is hereby dismissed, with costs of suit to be taxed against said complainants, in favor of said defendants. BY THE COURT.

(Endorsed:) No. 53, May Term, 1877; U. S. Circuit Court, Western Dist. of Pa.; In Equity; Arthur Pickering *et al. vs.* McCullough, Dalzell & Co.; Decree Filed May 13th, 1878. Bakewell & Kerr, Sols. for Def'ts.

425 *Petition for Appeal.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

ARTHUR PICKERING, of Hull, CHARLES R. VICKERY and CHARLES R. ATWOOD, of Taunton, Mass., and "THE PHŒNIX MANUFACTURING COMPANY," a corporation duly established by the Commonwealth of Massachusetts, *vs.* MICHAEL McCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBURGH, and H. E. DUBARRY, partners as McCULLOUGH, DALZELL & Co.	No. 53, May Term, 1877.

To the Honorable W. W. Ketcham, Judge of the Circuit Court of the United States for the Western District of Pennsylvania:

The petition of plaintiff above named, by their attorney, Robert Robb, respectfully sets forth that the above case came on to be heard before the Circuit Court of the United States for the Western District of Pennsylvania at May Term, 1878, and after argument by plaintiffs' and defendants' counsel, respectively, and due considera-

tion by the court, the cause was, on the 13th day of May, 1878, dismissed at the cost of the plaintiff.

Your petitioners pray your honor that they may be allowed to enter an appeal from said decision to the Supreme Court of the United States; and they will ever pray, &c.

ROBERT ROBB, *Plff's. Att'y, July* 22, 1878.

(Endorsed:) No. 53, May Term, 1877; Arthur Pickering & Co. *vs.* McCullough, Dalzell & Co.; Petition for an Appeal. Aug. 3, 1878, appeal allowed in open court; W. McKennan, Cir. J. R. R.

426 *Withdrawal of Appeal.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

ARTHUR PICKERING & Co.
vs.
MICHAEL MCCULLOUGH & Co. } No. 53, May Term, 1877.

And now, to wit, September 7, 1878, on motion of Robert Robb, attorney for plaintiffs, he is hereby allowed to withdraw, and does hereby withdraw, an appeal entered in this case.

By the Court: H. D. GAMBLE, *Clerk.*

(Endorsed:) No. 53, May Term, 1877; Pickering *et al. vs.* McCullough, Dalzell & Co. Withdrawal of appeal filed September 9, 1878. R. R.

427 United States Circuit Court, Western District of Pennsylvania.

ARTHUR PICKERING *et al.*
vs.
MICHAEL MCCULLOUGH, JR., *et al.* } In Equity.

To the Judges of the Circuit Court of the United States for the Western District of Pennsylvania: Humbly complaining, show unto your honors, your orators, Arthur Pickering, of Hull, in the district of Massachusetts, Charles R. Vickery and Henry D. Atwood, as he is executor, as more fully stated hereinafter, both of Taunton, in the district of Massachusetts, and the Phœnix Manufacturing Company, a corporation duly established by the State of Massachusetts, and having its principal place of business at said Taunton, all citizens of said State, that said Pickering, said Vickery, Charles R. Atwood, late of said Taunton, but now deceased, and the said Phœnix Manufacturing Company, on or about the ninth day of January, 1877, exhibited their original bill of complaint in this honorable court against Michael McCullough, Jr., John H. Dalzell, C. C. Arensburgh, and H. E. Dubarry, partners, and trading under the name of McCullough, Dalzell & Co.; that all of said defendants being duly served with
428 process appeared and answered unto the said bill; that thereupon replication was duly filed by the said complainants, and proofs duly taken and published; that thereafter the case came on to be heard on pleadings and proof on or about September 10, 1877,

before the Honorable the Circuit Judge for the Third Circuit, who did, on 13th May, 1878, ordered a final decree to be entered in favor of said defendants, all of which by the records of this honorable court will more fully and at large appear.

And your orators further show unto your honors, that on or about the 18th day of December, 1877, the said Charles R. Atwood departed this life testate, and that his will was proved, and letters testamentary upon the said will were issued to said Henry D. Atwood in and by the proper court, and that he thereby became and now is the proper legal representative of said Charles R. Atwood, as will more fully and at large appear from the certificate of the register of the Probate Court for the county of Bristol, Commonwealth of Massachusetts, hereto annexed and marked A, which your orators pray may be taken as a part thereof.

And your orators further show unto your honors, that the said suit and proceedings have become abated by reason by the above-recited event, and your orators are, as they are advised, entitled to have the same revived.

429 To the end, therefore, that the said defendants may answer the premises, and that the said suit and proceedings may stand revived, and be in the same plight and condition as the same was in at the time of said abatement, or that these defendants may show good cause to the contrary—

May it please your honors to grant unto your orators a writ of subpœna, to revive out of and under the seal of this honorable court, to be directed to the said Michael McCullough, Jr., John H. Dalzell, C. C. Arensburgh, and H. E. Dubarry, thereby commanding them at a certain day and under a certain penalty, personally to be and appear before your honors in this honorable court, then and there to show cause, if they can, why the said writ should not stand and be revived against them, and be in the same plight and condition as the same was in at the time of said abatement; and further, to stand to and abide such order and decree in the premises as to your honors shall seem meet. And your orators shall ever pray, &c.

ARTHUR PICKERING,
CHARLES R. VICKERY,
HENRY D. ATWOOD, *Executor, &c.*
PHŒNIX MANUFACTURING CO.
By J. E. MAYNADIER, *their Solicitor.*

J. E. MAYNADIER, *of Counsel.*

430 (Endorsed:) No. 53, May Term, 1877; Arthur Pickering *et al. vs.* McCullough, Dalzell & Co.; In Equity; Bill of Revivor. We hereby waive the issuing of subpœna and except service of notice of filing the within bill. Bakewell & Kerr, Sols. for Respondents. Sept. 11, 1878; Filed Sept. 21, 1878.

A.

COMMONWEALTH OF MASSACHUSETTS, *Bristol*, } *ss:*

Probate Court.

J. W. E. Fuller, register of the Probate Court for said county of Bristol, hereby certify that at a Probate Court holden at Taunton, in and for said county, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, the last will and testament of Charles R. Atwood, late of Taunton, in said county, deceased, testate, was duly proved and allowed, and letters testamentary thereon issued to Henry D. Atwood, of Taunton, in the county of Bristol, the executor therein named, who gave bond in the penal sum of fifty thousand dollars, with two good and sufficient sureties, to the acceptance of the judge of said court, for the due performance of said trust according to law.

431

I also certify that it appears by the records and files of said court that said letters are now in full force.

In witness whereof, I have hereunto set my hand, and seal of said court, this twenty-third day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

W. E. FULLER, *Register.*

COMMONWEALTH OF MASSACHUSETTS, *Bristol*, } *ss:*

Probate Court.

I, Edmund S. Bennett, Esquire, judge of the Probate Court within and for the county of Bristol, hereby certify that W. E. Fuller, whose signature is affixed to the annexed certificate and attestation, is the register and proper certifying officer of said court, and has by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said court, and that said certificate and attestation are in due form, and entitled to full faith and credit.

In witness whereof, I have hereunto set my hand, this twenty-third day of August, in the year of our Lord eighteen hundred and seventy-eight.

EDMUND H. BENNETT,
Judge of Probate Court.

432 U. S. Circuit Court, Western District of Pennsylvania. No. 53, May Term, 1877.

ARTHUR PICKERING *et al.*
vs.
MCCULLOUGH, DALZELL & CO. } In Equity.

The joint and several answer of Michael McCullough, Jr., John H. Dalzell, C. C. Arensburg, and H. E. Dubarry, to the bill of revivor of Arthur Pickering, Charles R. Vickery, and Henry D. Atwood, executor of Charles R. Atwood, deceased, and the Phœnix Manufacturing Company.

These respondents, answering, say that they admit that the said Arthur Pickering, Charles R. Vickery, Charles R. Atwood, and the Phœnix Manufacturing filed their bill of complaint against these respondents in this honorable court, and that having been duly served with process, they, these respondents, filed their answer thereto; that replication was duly filed thereto, and that proofs were taken and published, and that the said case came on to be heard before the honorable the circuit judge of the third circuit, who, on 13th May, 1878, ordered a final decree to be entered in favor of said defendants, as set forth in said bill of revivor.

And these respondents, further answering, say that they are informed, and believe it to be true, and therefore admit, that said Charles Atwood, one of said complainants, departed this life on or about the 18th December, 1877, testate, and that letters testamentary were duly issued to said Henry D. Atwood, and that he is now the
433 proper legal representative of said Charles D. Atwood, deceased.

And these respondents, further answering, say that they have nothing to say why the said suit should not be revived as prayed for in said bill.

But these respondents submit to your honorable court that they are entitled to the same decree in this suit as revived against the complainants to this bill as was granted to them in the said original suit, and they pray as by their answer filed in said original suit they have already prayed, that they be hence dismissed with their reasonable costs.

MICHAEL McCULLOUGH, JR.
JOHN H. DALZELL.
C. C. ARENSBERG.
H. E. DUBARRY.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

Before me, the subscriber, personally appeared Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg, and H. E. Dubarry, the above-named respondents, who, being duly sworn according to law, do depose and say that they have read or heard read the foregoing answer, and that the facts set forth, so far as they are of their own knowledge are true, and so far as they are stated on knowledge derived from others, they believe them to be true.

[SEAL.]

MICHAEL McCULLOUGH, JR.
JOHN H. DALZELL.
C. C. ARENSBERG.
H. E. DUBARRY.

R. H. WHITTLESEY, *Notary Public.*

(Endorsed:) No. 53, May Term, 1877; Arthur Pickering *et al. vs.* McCullough, Dalzell & Co.; Answer to Bill of Revivor; Filed Sept. 21, 1878; Bakewell & Kerr.

434 United States Circuit Court, Western District of Pennsylvania.

ARTHUR PICKERING *et al.*
vs.
McCULLOUGH, DALZELL & Co.
} No. 53 of May Term, 1877.

And now, this twenty-first day of September, 1878, upon motion made this day by Robt. Robb, Esq., being of complainants' counsel, it was alleged that the complainants, on or about the 9th day of January, 1877, exhibited their bill into this court against Michael McCullough, Jr., John H. Dalzell, C. C. Arensberg and H. E. Dubarry, partners under the name of McCullough, Dalzell & Co.; that the said defendants appeared accordingly and put in their answer thereto; that thereupon replication was duly filed by said complainants, and proof duly taken and published; that thereafter the case came on to be heard on pleadings and proofs on or about September 10, 1877, before this honorable court, and that said court did, on the 13th day of May, 1878, order a final decree to be entered therein in favor of said defendants; that prior to the entry of said final decree, to wit, on or about the 18th day of December, 1877, the said Charles R. Atwood, one of the said complainants, departed this life testate, and that his will was duly proved, and letters testamentary were
435 granted to Henry D. Atwood as executor of said Charles R. Atwood, deceased, and that said suit and proceedings abated by the death of Charles R. Atwood; that the complainants have lately exhibited their bill of revivor unto this court against the defendants, to which they have appeared and filed their answer, wherein they allege that they have nothing to say why the said suit should not be revived as prayed for in said bill.

And thereupon it was prayed that the said suit and proceedings may stand revived and be in the same plight and condition as the same was in at the time of said abatement; which is ordered accordingly, and that the final decree of this court in favor of said defendants, entered on the 13th day of May, 1877, be set aside at the costs of the said complainants. BY THE COURT.

(Endorsed:) No. 53, May Term, 1877; Arthur Pickering *et al. vs.* McCullough, Dalzell & Co.; Order allowing Bill of Revivor and setting aside Decree; filed Sept. 23rd, 1878.

436 Circuit Court of the United States, Western District of Pennsylvania.

PICKERING *et al.*
vs.
McCULLOUGH, DALZELL & Co.
} In Equity.

McKENNAN, CIR. J.—In deciding this case it is unnecessary to go beyond the proofs presented by the respondents touching the existence and use of a machine at Kier's works, at Pittsburgh, for the manufacture of plumbago crucibles. That such a machine was constructed before the date of Nimmo's patent, is clearly established by the proofs. That it was capable of successful operation, is the result

of a decided preponderance of the evidence. That it was so constructed as to perform the distinguishing functions of Nimmo's machine, viz., the guidance of the rib towards the axis of revolution of the mould so that it could be withdrawn therefrom without touching the sides of the mould, is manifest from the drawing prepared from the description of those who operated and saw the machine. In a word, in the mechanical forces employed in mode of operation, in so far as the essential feature of Nimmo's machine is concerned, and
437 in the results produced, the machines are undistinguishable.

Why, then, is not the Kier machine an effectual anticipation of Nimmo's?

The argument against this hypothesis is that it was an abandoned experiment. But the proof is that it was a complete machine; that it was operated for nearly a year, that crucibles were made upon it without any imperfection in form; and that the rib was removed from the mould by guiding it to the center and thence withdrawing it without touching the sides. True it is that the use of the machine was discontinued; that it was not produced in evidence, and that it was not shown what had become of it. But these considerations tend rather to discredit the testimony touching the existence, construction, and operation of the machine, than to impress upon it the character of a mere experiment. If that testimony is believed, there can be no doubt that the machine was neither incomplete in construction or ineffective in adaptation to the work for which it was intended; and it is now too well settled to admit of controversy, that an abandoment of the use of a mechanical structure which
438 has been brought to such a degree of maturity, and whose operative merit has been demonstrated by trial, will enure to the benefit of the public, and not to that of even an original but subsequent inventor. Bedford *v.* Hunt, 1 Mass., 305; Reid *v.* Cutter, 1 Story, 600; Gayler *v.* Wilder, 10 How., 498; Coffin *v.* Ogden, 18 Wall., 124.

There is no sufficient reason to reject that testimony, and the result necessarily is, that

The bill must be dismissed with costs.

(Endorsed:) No. 53, May Term, 1877; Pickering *et al.* *v.* McCullough *et al.*; Filed Sept. 23, 1878.

439 United States Circuit Court, Western District of Pennsylvania.

ARTHUR PICKERING, CHARLES R. VICKERY, HENRY D. ATWOOD, executor of CHAS. R. ATWOOD, deceased, and THE PHŒNIX MANUFACTURING COMPANY *vs.* MICHAEL MCCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBERG, and H. E. DUBARRY, partners under the name of MCCULLOUGH, DALZELL & CO.	No. 53, May Term, 1877. In Equity.

And now, to wit, September 23d, 1878, this case having been

heard on bill of complaint, answer, replication, proof, and argument of counsel for the complainants, and counsel for the defendants, and thereupon on consideration thereof it is hereby adjudged and decreed that letters patent reissue No. 6,166, granted to said complainants for improvement in moulding crucibles on Dec. 8, 1874, in said bill of complaint mentioned, and on which this suit is brought, are invalid, and of no effect to grant any exclusive right or privilege to said complainants, and thereupon the said bill of complaint is hereby dismissed, with costs of suit to be taxed against said complainants, in favor of said defendants. BY THE COURT.

(Endorsed:) No. 53, May Term, 1878; Arthur Pickering *et al. vs.* McCullough, Dalzell & Co.; Decree in revised suit; filed September 23, 1878.

440 In the Circuit Court of the United States for the Western District of Pennsylvania.

ARTHUR PICKERING, of Hull, CHARLES R. VICKERY, and CHARLES R. ATWOOD, of Taunton, Mass., and THE PHŒNIX MANUFACTURING COMPANY, a corporation duly established by the Commonwealth of Massachusetts, *vs.* MICHAEL MCCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBERGH, and H. E. DUBARRY, partners as MCCULLOUGH, DALZELL & CO.	No. 53, May Term, 1877.

To the Honorable the Supreme Court of the United States:

The appeal of the above-named plaintiffs, the appellants, respectfully shows, that on the ninth day of January, 1877, the above-named complainants filed their bill in the Circuit Court of the United States for the western district of Pennsylvania against the above-named respondents, and alleging and charging that said respondents had infringed certain letters patent of the United States, No. 49,140, and dated August 1, 1865, and reissue No. 6,166, and dated December 8, 1874, the right to which is now vested in the plaintiffs, the said letters patent being for certain improvements in moulding crucibles, and by their bill praying that the said respondents might be adjudged and decreed to account for all damages which complainants had sustained, as well as the profits which had arisen or accrued to the respondents by reason of such infringement; that on
441 the third day of August, 1877, the respondents filed their answer to said bill, denying that they had infringed the letters patent therein mentioned, and that on the third day of August, 1877, the plaintiffs filed a replication thereto; and that after argument, on the 23d day of September, 1878, it was by said court ordered, adjudged, and decreed that the said bill of complaint be dismissed at the costs of complainants.

Wherefore these appellants appeal from the whole of said decree of said Circuit Court, and respectfully pray that the decree of the said court, and the bill, answer, pleadings, depositions, and evidence and pleadings in the said cause, may be sent to the Supreme Court of the United States without delay, and the said Supreme Court will proceed to hear the said cause, anew, and that the said decree of the Circuit Court may be reversed, and such other decree made as to the said Supreme Court shall seem just.

ARTHUR PICKERING,
C. R. VICKERY,
CHARLES R. ATWOOD, and
THE PHŒNIX MANUFACTURING CO.,
Plaintiffs.

By their attorney: ROBT. ROBB.

(Endorsed:) No. 53, May Term, 1877; Pickering & Co. and Phœnix Manufacturing Co. *vs.* McCullough, Dalzell & Co.; Petition for Appeal. And now, to wit, September 23, 1878, on motion of Robt. Robb, appeal allowed in open court. W. McKennan, Cir. Judge. Filed Nov. 12, 1878. R. R.

442 United States Circuit Court, Western District of Pennsylvania.

ARTHUR PICKERING *et al.*
vs.
MICHAEL MCCULLOUGH *et al.* } In Equity.

Assignments of Error.

The appellants respectfully submit that the court below erred in the following particulars:

1st. In not deciding that the machine described in letters patent No. 9,437, granted to Jacob Wise and Freeman Wise November 30, 1852, was not practically operative.

2d. In not deciding that the machine described in the Wise patent aforesaid was substantially different from the machine described and claimed in reissued letters patent No. 6,166, dated December 8, 1874, being the patent on which the suit is based.

3d. In not deciding that the said Wise patent did not in any way effect the validity of said reissued letters patent No. 6,166.

4th. In not deciding that the machine described in letters patent No. 40,506, granted to William Smith November 3, 1863, was not practically operative.

5th. In not deciding that the machine described in the Smith patent aforesaid was substantially different from the machine
443 described in said reissued letters patent No. 6,166.

6th. In not deciding that the said Smith patent did not in any way effect the validity of said reissued letters patent No. 6,166.

7th. In not deciding that the defendants had failed to establish the prior knowledge or use of the thing patented in said reissued letters patent No. 6,166, at the works of William Smith or else-

where, by said William Smith, or by Rowland H. Smith, or by James Park, Junior, or by any one else.

8th. In not deciding that the things described on pages 118 to 124, both inclusive, of volume second of the printed publication entitled "Lecons de Ceramique," published by A. Salvetat, Paris, France, were vaguely and ambiguously described, and substantially different from the thing described and claimed in said reissued letters patent No. 6,166.

9th. In not deciding that nothing contained in said printed publication affected in any way the validity of said reissued letters patent.

10th. In not deciding that the defendants had failed to establish the prior knowledge or use of the thing patented in said reissued letters patent No. 6,166, at the works of Samuel M. Kier, or elsewhere, by said Kier, or by Joseph Winkle, or by William M. Winkle, or by Frank Wright, or by Thomas M. Kier, or by any one else.

11th. In not deciding that the machine which the testimony on behalf of the appellees tended to show was constructed at the
444 works of Samuel M. Kier, in Pittsburgh, and was known to and used by said Joseph Winkle, said William M. Winkle, and others, was an unsuccessful and an abandoned experiment.

12th. In deciding that the machine last above named was an effectual anticipation of the invention described and claimed in said reissued letters patent No. 6,166.

13th. In not deciding that said reissued letters patent were for the same invention as were the original letters patent No. 49,140, granted to Joseph Nimmo August 1st, 1865, and were free from new matter.

14th. In not deciding that said Nimmo was the original and first inventor of the thing patented in said reissued letters patent No. 6,166.

15th. In not deciding that the appellees had infringed said reissued letters patent No. 6,166.

16th. In not deciding that the appellants were the owners of said reissued letters patent No. 6,166.

J. E. MAYNADIER,
Solicitor and of Counsel for Appellants.

445 In the Circuit Court of the United States, for the Western District of Pennsylvania.

ARTHUR PICKERING, CHARLES R. VICKERY, HENRY D. ATWOOD, Adm'r of Charles R. Atwood, dec'd, and THE PHŒNIX MANUFACTURING COMPANY, *vs.* MICHAEL MCCULLOUGH, JR., JNO. H. DALZELL, C. C. ARENSBERG, and H. E. DUBARRY, trading as McCullough, Dalzell & Company.	No. 53, May Term, 1877. In Equity.

Western District of Pennsylvania, ss.

I, H. D. Gamble, clerk of the Circuit Court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above entitled case, so full and entire as the same remains of record and on file in my office.

[SEAL.]

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 4th day of January, A. D. 1879. H. D. GAMBLE, *Clerk.*

Western District of Pennsylvania, ss.

I, William McKennan, judge of the United States Circuit Court for said district, do hereby certify that H. D. Gamble, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law. W. McKENNAN, *U. S. Circuit Judge.*

PITTSBURGH, *Jan'y* 4, 1879.

1067

SUPREME COURT OF THE UNITED STATES.

ARTHUR PICKERING ET AL., APPELLANTS,

v.

MICHAEL McCULLOUGH ET AL., APPELLEES.

ARGUMENT FOR APPELLANTS.

J. E. MAYNADIER,

of Counsel.

Supreme Court of the United States.

ARTHUR PICKERING ET AL., APPELLANTS,

v.

MICHAEL McCULLOUGH, JR., ET AL., APPELLEES.

ARGUMENT FOR APPELLANTS.

This is a suit in equity, based upon Reissued Letters Patent granted to the complainants, No. 6166, dated December 8, 1874, for Improvement in Moulding Crucibles.

The bill was dismissed in the Court below.

ASSIGNMENT OF ERRORS.

The appellants respectfully submit that the Court below erred in the following particulars: —

1. In not deciding that the machine described in Letters Patent No. 9437, granted to Jacob Wise and Freeman Wise, November 30, 1852, was not practically operative.

2. In not deciding that the machine described in the Wise patent aforesaid, was substantially different from the machine described and claimed in Reissued Letters Patent No. 6166, dated December 8, 1874, being the patent on which the suit is based.

3. In not deciding that the said Wise patent did not in any way affect the validity of said Reissued Letters Patent No. 6166.

4. In not deciding that the machine described in Letters Patent No. 40,506, granted to William Smith, November 3, 1863, was not practically operative.

5. In not deciding that the machine described in the Smith patent aforesaid, was substantially different from the machine described in said Reissued Letters Patent No. 6166.

6. In not deciding that the said Smith patent did not in any way affect the validity of said Reissued Letters Patent No. 6166.

7. In not deciding that the defendants had failed to establish the prior knowledge or use of the thing patented in said Reissued Letters Patent No. 6166, at the works of William Smith or elsewhere, by said William Smith, or by Roland H. Smith, or by James Park, Jr., or any one else.

8. In not deciding that the things described on pages 118 to 124, both inclusive, of volume second of the printed publication entitled "Leçons de Céramique," published by A. Salvetat, Paris, France, were vaguely and ambiguously described, and substantially different from the thing described and claimed in said Reissued Letters Patent No. 6166.

9. In not deciding that nothing contained in said printed publication affected in any way the validity of said Reissued Letters Patent No. 6166.

10. In not deciding that the defendants had failed to establish the prior knowledge or use of the thing patented in said Reissued Letters Patent No. 6166, at the works of Samuel M. Kier or elsewhere, by said Kier, or by Joseph Winkle, or by William M. Winkle, or by Frank Wright, or by Thomas M. Kier, or by any one else.

11. In not deciding that the machine which the testimony on behalf of the appellees tended to show was constructed at the works of Samuel M. Kier, in Pittsburgh, and was known to and used by said Joseph Winkle, said William M. Winkle and others, was an unsuccessful and an abandoned experiment.

12. In deciding that the machine last above named was an effectual anticipation of the invention described and claimed in said Reissued Letters Patent No. 6166.

13. In not deciding that said Reissued Letters Patent were for the same invention as were the original Letters Patent No. 49,140, granted to Joseph Nimmo, August 1, 1865, and were free from new matter.

14. In not deciding that said Nimmo was the original and first

inventor of the thing patented in said Reissued Letters Patent No. 6166.

15. In not deciding that the appellees had infringed said Reissued Letters Patent No. 6166.

16. In not deciding that the appellants were the owners of said Reissued Letters Patent No. 6166.

THE MACHINE PATENTED in Reissued Letters Patent No. 6166, consists of three main parts: first, a mould to shape the exterior of the crucible; secondly, a rib, whose office is to shape the interior of the crucible; and thirdly, certain mechanical means for so incorporating this mould and this rib into one machine that while the mould is revolved rapidly, the rib can be forced into the mould, until its working face is brought into the proper relation with the bottom and side of the mould, and afterwards moved bodily towards the axis of the mould and upwards out of the mould.

The mould is old, and the rib is old; but prior to Nimmo's invention, the mechanism for combining the rib and mould into one machine was such that the rib could not be moved bodily towards the axis of the mould, or away from that axis.

The apparatus is clearly described in the reissue, and is also very clearly described by Mr. Justice CLIFFORD in the Opinion, a copy of which follows this argument.

MATTERS NOT IN DISPUTE.

The defendants made and used, and still use, machines such as that shown by Exhibit Defendants' Model.

Prior to 1865, all the crucibles in the market were hand-made, (disregarding, for the present, those made by Kier & Co., *if any*); during 1865–7 the hand-made were displaced by the machine-made, and since 1867 the market has been almost wholly supplied with the machine-made crucibles (see first depn. of *H. D. Atwood*, ints. 2–13).

No machine for making crucibles is mentioned throughout the testimony but Nimmo's, and others the same in substance (disregarding the Wise, Smith and Kier machines for the present).

The machine-made crucibles cost much less, and are much better, than the hand-made.

INFRINGEMENT.

It is believed that this will be clear on inspection; although it is denied in the answer, and, after a manner, by Mr. McIntire, int. 20 (see on the part of appellants, *Atwood's* first depn. int. 12; and *Spencer*, int. 9).

THE CONTROVERSY.

The appellees assert that the complainants' reissue is void for the following reasons:—

(1) New matter.

(2) Want of novelty.

The first defence seems based upon a misapprehension of the law as to reissues. The facts, of course, are clear from a comparison of the original and reissue patents, there being nothing technical or ambiguous in either.

It is obvious at a glance that the machine described in the two patents is the same. The reissue claim is wordy, but it is clear that it claims only "the improved apparatus above described." The original patent was void because it claimed far more, in view of the state of the art, than Nimmo invented, plaster moulds having been in general use prior to 1865, in the manufacture of many articles of clay, closely analogous to crucibles; and the 2d, 3d and 4th claims were each broad enough to cover many combinations of lever, rib and revolving mould, which were old; viz., those referred to in the second paragraph of the reissue. In other words, these three claims are in substance for the apparatus described, and the description contained nothing which made it clear that the bulk of the apparatus was old, and that Nimmo had merely *improved* the old apparatus. Nor was anything said in the original about the state of the art.

The reissue specification differs from the original in describing fully the state of the art, and in pointing out clearly the difference between the *improved* apparatus and what was before known; and the claim is most carefully limited to the points of difference between the old and the improved apparatus. No addition whatever is made

in the reissue except for the purpose of explaining wherein Nimmo's improved apparatus differs from what was old.

In fact, the more closely this defence be examined, the clearer it will be that it is based upon the confusing of matter which is strictly explanatory *of what is shown in the original;* and matter descriptive or explanatory of something *not* described, suggested or substantially indicated in the original.

Here the apparatus in the original is identical with that in the reissue; but, owing to ignorance of the state of the art, very broad claims are made in the original, — covering broadly all combinations of lever, rib and mould, — and consequently no stress is laid upon the peculiarity which, in fact, distinguished Nimmo's invention from all similar machines; viz., the motion of the rib towards and from the axis of revolution of the mould.

The testimony on this point is *McIntire*, int. 7; *Spencer*, int. 3. Mr. McIntire's point is based upon two mistakes: (1) that when the lever is "drawn outward until its end clears the cross-piece," it must be moved in a *horizontal* plane (and Mr. McIntire himself shows this mistake at the end of his 11th answer); (2) that the drawing is made to a scale. In fact, as the lever is drawn outward, its handle is lifted.

NOVELTY.

This defence is based upon (1) Salvetat's book; (2) the Kier machine; (3) the Wise and Smith patents.

As to Salvetat's Book. — This publication was before the Patent Office when the reissue was granted. Figures 230 to 236, both inclusive, show all that was claimed in the four claims of the original patent, and what is disclaimed in the second paragraph of the reissue. Figures 238 to 241, both inclusive, show what is disclaimed in the third paragraph of the reissue.

The defendants' ground seems to be that inasmuch as plaster moulds of various forms are shown in nearly all the figures *except* 238 and 240, such a mould is to be *implied* in those figures, in spite of the description and those figures.

The testimony as to the machines described in Salvetat's book is *McIntire*, ints. 12, 13; *Spencer*, ints. 7, 17, 18, 21–29.

As to the Kier Machine: — Three witnesses, Winkle, Wright and Graham, testify as to this machine:

Winkle swears that the drawing Exhibit Kier Machine is "the exact thing, *as near as I can remember*" (int. 13).

Wright swears that the drawing "is *like* the Kier machine," and in one feature only "is just the same" (int. 8).

Graham knows very little about the machine (ints. 7, 8, 15, 16, 23, 24, 32–36).

These men testify from unaided recollection, no portion of the machine being in existence, and nothing being produced except the drawing (marked "Exhibit Kier Machine") made for the purpose, and an old crucible mould such as was formerly used for making crucibles by hand (*Stewart*, ints. 4–6).

Winkle and Wright swear to altogether too much. They make the capacity of the machine over 400 crucibles in ten hours of ordinary work, with the usual help (ints. 114–121; *Wright's* depn. ints. 12–16, 99–103), which is more than double that of the machines now in use (*DuBarry's* depn. ints. 11, 12).

The defendants have failed to show that a single one of the crucibles made on the Kier machine was of even ordinarily good quality. Mr. Park testifies that he tried some of Kier & Co.'s crucibles "in the neighborhood of 1864 or 1865," and some of them stood properly and some did not. He thinks their failure was due "chiefly" to the material and the mixing; but gives a reason for his opinion which does not even tend to support it. His reason is, however, very significant when taken in connection with Stewart's testimony (ints. 29, 30, 48–54, 61–73), that the sample lots, the greater part of which were hand-made, gave satisfaction in nearly every case.

The complainants most confidently submit that the Kier machine was merely an abandoned experiment. The facts are that no part of the Kier machine is produced; that its non-production is not accounted for in any way; that it had neither progenitor nor offspring; that its construction is shown only by the unaided recollection of

two witnesses (three if Graham be included) who are strongly biased in its favor; that the whole enterprise was a complete failure, and in the city of Pittsburgh, where, had the machine been of any actual value, it would most certainly have been adopted; that there was an abundance of capital at its back; that in 1865, probably, it was disused; that none of the witnesses have seen it since 1867 (*Winkle*, ints. 18, 19; *Wright*, ints. 26, 27; *Graham*, ints. 8, 24; *Stewart*, ints. 25–28).

The testimony of Glover and Stewart is conclusive against the Kier machine; and, *à fortiori*, in view of the many weaknesses of the testimony of Winkle, Wright and Graham. Mr. Park must be counted against the Kier machine.

See especially, *Glover*, int. 7; *Stewart*, ints. 7–14, 17, 64, and *Spencer*, int. 6.

This case was decided in the Court below, upon the testimony of these three witnesses, Winkle, Wright and Graham. William M. Winkle was in the army up to June 7, 1865 (int. 20), stationed at Camp Reynolds, Braddock's Fields (int. 21), and yet saw this machine at least three days in every week during that time (int. 22), and used it without pay, and a great many times merely for his own amusement (ints. 27 and 31). He swears that the machine was in steady and continuous operation from September, 1874 (when he first saw it), until June, 1865 (int. 33), when, on his own showing, he was in the army during all that time, and certainly could not have known whether it was or not. Its product would have been during that time, at a very low estimate, not less than 30,000 crucibles; and if a third or a tenth of that many had been made and sold, this case would surely not depend upon the unaided recollection of these three witnesses; and Mr. James Park, Jr., would not have been the only witness as to the use of crucibles made on it. Winkle's answers to interrogatories 136–142, show that he is not a trustworthy witness.

Frank Wright worked at Kier's works in the summer and fall of 1864 (int. 2), and, swears that he frequently used the machine (int. 10), and that it was worked continuously, as a general thing,

until he left, in December, 1867 (ints. 26, 27), and that it was first used in the summer of 1864 (cross-int. 50). If he is to be believed, there must have been, at a low estimate (assuming the machine to have been used 100 days in the year, and that 100 crucibles were made each day it was used), not less than 30,000 crucibles made from the summer of 1864 until December, 1867.

Andrew Graham saw this machine more than once, but can't say how often (int. 8). He don't know about the extent of use; and his testimony is clearly more in accordance with the facts than that of Winkle or Wright (assuming for the present that the facts are that an attempt was made in 1864 to get up a machine to make crucibles, and that the machine was tried repeatedly, but that all the crucibles made upon it were failures, and the machine was nothing more than an abandoned experiment).

These three witnesses are the only ones called by the defendants to prove the prior use of the patented apparatus at Kier's works. Mr. James Park, Jr., is called to show that his firm, Park, Brother & Co., used some of Kier's crucibles, he does not say when, nor how many, but does say that some of them stood properly and some did not (int. 3). He is not an expert in the manufacture of crucibles. As to the form and finish of the crucibles from Kier's works, he says, "My recollection is that they were *about as good* as any crucibles we ever had in use at our works" (int. 5). It does not appear whether he is speaking of machine-made or hand-made crucibles, as Kier made both.

To control the testimony of Winkle, Wright and Graham, appellants called Stewart and Glover.

Stewart testifies that Kier made crucibles by hand-moulding, using moulds like Defendants' Exhibit Kier Mould (ints. 3-6), and afterwards got up a machine which he describes in his 7th, 8th, 9th and 10th answers; this machine, which is the same one referred to by Winkle, Wright and Graham, "was troublesome to keep in order, from being too weak" (int. 13), and was wholly remodelled as shown in the drawing Exhibit Stewart No. 1 (ints. 13–18). Stewart testifies that a few of the crucibles made by Kier gave satisfaction, but a large majority did not (int. 29); that the crucibles were broken up;

"towards the last, very little account was taken of them" (int. 30); that the materials used in the manufacture of crucibles were the best that could be had (cross-int. 48); that the crucibles wouldn't stand three heats (cross-int. 53); that sample lots were made from time to time by hand, which gave satisfaction (ints. 61, 62); that the machine referred to by Winkle, Wright and Graham, "*was out of date*" when Winkle made these sample lots by hand; that none of these sample lots which were machine-made, if any were machine-made, were "made on this machine Exhibit Kier Machine, as I think it wasn't in use at that time. I think this machine [meaning the one shown in Exhibit Kier Machine, and the one about which Winkle Wright and Graham testified] was in use at the time the difficulty occurred; but it was after this time that the sample crucibles were made, in order to let Winkle redeem himself. That is about the idea of it" (cross-int. 64).

Glover testifies that he was a partner in the crucible business carried on at Kier's works; that they "had no success at all, because Winkle [Joseph] couldn't get them [crucibles] up in a style that they could be used in the market." That Winkle tried to make them by machinery, but didn't succeed; that a few were sold to steel manufacturers, but "they wouldn't buy any more, because they wouldn't go up to their point; that is, they didn't stand with the crucibles that came from the Jerseys."

It is most confidently submitted, that the testimony of Winkle, Wright and Graham is abundantly controlled by that of Glover, Stewart and Park; and that it is clear on all the testimony, that Joseph Winkle attempted to make crucibles with an apparatus of some kind, before 1865, but failed entirely, and abandoned the attempt.

It is certain that the apparatus constructed by Winkle was of no practical use; for had it been, the defendants would not now be relying upon the very meagre testimony introduced on their behalf, and Glover and Stewart and Park would have testified very differently.

No practical working machine was ever used to the very large extent testified to by Winkle and Wright (over three years averag-

ing, at a very low estimate, more than 10,000 crucibles a year), and then disappeared, leaving absolutely no trace except the imperfect recollection of three witnesses.

The drawing, made from a recollection of over ten years, must, of course, be extremely unsatisfactory; and it is certain, on inspection, that the drawing Exhibit Kier Machine is a mere sketch; and that a machine built in accordance with that drawing would be worthless (see *Spencer's* 6th answer).

The question here raised is not a mere question of fact, to be settled by a nice balancing of conflicting statements, but is an extremely grave one, upon the proper solution of which, the security of property worth very many millions of dollars depends. Can a patent in the first rank as to value and importance be destroyed by the testimony of three witnesses, speaking wholly from recollection, more than ten years after the time to which their testimony relates, unaided by the production of any portion of the apparatus about which they testify (for the mould produced, although it may have been used on a machine, was designed for hand-moulding, *Stewart*, ints. 3–6), and in the absence of any attempt even to account for its non-production?

Nimmo's machine was first used early in 1865, at Jersey City, and not only has it remained in use ever since, but it rapidly supplanted all other modes of making crucibles (*Atwood's* 1st depn. ints. 2–9, 13).

Surely, it is grossly improbable that there was in 1864 a practically operative machine for making crucibles at Kier's works in Pittsburgh (*the* market for crucibles), which is the first, last and only machine of its kind, and the existence of which it is hard to prove in 1877.

Will it not make the patent system of our government farcical to destroy a patent for an apparatus, the invention of which has revolutionized a large and important manufacturing industry, upon such testimony as that of Winkle, Wright and Graham, controlled as it is by that of Glover, Stewart and Park?

Human memory, even when wholly unbiased, is weak and uncertain after the lapse of considerably less than ten years; and before

and since the first statute of frauds, it has been a well-recognized rule, that valuable rights should not be left at the mercy of witnesses testifying from mere recollection.

The appellants are not invoking any technical rules as to the weighing of evidence or otherwise; they stake their case upon the assertion that it is not true that any practically operative machine for making crucibles existed in 1864, at Pittsburgh, and disappeared. They say that all business men who invest capital in patents, and who have made the manufactures of this country what they are, *know* that a practically operative machine substantially like Nimmo's does not disappear.

In reading the testimony of Winkle, Wright and Graham (after having read that of Glover, Stewart and Park), the following questions naturally arise: —

Why didn't the defendants show where the machine is now? Why didn't they show its origin and history, who made it, who used the crucibles made upon it, what was the reason for the failure of the crucible business of Kier & Co.; why no witness was called who knew anything of the machine after 1867; what is the explanation of the circumstance, wholly contrary to experience, that a very valuable machine, especially desirable at Pittsburgh, never was reproduced? Why did the defendants, with the burden of proof upon them, and attempting to prove a fact which is grossly improbable, call so few witnesses? Why should Winkle, Wright and Graham be believed when they testify to a thing grossly improbable; and why should not Glover and Stewart be believed when they testify to what is in the highest degree probable?

This is not a mere question of fact, depending upon conflicting testimony; but is a question of the CHARACTER of testimony necessary to destroy patents. Here are three witnesses, swearing in a group that a machine of which Exhibit Kier Machine is a drawing, existed in 1864 at Kier's works in Pittsburgh, that it worked admirably, in fact, very much better than any machine since known; no one has seen the machine since 1867; no part of the machine is produced; no attempt is made to account for the non-production, and

no evidence has been introduced tending to show what has become of the machine, or where it now is. Finally, the only testimony as to the use of crucibles made on the machine, falls very far short of showing that any one of such crucibles was in fact made on the machine; but dóes show that crucibles from Kier's works were some good and some bad.

In reply to this, appellants introduced evidence tending to show that Kier's works failed entirely to make marketable crucibles; that the only ones made there which ever gave satisfaction were small lots of hand-made crucibles; that the very machine relied upon by the defendants was abandoned and disused, and altered over into a wholly different machine. It also appears from the uncontrolled testimony of an intelligent and able expert that a machine built as shown in the drawing Exhibit Kier Machine, and described by Winkle, could not last an hour, would not make a single marketable pot, and would be weak and rickety in the extreme (*Spencer*, int. 6).

The temptation to assail valuable patents by inducing witnesses to give strong testimony based upon a very slight foundation of recollection, — transmuting crude and futile attempts into practical working machines, — is familiar; and the wisest and best remedy, one well established by a long line of authorities (including *Coffin* v. *Ogden*, cited in the opinion of the Court below), is to require of the defendant a consistent story, well established, showing a reasonably clear and full history of the alleged anticipating machine.

Three witnesses swear that they recollect a machine prior to the patented one; that the machine was like a drawing (made for the purpose of making their descriptions agree); that it was used largely, and worked miraculously. Two other witnesses, equally well informed at least, swear that it wouldn't work, and was a complete failure. No part of the machine is produced; it is not shown what became of it; no excuse is offered for its non-production; it is not shown that any crucibles made on it were marketable; it is shown that the great bulk of all the crucibles made at the works where the machine was tried were worthless. Should it be decided that on such evidence as this, a valuable patent will be held void, it will go

far to make patents worthless. Such evidence as that of Winkle, Wright and Graham can always be readily obtained in any patent suit where the amount at stake is large.

AS TO THE WISE PATENT OF 1852, AND THE SMITH PATENT OF 1863.

The machine described in the Wise patent clearly lacks the rib of the Nimmo machine, and also lacks the stop of the Nimmo machine for giving uniformity of thickness in the walls of the crucibles. But it is also clear that the Wise machine has a revolving former, which, it is assumed in the patent, will operate as does the rib in the Nimmo machine; and also has a flange at the mouth of the mould, which, it is assumed in the patent, will operate as does the lateral stop in the Nimmo machine.

The same statements are true of the machine described in the Smith patent, except that that machine lacks not only the lateral stop (for making the walls of a batch of crucibles of uniform thickness), but also lacks the vertical stop (for making the bottoms of uniform thickness); but these two stops are both intended to be present in the Smith machine.

The defendants put this part of their case apparently upon the well-settled rule that the mere substitution of old devices for performing desired functions is not invention, where the old devices are known substitutes for performing their respective functions; that is, that inasmuch as the revolving formers of Wise and Smith and the rib of Nimmo were both old at the date of Nimmo's supposed invention for giving internal shape to the vessel, and inasmuch as the flange at the top of the mould and the stationary vertical stop of Wise, and the stationary vertical and lateral stops of Salvetat, were old before Nimmo's invention, for giving uniformity of thickness to both bottom and walls, and inasmuch as Nimmo did nothing more, on a fair analysis, than to substitute the old rib for the Wise and Smith formers, and old stationary stops for the stops found in Wise and Smith, it follows that he has made no invention.

To these patents the complainants make two answers: 1st, that the Wise and Smith patents are mere *paper* patents; that is, that

neither of them describes a machine which ever has been, or ever can be, put to any practical uses; 2d, that the revolving formers of Wise and Smith are neither the substitutes for, nor substantially the same as, the rib of the Nimmo machine.

The complainants submit that it is well-settled law that a patent, whether home or foreign, is void *in toto*, not only as a grant, but also as a defence against a subsequent patent, if the thing described be not practically operative; in other words, any patent in which the thing described is not practically operative, is, for all purposes, precisely as if it were not, or on the same footing as an abandoned experiment. Both show that some one has *tried* to do something, and also show that he has *failed* to do it.

There is, of course, much difference in the kind of proof requisite; for where the person who constructs a machine, tries it, fails, and abandons it, proof of these facts is sufficient, without showing *wherein* the machine was wrongly built. But when a person puts his notions, more or less crude, upon paper, makes a small model, applies for and obtains a patent, and does nothing whatever afterwards, then, as the record shows just what he has done, leaving no room for dispute and nothing depending upon uncertain memory, largely colored, as it must be, of necessity, by present knowledge, it is necessary to show wherein the machine was wrongly built.

The defendants assumed the burden of proof on this question, and endeavored to show that the Smith machine is practically operative by the testimony of Mr. McIntire, and that of three of the defendants, Messrs. Arensberg, DuBarry and Dalzell.

Mr. McIntire testifies that he saw two crucibles (the two afterwards put in evidence, and marked "Exhibits X and XII," *Arensberg's* depn. int. 67), made on a machine "constructed substantially like the machine shown and described in the Smith patent" on Wednesday, Sept. 12, 1877 (int. 15, *McIntire's* depn.), and one other made on the same machine, but with a plaster mould, without a flange at the mouth, substituted for the iron mould. He afterwards testifies that the machine he saw tried "was substantially identical with" the Exhibit Smith Model (int. 18; and see ints. 21 *et seq.*).

This is the extent of Mr. McIntire's information as to the use of

this so-called Smith machine, and he has no practical knowledge whatever in regard to the manufacture of crucibles (int. 3); his testimony, therefore, cannot aid the Court in determining this question. He is, of course, biased, as professional experts always are.

Mr. Arensberg, one of the defendants, never made a crucible, either by hand or machinery (int. 48); is not a machinist (51); "understands very little about machinery" (81), and is heavily interested. His testimony is, in substance, that the machine which the defendants had built for them, is like Exhibit Smith Model, "*substantially the same*," the only difference relating to the means for connecting the former and spindle, *not clearly described;* but a very material difference, as Mr. Arensberg describes it (for it is clear that the former would not work at all, but would cramp and bind if attached to the spindle as he describes, and without a proper bracing near the bottom of the former, which he does not mention); that he has seen *this* machine used with an iron mould, and with a plaster mould, and also with the Nimmo rib substituted for the revolving former; and that it works satisfactorily, and is a good machine. It should be noted that but *very* few of these trials were made with the iron mould *flanged at the mouth.* Mr. Arensberg "don't know how many" (58), but only *two* crucibles (Exhibits X and XII) are produced, and only two or three others are spoken of anywhere in the testimony; viz., one made on Friday, September 14 (*Dalzell*, ints. 40, 41; *DuBarry*, int. 35), three or four (including the two produced) before Friday, September 14 (*DuBarry*, int. 36), and one other after Monday, September 17, and before October 10 (*DuBarry*, int. 126); that is, not more than six in all.

Neither Mr. Dalzell nor Mr. DuBarry describes the machine; they say merely that it was "*like or substantially like*" Exhibit Smith Model (*DuBarry*, int. 18; *Dalzell*, int. 2).

The machine was not put in evidence; was never shown to any of the complainants, nor to any person in their interest; and no offer was ever made by the defendants to show their machine, until after the testimony was all taken and printed.

The evidence on behalf of the complainants is very full, direct and positive, and, it is most confidently submitted, establishes that

the Wise and Smith machines can neither of them be used for any practical purpose; or, differently expressed, that these machines constructed as described in the patents, could not be used at all for making crucibles.

The testimony of complainants' witnesses on this point is in direct conflict with that of the three defendants Arensberg, Dalzell and DuBarry, so far as concerns the way in which the revolving former works; but as to all the other fatal defects mentioned by the witnesses on behalf of the complainants, they are not controlled in any way.

(1) In the Wise patent the mould is held upon the wheel (or "head-piece") by an iron rod, *i*, and by the head-block *d*, and not otherwise. This head-block *d* is thus described: "*d* is the block of the head-piece, a head-block, which is a part peculiar to our machine; *it is made of wood about one fourth of an inch in thickness*, and secured to the head-piece by means of three or more screws, so as to be removable at pleasure to suit the various moulds; it is circular in shape, and will vary in *diameter* [not in thickness] according to the size of the mould in use." It is obvious on inspection, and is fully proved, that these means for securing the mould are absurd.

This is so clear that the mechanic who made the Exhibit Wise Model departed widely from the Wise patent in this respect.

(2) The former in the Wise machine is so improperly supported that it could not be used. The former "is attached to the lever by being placed in a groove and fastened with a pin." The mechanic who made the Exhibit Wise Model also departed widely from the Wise patent in this respect.

(3) The mould shown is flanged at the mouth, and this flange constitutes the only lateral stop.

(4) The former is so small at the bottom that it cannot shape the bottom of the pot, but the material will rise there, making a conical projection, which is cut off as the former is brought back to the axis of revolution.

(5) Lastly, the former is intended to revolve freely.

It is submitted that the testimony establishes that either one of

these five defects (unless possibly the fourth) is in itself enough to prevent the practical use of the Wise machine.

It will be observed that the testimony of complainants' witnesses is not controlled in any way as to the first four of these defects; and that it is in some measure corroborated as to the first and second by the defendants causing the Exhibit Wise Model to be made as it is; and very largely corroborated as to the third by the fact that the defendants have testified to not more than six crucibles in all, as having been made in a mould flanged at the mouth (*Arensberg*, int. 58; *Dalzell*, ints. 40, 41; *DuBarry*, ints. 35, 36, 126); all the rest of the crucibles spoken of by them, nearly 700 in all, having been made in plaster moulds not flanged at the mouth (*DuBarry*, ints. 74, 116–118).

(1) In the Smith patent the mould is shown as held in place by means wholly inadequate; and this is clear on inspection, in addition to being fully proved. The mechanic who made the Defendants' Exhibit Smith Model departed widely from the Smith patent in this respect; and it is highly significant that the model itself affords satisfactory evidence that it was originally made like the Smith patent in this respect, and afterwards changed.

(2) The mould is flanged at the mouth, and this flange constitutes the only lateral stop; the top of the mould is the only vertical stop. It is significant that the Smith machine is in these respects like the Kier machine.

(3) The flat top of the former, being nearly on a level with the lower corner of the flange, will receive all the surplus material, and throw it back into the pot.

(4) No provision is made for handling the mould.

(5) Lastly, the former is intended to revolve freely.

Either of these defects (except the 3d and 4th) is in itself fatal to any practical use of the Smith machine.

The complainants' witnesses are not only not controlled in any way as to the first, second, third and fourth of these defects; but are fully corroborated by the facts that the machine made by the defendants, if it be like the Smith Model, differs radically from the

Smith patent so far as concerns the manner of securing the mould; and has been used to make not over six pots with the iron mould flanged at the mouth, and *has never been used* with the top of the mould acting as the vertical stop (*DuBarry*, ints. 47–51, 74, 87–90, 116–123, 131, 132, 151, 152).

The bulk of complainants' record is made up of the testimony of witnesses as to the Smith and Wise machines, that being regarded by complainants' counsel as the only real issue in this case.

MacFarlane, Spencer, Atwood (second depn.), Paine, Brammer, Driscoll, Gregory, Wallace and Ryder, nine men, all practical experts, except Spencer, who is a professional expert, are very positive that no machine with a revolving former will work practically; and that the machines made by the complainants marked "Exhibits Complainants' Smith Machine," and "Wise Lever and Formers," are wholly inoperative.

This part of the case stands thus: as to the Wise machine, the defendants do not attempt to show that it is practically operative; the testimony is all one way; and it is strongly corroborated by the fact that the defendants have made not more than six crucibles in a mould with a flanged mouth, and in addition to all this, the Wise patent was granted twenty-five years ago, no evidence is offered to show that any machine was ever made under it, and the testimony tends very strongly to show that there never was a machine made for making crucibles, or anything else, in which a *revolving* former was used with a mould of any kind, before 1877 and for this case.

As to the Smith machine: three of the defendants testify that a machine made by them with a revolving former will work practically; but this machine is not put in evidence, its exact construction does not appear, and it was not shown to the complainants or to any one interested with them, until the hearing in the Court below. This testimony of these three defendants is directly in conflict with that of five witnesses (disregarding Mr. Spencer, as he is a professional expert, and not skilled in this art), equally as competent to judge as the defendants, and no more interested than they; and with

the testimony of three other witnesses, not interested, and as skilful as any in the country.

But in addition, it appears that the defendants' so-called Smith machine differs very materially from the machine described in the Smith patent in the manner of mounting the mould, and in the relation of the top of the former and the lower corner of the flange of the mould; and also that not more than six pots in all were ever made by them in the mould with the flanged mouth, that none were ever made with the top of the mould acting as the vertical stop, and that they have made over 99 per cent of all the pots made by them on the so-called Smith machine with a plaster mould and without using a flange for the lateral stop or the mould for the vertical stop.

Moreover, the defendants state in their answer that William Smith, *now* residing in Pittsburgh, and many others in that city, and James Park, Jr., knew of, and *used*, a machine like Nimmo's in 1862, 1863, and thereafter, "*at* the works of William Smith." Mr. Park testified in the case, *but did not mention the Smith machine;* Mr. William Smith *was not called as a witness;* nor was any one else who knew anything about the history of the Smith machine.

Surely, this shows that the Smith machine perished at its birth; its existence on the records of the Patent Office is no more like life than is the preservation of some curious fœtus in alcohol.

The complainants submit that, in view of all the evidence, and in view of the silence of Mr. Smith and Mr. Park, and others who had knowledge of the early history of the Smith machine, one of two things must be true: either there was never a Smith machine built (until the complainants had one *altered and improved*, built for use in this case) or else the one that was built was found worthless, and was never used.

Why is it that machines with a revolving plaster mould, a *rib*, and means for moving and guiding the rib towards and from the axis including proper stops, were largely used within a few months after Nimmo's invention, and were in general use in a few years after? And why has no machine with a *revolving former* ever been used anywhere, until the exigencies of this case compelled it? And why

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Why is it that machines with a revolving plaster mould, a *rib*, and means for moving and guiding the rib towards and from the axis including proper stops, were largely used within a few months after Nimmo's invention, and were in general use in a few years after? And why has no machine with a *revolving former* ever been used anywhere, until the exigencies of this case compelled it? And why

has no mould with a flanged mouth, nor any machine in which the top of the mould and the flange formed the stops, ever been used successfully? Why have the defendants themselves used the mould with the flanged mouth in making less than one per cent of the crucibles made on their so-called Smith machine? And why have they never used the top of the mould as a stop? And why did they not make their so-called Smith machine the same as that shown and described in the patent? Why did no one testify on behalf of the defendants as to this, the real issue, save three of the defendants, and their expert?

The Wise machine is not substantially the same as Nimmo's: (1) The revolving former is not substantially the same as Nimmo's rib; the revolving former must be mounted very differently from the rib; its construction is widely different; when it is revolved freely by contact with the clay, as described in the Wise patent, the clay will gather upon it as snow upon a rolling snowball, while Nimmo's rib is constantly wiped clean by the clay; the revolving former requires a spindle and other appliances; the rib is a single solid piece of metal. (2) The lateral stop is the flange at the mouth of the mould in Wise, while in Nimmo, the lateral stop is the shoulder on the lever and the front of the piece marked *o*.

See *Spencer's* depn. int. 4.

The Smith machine is not substantially the same as Nimmo's: (1) The revolving former is not substantially the same as Nimmo's rib, for the reasons just stated. (2) The lateral stop is the flange at the mouth of the mould, as in Wise, and not separate and distinct from the mould, as in Nimmo. (3) The vertical stop is the upper surface of the mould, and not separate and distinct from the mould, as in Nimmo. In Nimmo, the vertical stop is the part marked *p*, and the under surface of the lever.

See *Spencer's* depn. int. 4.

The complainants refer to the following authorities: —

Abandoned experiment:

Kinsman v. *Parkhurst*, 18 How. 289; 1 Blatchf. 489.
Union Sugar Refinery v. *Matthiesson*, 2 Fish. 600.
Many v. *Jagger*, 1 Blatchf. 372.
Howe v. *Underwood*, 1 Fish. 160.

Non-production of the alleged prior device:

Hayden v. *Suffolk Co.*, 4 Fish. 95.
Bailey Co. v. *Lincoln*, 4 Fish. 385.
Masury v. *Tiemann*, 4 Fish. 527, 528.
Blake v. *Eagle Co.*, 4 Fish. 592, 593.
Blake v. *Rawson*, 1 Holmes, 200.
Hall v. *Bird*, 3 Fish. 595.
Coffin v. *Ogden*, 3 Fish. 641.
Smith v. *Glendale Co.*, 1 Holmes, 340; 5 Off. Gaz. 429.
Gallahue v. *Butterfield*, 10 Blatchf. 232; 6 Fish. 203; 2 Off. Gaz. 645.
LeBaw v. *Hawkins*, 6 Off. Gaz. 424.

The alleged prior machine must be capable of practical use:

Hayden v. *Suffolk Co.*, 4 Fish. 101.
Johnson v. *McCullough*, 4 Fish. 175.
Roberts v. *Dickey*, 4 Fish. 545; 1 Off. Gaz. 4.
Swift v. *Whisen*, 3 Fish. 360.
Taylor v. *Wood*, 12 Blatchf. 100; 8 Off. Gaz. 90.
Seymour v. *Osborne*, 11 Wall. 516.
Cohn v. *The U.S. Co.*, 12 Blatchf. 225; 6 Off. Gaz. 259.
Cohn v. *The U.S. Co.*, 93 U.S. R. 366; 11 Off. Gaz. 457.
Union Mfg. Co. v. *Lounsburg*, 2 Fish. 389.
Graham v. *Mason*, 5 Fish. 8, 9.
Reeves v. *Keystone Co.*, 5 Fish. 465.
Jenkins v. *Walker*, 1 Holmes, 120.

Respectfully submitted by
J. E. MAYNADIER,
of Counsel for Appellants.

UNITED STATES CIRCUIT COURT,

DISTRICT OF MASSACHUSETTS.

ARTHUR PICKERING ET AL.

v.

WILLIAM H. PHILLIPS ET AL.

IN EQUITY.

(Before CLIFFORD, J. Decided September 1, 1876.)

(See 10 Official Gazette, 420.)

OPINION OF THE COURT.

CLIFFORD, J.— Defective patents, if invalid, may be surrendered and reissued, and the lawful grantee of the new patent may maintain a suit in equity against an infringer, to recover the gains and profits which such infringer made by his unlawful acts, if the cause of action is properly set forth in the bill of complaint.

Sufficient appears to show that Letters Patent were, on the first day of August, 1865, granted to George Nimmo for a "new and useful improvement in moulding crucibles and pots," as more fully set forth in the record, and that the complainants, during the lifetime of the patent, became the assignees of the same. Infringers were prosecuted, but the grantees of the original patent, finding that the specification was defective, settled the suit against the Taunton Crucible Company, and surrendered the patent; and the record shows that the same was reissued to them as such assignees. Since that time they have commenced the present suit, and the charge is that the respondents unlawfully and wrongfully use an apparatus which, in construction and mode of operation, embraces the invention described and claimed in the Reissued Letters Patent. Service was made, and the respondents appeared and set up three defences: 1st, they deny that George Nimmo is the original and first inventor

of the alleged invention; 2d, that the complainants are estopped from maintaining the present suit against the respondents, for the reasons set forth by the respondents in their special plea; 3d, that none of the acts done by the respondents amount to an infringment, for the reason that they were all done by the respondents as officers and agents of the Taunton Crucible Company, under a license from Thomas G. French, and because they are not in violation of any rights of the complainants.

1st. Unless the invention is new and useful, the Letters Patent are not the proper foundation of a suit for infringement, but the Letters Patent, when introduced in evidence, if regular in form, afford a *prima facie* presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement. Persons charged with infringement may disprove that presumption by showing that the invention had previously been patented or described in some printed publication, or that the alleged inventor was not the original and first inventor of the improvement; but they cannot be allowed to give such evidence in a suit at law, unless they give notice in writing of their intention to do so, thirty days before the trial. Notices of the kind are required to state the names of the patentees, and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented the same, and where and by whom the invention had been used. Proofs of the kind may be given in equity suits for infringement, upon proper notice being given in the answer of the respondent, and with the like effect (16 Stat. at Large, 208; Rev. Stat. sec. 4920, p. 960). Such a notice was never given in this case, and of course the first defence must be overruled.

2d. Prior to the surrender of the original patent, a suit was commenced by the then grantees of the same against the Taunton Crucible Company, charging the respondents with the infringement of the exclusive right secured by the Letters Patent; and it appears that the bill of complaint was dismissed upon the terms and conditions specified in the agreement exhibited in the present record. It appears by the entry that the respondents recovered costs; but the proofs show that the respondents paid the costs of the suit to the

complainants. Support to the second defence is attempted to be drawn from that agreement; but the complainants insist that the terms of the agreement extend no further than to estop the grantees of the original patent from prosecuting the respondents for infringing the title set up in that bill of complaint, and the Court, after a careful consideration of the question, is compelled to adopt that conclusion. No mention whatever is made of any right except what is secured by the patent set forth in the bill of complaint. Reasonably construed, the Court is of the opinion that the agreement set up in the second defence does not operate as a license to the respondents to make and use the invention secured by the reissued patent, nor does it estop the *present* complainants from prosecuting the respondents for an infringement of the exclusive right secured by the reissued patent.

3d. Suppose that is so, still it is insisted by the respondents that they do not infringe the exclusive rights secured to the complainants, which is the only question that remains to be considered. Issues of the kind make it necessary to construe the claim of the patent, and to ascertain what is the real nature and character of the invention secured by the patent. Crucibles made of clay, or other articles made of plastic material, require to be moulded before they are exposed to heat, and what the complainants claim as the invention of George Nimmo, is the apparatus described in the specification, which consists of a revolving vessel and the device called a "rib," and the mechanism for connecting the rib and the vessel, and for so guiding the rib that it will approach the axis of revolution as it is withdrawn from the revolving vessel. Clay suitable for moulding is placed in the vessel, which is then rapidly revolved, when the rib is brought down upon the clay in the vessel, and is pressed down upon it until the clay is reduced to the desired form, the profile of the rib forming the inside of the crucible, and the revolving vessel giving form to the outside of the same. Due form having been given to the crucible, the rib is then withdrawn, which is a matter of difficulty, in case the crucible is of less diameter at the mouth than below, unless the mechanism for guiding the rib is so constructed that it will cause the rib to approach the axis of revolution

as it is withdrawn from the revolving vessel. Unless the rib can be so guided, it is impossible to manufacture vessels having a bilge, without injury to the manufactured article; and it is for that reason that the patented apparatus of the complainants is greatly superior to anything which has preceded it in the art.

Taken as a whole, it is both new and useful, and when taken as a whole the Court is of opinion that the articles manufactured by the respondent do infringe the exclusive rights secured to the complainants by the Reissued Letters Patent. Doubts were entertained upon that subject at the argument; but a more complete examination of the record has had the effect to remove those doubts, and to convince the Court that the apparatus used by the respondents is substantially the same as that described in the specification of the reissued patent. They use the vessel and the rib and mechanism for connecting the two and for causing the rib to approach the axis of revolution as it is withdrawn from the revolving vessel. Viewed in the light of those suggestions, it is clear that the complainants are entitled to a decree for an account and for an injunction.

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as it is withdrawn from the revolving vessel. Unless the rib can be so guided, it is impossible to manufacture vessels having a bilge, without injury to the manufactured article; and it is for that reason that the patented apparatus of the complainants is greatly superior to anything which has preceded it in the art.

Taken as a whole, it is both new and useful, and when taken as a whole the Court is of opinion that the articles manufactured by the respondent do infringe the exclusive rights secured to the complainants by the Reissued Letters Patent. Doubts were entertained upon that subject at the argument; but a more complete examination of the record has had the effect to remove those doubts, and to convince the Court that the apparatus used by the respondents is substantially the same as that described in the specification of the reissued patent. They use the vessel and the rib and mechanism for connecting the two and for causing the rib to approach the axis of revolution as it is withdrawn from the revolving vessel. Viewed in the light of those suggestions, it is clear that the complainants are entitled to a decree for an account and for an injunction.

SUPREME COURT
FILED
NOV 8 1881
JAMES H. McKENNEY, CLERK

SUPREME COURT of the UNITED STATES,

No. OCTOBER TERM, 1878.

ARTHUR PICKERING, CHARLES R. VICKERY, HENRY D. ATWOOD, EXECUTOR OF CHARLES R. ATWOOD, DECEASED, AND THE PHŒNIX MANUFACTURING COMPANY,

Appellants,

vs.

MICHAEL McCULLOUGH, Jr., JOHN H. DALZELL, C. C. ARENSBERG AND H. E. DUBARRY, AS McCULLOUGH, DALZELL & COMPANY,

Appellees.

ARGUMENT ON BEHALF OF APPELLEES.

WILLIAM BAKEWELL,

Counsel for Appellees.

PITTSBURGH, PA.
W. V. DERMITT, PRINTER, COR. GRANT AND DIAMOND STREETS.
1879.

IN THE

Supreme Court of the U. S.

No. *OCTOBER TERM, 1878,*

ARTHUR PICKERING, CHARLES R. VICKERY, HENRY D. ATWOOD, EXECUTOR OF CHARLES R. ATWOOD, DEC'D, AND THE PHŒNIX MANUFACTURING COMPANY, A CORPORATION UNDER THE LAWS OF THE STATE OF MASSACHUSETTS,

Appellants,

versus

MICHAEL MCCULLOUGH, JR., JOHN H. DALZELL, C. C. ARENSBURG AND H. E. DUBARRY, TRADING UNDER THE NAME OF MCCULLOUGH, DALZELL & COMPANY,

Appellees.

ARGUMENT ON BEHALF OF APPELLEES.

WILLIAM BAKEWELL,
Counsel for Appellees.

W. V. DERMITT, PRINTER, COR. GRANT AND DIAMOND STREETS, PITTSBURGH.

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Appellees.

ARGUMENT ON BEHALF OF APPELLEES.

The appellants, who were complainants in the Court below, brought suit in equity against the appellees, for infringement of Reissued Letters Patent No. 6,166, granted to the complainants as assignees of George Nimmo, for improvement in moulding crucibles. The reissue is dated December 8, 1874. The original patent, No. 49,140, was granted on August 1st, 1865.

The appellees are engaged in the manufacture of plumbago crucibles, in Pittsburgh, Pa., and in so doing, use a machine

of which the model produced by defendants, and marked "*Exhibit Defendants' Model*" is a correct representation.

(See stipulation ~~Appellants'~~ Record, page ~~9~~). 20.

The model marked "*Complainants' Exhibit Nimmo Machine*" is a very *incorrect* representation of the machine described in the Nimmo patent, in three important particulars, viz: the model has a *bilged-shaped* mould in two parts, while the patent describes a flaring-mouth mould in one piece. The model has a rib adapted to making bilged crucibles, which the patent has not; and the model has a cross-bar or guide for the lever of the rib, which the patent does not represent.

See testimony of J. N. McIntire, *Int.* ~~11~~. 8. page 201.

The appellees filed their answer, in which they set up the following defences:

1. That the Reissue No. 6,166, sued upon, is invalid and void, because it is not for the same invention as the original patent, but for another and entirely different invention.
2. That the Reissue is void, because the specification and claims contain new matter relating to a method or operation not shown nor described in the original patent, and which the machine shown and described in the original patent is not adapted to perform.
3. That the invention claimed in the reissue was patented and described in patents granted to others, prior to Nimmo's alleged invention, viz:

   Patent to Jacob Wise and Freeman Wise, dated November 30, 1852.

   Patent to William Smith, dated November 3, 1863.
4. That the alleged invention of Nimmo, was described in a printed publication, to wit: "Lecons de Ceramique," by A. Salvetat, published in Paris, France, in the year 1857, Vol. 2, pp. 118 to 124, before Nimmo's alleged invention.
5. That prior to the alleged invention by Nimmo, the same was known and used at the works of Samuel M. Kier, at Pittsburgh, by said Samuel M. Kier, Joseph Winkle and others, whose names and residences are given in the answer.

Also, at the works of William Smith, in Pittsburgh.

6. The appellees also denied the infringement of the appellants' patent.

Evidence was offered on part of appellees to substantiate all of these defences, excepting as to the alleged prior use at the works of William Smith. Replication having been filed, the case was heard on the pleadings, testimony and exhibits, before Hon. William McKennan, Circuit Judge, and a decree entered in favor of appellees, dismissing the bill.

In the opinion of the Court, none of the defences relied upon by the appellees was referred to, excepting that of prior knowledge and use of the patented invention at Kier's works, in Pittsburg; the Court holding that it was clearly established by the proofs that a machine was constructed and in use at Kier's works before the date of Nimmo's patent, which "was so constructed as to perform the distinguishing function of Nimmo's machine, viz.: the guidance of the rib towards the axis of revolution of the mould so that it could be withdrawn therefrom without touching the sides of the mould," and that "in a word, in the mechanical forces employed, in mode of operation, in so far as the essential features of Nimmo's machine is concerned and in the results produced, the machines are undistinguishable." Record p. 436.

The appellants, in their assignment of errors, have, however, referred to all the defences set up by the appellees, alleging that the Court below erred in not deciding in favor of the appellants on each of the several issues raised by the appellees in their answer.

It becomes necessary, therefore, to refer to each of the defences set up in the answer and supported by proofs.

SUBJECT MATTER OF THE INVENTION.

The invention in controversy in this suit, relates to the manufacture of crucibles, or pots used for melting steel. They are made of a plastic mixture, the chief ingredient of which is plumbago, commonly known as "black lead," and are formed on a potter's wheel, precisely in the same way as

other articles of pottery. Originally they were formed from a lump or batch of the plastic material placed on a horizontally revolving wheel, being shaped as the wheel revolved, by the hands of the workman. Afterwards they were formed within a mould or matrix, placed on the revolving potter's wheel, being shaped within the mould, either by the hand of the workman, or by means of a "rib" or "former," the profile of which was the shape of the interior of the crucible to be formed.

Of what material such moulds were first made, does not appear. The Wises in their patent of 1852, speak of using moulds of iron *or other suitable material.* Salvetat, in his publication in 1857, speaks of moulds made of plaster of paris; and Nimmo, in his original patent in 1865, describes the use of moulds of plaster of paris, and even claimed them as new, and refers to moulds of other material having been used before. Nimmo's reissue, however, makes no claim to the use of plaster of paris moulds, they being obviously old; so that the *material* of which the mould is made is unimportant in this suit.

When Nimmo procured his original patent in 1865, he was apparently entirely ignorant of the state of the art. He evidently thought that he was the first to make use of moulds of plaster of paris, and even seems to have had the idea that he was the first to use a mould and "former," wherewith to form crucibles on a revolving wheel. All this ground, however, was fully covered before his invention, as appears by the Wise Patent, the Smith Patent, the Salvetat publication, and the Kier machine, which will be specially referred to hereafter.

The manufacture of plumbago crucibles as a branch of the ceramic art, differs in no respect from the manufacture of other articles of pottery, the process being the same, whether the article be made of clay, porcelain, or plumbago.

THE NIMMO REISSUE ADMITS THE INVENTION CLAIMED THEREIN TO BE OLD.

It is very difficult to ascertain exactly what was intended to be claimed by the Nimmo reissue. As we shall presently see, the appellants' expert found it impossible to settle upon any definite construction. The first part of the reissue specification is a labored argument, directed to the task of distinguishing the alleged invention of Nimmo, from the apparatus for making pottery, described in Salvetat's "Lecons de Ceramique." The *claim* in the Nimmo reissue is as follows:

"What we do claim as the invention of said Nimmo, is—

"The improved apparatus above described, having the "specific character, objects and functions above explained, and "consisting of the rib, the revolving mould, and *mechanism* "*by which the rib is guided towards the axis of revolution of the* "*mould as it is withdrawn, as set forth,* these elements being "claimed only in combination each with all the others, and no "claim is made to any combination of any of them less than "the whole." (Record p. 152.)

Here we have three elements, and *only three*, viz:

1. The rib.
2. The revolving mould.
3. Mechanism for guiding the rib towards the axis of revolution of the mould.

The rib is the piece marked *n*, in the drawing attached to the Nimmo patent, the profile of which is of the shape desired to be given to the inside of the crucible.

On the opposite page is a copy of the drawing from the Nimmo reissue. (Record p. 154.)

I desire at this point to call the attention of the Court to the fact that although one of the elements of this claim is "*mechanism* for guiding the rib towards the axis of revolution of the mould;" there is, in fact, no mechanism whatever, described in the patent which does in fact so guide the rib towards the axis of revolution or centre of the mould. The *rib* is attached to a handle *m* and is guided towards the centre of the mould solely by the hand of the operator, by

pulling the handle *m* horizontally forwards. There is no mechanism other than the human hand, which either performs or aids in performing this operation.

Let us now turn again to the Reissue specification, from which I quote as follows: (Record p. 150)

"Long prior to Nimmo's invention, the mode of manu-
"facturing certain articles of pottery by means of a rib or
"former to give the desired shape to the inside of the article,
"and a revolving plaster vessel to properly present the ball
"(as the lump of tempered clay is called) to, and support it
"under the action of the rib, was well known."

This statement immediately follows the opening paragraph of the specification, and is the *first method* of manufacturing articles of pottery, referred to in the specification.

We have here a distinct admission that two of the three elements of the Nimmo invention are old, viz: the rib or former, and the revolving mould.

Did this old method of making pottery contain also the *third* element? that is, was the apparatus so constructed and arranged that the rib could be guided to the centre of the mould so as not to mar the crucible when the rib was removed? It could hardly be otherwise, because in the use of a revolving mould and a rib, it is necessary first to insert the rib into the mould, and then to press the rib outwards towards the *circumference* of the mould, in order to form the crucible, or other article to be made; and we can hardly imagine a construction of rib and mould, which would admit of an outward motion of the rib, from the centre of the mould and not also permit of the rib being drawn back again towards the centre of the mould when the crucible is finished and the rib has to be withdrawn.

The specification answers this question very satisfactorily, and clearly shows that this old apparatus of revolving mould and rib, did contain the very same devices for guiding the rib to the centre of the mould, as are described in the Nimmo reissue.

But first let us enquire what constitutes the mechanism for guiding the rib, which forms the third element of the claim.

G. Nimmo.

Molding Crucibles.

No. 49,140. Patented Aug. 1, 1865.

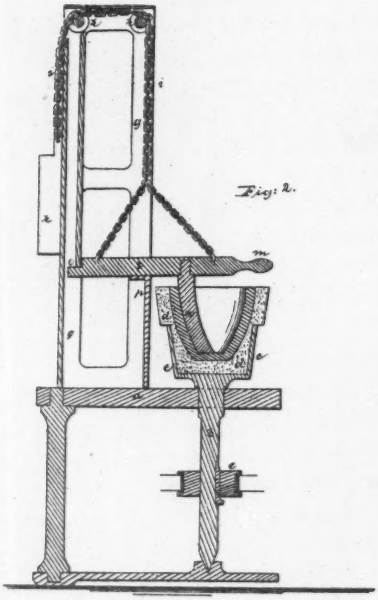
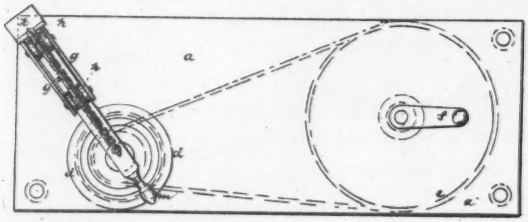


Fig: 2.

Fig: I



Witnesses:
Jas. E. Sewell Jun.
Chas. N. Lindsey

Inventor:
George Nimmo

I will refer to the specification and see what light it gives us on this point. In describing the apparatus represented in the drawing, reference is made to the following parts: the bed *a*, carrying the vertical spindle *b*, the revolving chuck *c*, the plaster mould *d*, the wheel *e*, and crank, the upright frame *g*, rollers *h h*, *chain i*, *weight k*, *the lever l*, with its handle *m*, carrying the rib *n*. "*This lever is guided by the uprights g g*, "*and cross piece q*, and when not in use is drawn up by *the* "*weight k*. The rib can always be brought into precisely the "same relation to the axis of revolution of mould *d*, conse- "quently crucibles can be thus manufactured with great uni- "formity." "The stop *p*, arrests the motion of the lever "when fulcrumed at *o*, as soon as the working face of the rib "is brought into the desired relation with the axis of revolu- "tion of the mould—that is as soon as the crucible is shaped. "IN ALL THESE RESPECTS THIS APPARATUS DOES NOT DIF- "FER FROM THAT FIRST ABOVE MENTIONED." (Record p. 151.)

"The rib must be withdrawn and to prevent its marring "the interior of the crucible it must be so guided that it will "travel in a path materially different from that of the rib in "the apparatus first above described, and substantially the "same as that of the rib in Salvetat's apparatus; *for this pur- "pose*," [*i. e.* for guiding the rib to the centre of the mould,] "the lever is hung by the chain *i* between the two uprights "*g g*, so that when it is drawn outward until its end clears the "cross piece *q* it may be readily lifted bodily and guided by "the cross piece *q* and uprights *g g*, in such a way that the "rib will not strike against the interior of the crucible." p. 151.

It appears then that the mechanism for guiding the rib to the centre of the mould, (the third element of the combination) consists of the lever *l*, hung by the chain *i*, between two uprights *g g* and the cross piece *q*. *But each and all of these parts so arranged are before described and stated to be in all respects like the apparatus first mentioned in the specification.* And this apparatus first mentioned contains also the revolving mould and the rib. It follows therefore that the apparatus first referred to in the specification as being in use "long prior to Nimmo's invention," embraced all the elements of the Nimmo reissue claim, not only, but that the Nimmo apparatus

"in all these respects does not differ from that first above mentioned."

This statement of the specification is undoubtedly correct, and is a distinct and full admission that the combination of "the rib, the revolving mould, and mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn" was contained in apparatus known and used long prior to Nimmo's invention.

We thus anticipate all that the Nimmo reissue claims, by the admissions of the specification itself.

This method of guiding the rib to the centre of the pot or vessel is also stated to be found in the apparatus described in the Salvetat publication, as appears from the following quotation from the Nimmo reissue.

"This last named mode of manufacture [Salvetat's] was "applicable to the manufacture of crucibles, the apparatus be-"ing such that *the rib was guided so as to cause it to approach* "*the axis of the pot, where it was necessary that it should do so* "*in order to prevent injury to the pot.*" (Record p.150)

NIMMO REISSUE NOT FOR THE SAME INVENTION AS THE ORIGINAL PATENT.

From what has already been quoted from the Nimmo Patent it is clear that the gist of the supposed invention as claimed in the reissue lies in the means employed for withdrawing the rib from the mould so as not to mar or injure the vessel formed therein.

Judge McKennan in his opinion says that, "the distinguishing function of Nimmo's machine" is "the guidance of the rib toward the axis of revolution of the mould so that it could be withdrawn therefrom without touching the sides of the mould." (Record p.436)

Let us now refer to the original patent and see whether this feature is to be found, either described or substantially indicated therein.

The specification of the original patent commences with a statement of the difficulty of removing crucibles from the mould in which they are formed, and then proceeds as fol-

lows: "The nature of my said invention consists in the "manufacture of crucibles in a *plaster mould*, which gives "shape to the pot externally and absorbs the moisture from "the pot causing it to dry uniformly, and at the same time "shrink away from the mould." (Record p. 279.)

In the specification there is no reference whatsoever to any necessity for guiding the rib, nor is it even stated that the rib is to be drawn toward the centre of the mould before being removed therefrom. It simply states that "the lever *l* having a handle *m* at one end and carrying the rib *n*, is guided by the upright frame *g*, and when not in use is drawn up by the weight *k*." The operation of the rib is stated thus, "The crucible material is placed in the plaster mould *d* and partially spread by a conical muller, the back end of the lever is then brought beneath the stop or fulcrum *o* and pressed down until the lever takes a stop *p*." (Record p. 279.)

The function of guiding the rib towards the centre of the mould, is not only not referred to, but would be utterly useless in the apparatus described in the specification and drawing of the original patent. The mould there represented is a mould with flaring sides, being of largest diameter at top, so that as soon as the crucible is formed, the rib may be lifted straight up without any danger of injury to the vessel formed in the mould.

It is only in *bilged* crucibles (that is crucibles of smaller diameter at top than in the middle), that there is any necessity for special care in removing the rib. Bilged crucibles are not referred to in the original patent, nor is a bilged mould represented in the drawing of either the original or reissued patents.

It is very evident, from the fact that the mould shown in the Nimmo patent is widest at the top, that Nimmo had no idea whatever, of the alleged invention on which so much stress is laid in the reissue. If his invention had consisted in the use, in connection with a rib and mould, of devices for guiding the rib to the axis of the mould, so as not to injure the crucible in lifting out the rib, he certainly would have shown in his drawing, and described in his specification a bilged crucible mould, which would present the difficulty (of

removing the rib) which the invention claimed in the reissue is designed to overcome.

So far was Nimmo from inventing a mode of obviating the danger of injuring a *bilged* crucible in removing the rib, that he did not even propose to use such a mould; it is obvious that if the rib be raised straight out of his flaring-mouth mould, without first bringing it towards the centre, there would be no difficulty in removing it, nor any danger of marring the crucible.

With the apparatus described in the Nimmo original patent, and represented in the drawing, it would be impossible to construct a bilged crucible, and there is no suggestion in the specification of the use of any other kind of mould, than one with a flaring-mouth. It is, therefore, obviously absurd to base a claim in the Reissue on a device to perform a function which the machine as described in the original patent, is incapable of performing.

Mr. McIntire, appellees' expert, in his testimony (Answer 7) in referring to this point, says: "Not only is the mode of operation thus pointed out in the reissue inconsistent with the description of the machine given in the original patent, but said machine is *incapable* of any such mode of operation." Record p. 200

In order to lay the foundation of the claim to "mechanism by which the rib is guided towards the axis of revolution of the mould, as it is withdrawn," in the Reissue, the statement is made, that after the crucible is formed, "the rib must then "be withdrawn, and to prevent its marring the interior of the "crucible, it *must* be guided so that it will travel in a path "materially different from that of the rib in the apparatus "first above described, and substantially the same as that of "the rib in Salvetat's apparatus." Record p. 151.

This statement is untrue in fact so far as the apparatus described in the original Nimmo patent, or even in the drawing of the reissue, is concerned, because the necessity of guiding the rib in the way described in Salvetat's apparatus (that is guiding it towards the centre of the mould) does not occur unless the mould is bilged, or smaller at top than in the middle, which it is not in the Nimmo patent. It is submitted,

therefore, that there is no foundation whatever, in the Nimmo original patent for the claim made in the reissue.

Before leaving this branch of the subject, I desire again to call the attention of the Court to the fact that the model of appellants' machine, put in evidence by them, is not a correct representation of the machine described in the Nimmo reissue, because the model has a bilged crucible mould, while the Reissue patent represents only a flaring mouth mould, as shown in the drawing.

As to this model, Henry D. Atwood, one of appellants' witnesses, testifies as follows: Record p. 21.

Cross-Int. 14. "Please point out any differences you may see between the model "Exhibit Nimmo machine" and the drawing of the Reissued patent?"

Ans. "I see two differences; one is, that the stop extends across from guide to guide, and it is not so shown in the drawing. The other is that *the inverted form of the crucible is not* shown in the drawing."

Cross-Int. 15. "Explain what you mean by the inverted form of the crucible."

Ans. "The mouth or top of the crucible shown in the drawing seems to be as large or larger diameter than any other part."

It further appears by the testimony of this witness, that the use of a "partible mould," that is, a mould made of more than one piece, was no part of the Nimmo invention.

Cross-Int. 19. "How do you know that the original Nimmo model and invention contained a partible mould?"

Ans. "*I don't think it did.*"

Cross-Int. 20. "When was the two-part mould introduced to the Nimmo machine, to your knowledge?"

Ans. "In 1865 or 1866."

As it is obviously impossible to manufacture *bilged* crucibles in a mould that is not "partible," because they could not otherwise be gotten out of the mould; and as the partible mould formed no part of the original Nimmo invention, it is clear that the invention claimed in the Reissue, which relates entirely to the removal of the rib from a bilged mould, formed no part of the invention described in Nimmo's original patent; and that the Reissue is void.

THE NIMMO REISSUE IS NOT FOR A PATENTABLE INVENTION IN VIEW OF THE STATE OF THE ART AS STATED IN THE SPECIFICATION.

As we have already seen the Nimmo Reissue specification states that the use of a revolving mould and a rib for forming articles of pottery was known long prior to Nimmo's invention. "It is then stated that in Salvetat's work (published in 1857,) the rib was guided so as to cause it to approach the axis of the pot where it was necessary to do so in order to prevent injury to the pot." Record p. 150.

It is alleged however that Salvetat used the rib *without a mould.* This I shall hereafter show to be an error; but, supposing it to be true, I contend that there was no invention in combining with the old revolving mould and rib, the guiding of the rib to the centre of revolution of the pot, as described by Salvetat.

Bearing in mind that the *claim* in the Nimmo reissue is confined to the rib, the revolving mould, and mechanism for guiding the rib towards the axis of revolution of the mould; the following statement from the specification is significant of the difficulty which the patentees had in defining their invention.

The specification states that "the invention of Nimmo is in "fact an improvement on the mode of manufacture as well as "on the apparatus described in Salvetat's work, *the improve-"ment consisting in the different mode of presenting and sup-"porting the ball; but we do not wish to be understood as "claiming this mode of presenting and supporting the ball as "the invention of said Nimmo.*" * * "As a short, general "description of Nimmo's improved mode it may be said to be "substantially the same as that described by Salvetat, so far "as shaping the inside of the crucible is concerned, and sub-"stantially the same as the mode first above referred to so far "as presenting the ball to and supporting it under the action "of the rib is concerned." Record p. 150.

The expression, "presenting and supporting the ball" means the use of a revolving mould in which to shape

the crucible, and the statement just quoted from the specification means simply this, that Nimmo's invention consists in the use of the old revolving mould and rib, with the addition of Salvetat's mode of operating the rib so that it may be retracted to the centre of the mould before being withdrawn.

It is submitted that there is no patentable invention involved in so connecting the rib to the machine that it can be guided to the centre of the mould before being withdrawn therefrom; and this is all that is claimed for Nimmo's invention.

It is a well settled principle of patent law, that where several different forms of a tool or mechanical device are known, and a combination of one of said forms with other mechanism is known, there is no invention in withdrawing from the combination that one form and substituting another known form of the same tool in place of it.

In *Stimpson vs. Woodman*, 10 Wall, 117, this Court held that where *smooth* rollers compressed by a spring, for finishing leather were old; and a single hand-roller having a *grained surface* for finishing leather was old, there was no invention in substituting the old grained rollers, in place of the smooth rollers, in combination with the springs.

So also in *Washing Machine Co., vs. Tool Co.*, 20 Wall, 342, the old style of wringer, which operated by twisting the clothes to express the water, having been made with a clamp to fasten it to the wash tub, this Court held that there was no patentable invention in combining with a wringer having rubber rolls, the old clamp for attaching it to the tub.

In *Robertson vs. Hill*, 6 Fish 465, a hand stamp having revolving lettered discs, being old; and inking ribbons having been previously used with *other forms* of stamps, it was held that there was no patentable invention in combining an inking ribbon with a stamp having revolving lettered discs.

Applying the same principle to this case we say that the revolving mould and rib being old, and it being also old to construct the rib so as to guide it towards the centre of the pot, there is no patentable invention in combining with a revolving mould and rib, the feature of guiding the rib to the axis of rotation of the mould.

If Nimmo had invented any new mechanism or device for so guiding the rib and had limited his claim to the use of his specific devices, the claim might be sustained; but he does not do this, but seeks to claim *any mechanism* whatever by which the rib is so guided. Such a broad construction is necessary for the appellants' case, inasmuch as the devices used by appellees for guiding the rib are entirely dissimilar from those shown in the Nimmo patent.

The learned counsel for appellants in his argument before the Patent Office when applying for this patent, (which argument is in evidence in this case) says:

"It is obvious that the claim which the examiner is willing to allow, namely, the monopoly of the use of the rib and mould in connection *only with a special form* of mechanism for so guiding the rib, is utterly inadequate to reward the inventor; for any ordinary mechanic can devise different mechanism for this purpose, or *can use that shown in Salvetat's apparatus.*" Record p. 381-2.

Such a claim, involving the use of a revolving mould, or rib, and *any* mechanism for guiding the rib to the centre of the mould, all the elements of the claim being confessedly old, is certainly too broad to be sustained.

CLAIM OF NIMMO REISSUE INVALID BECAUSE THERE IS NO CO-OPERATIVE COMBINATION.

The appellants earnestly contend that the Salvetat apparatus is no anticipation of their patent, because, although it shows a revolving wheel on which the pottery is formed, and a rib for forming it, and the rib is furnished with suitable mechanism by which it is guided to the centre of the pot when it is withdrawn, yet that there is no mould used in connection with the rib.

This leads us to the inquiry, what connection is there between the *mould* and the devices for guiding the rib to the centre of rotation of the pot?

Obviously there is none at all. If a crucible, or other article of pottery be made on a revolving wheel by means of a rib, and without a mould (the potter's hand being employed

instead of the mould,) and if the vessel so formed is bilged, it is just as necessary to guide the rib to the centre of the crucible before it is withdrawn, as if a mould had been used. It is the *crucible* that is in danger of being marred by the removal of the rib, and not the *mould.*

As bringing the rib to the centre of the revolution is only necessary in *bilged* crucibles, and *because* the crucible is bilged (to prevent marring it after it is made), it matters not how the crucible was shaped, nor whether any mould was used at all.

The function to be performed by the devices for guiding the rib to the axis of rotation is equally performed, whether there is a mould used, or whether it is dispensed with.

However necessary a mould may be to the making of a well shaped crucible, it performs no function which in any way derives aid from, or gives any aid to the mechanism for withdrawing the rib out of the crucible after it is made. It is the bilged *crucible* and not the bilged *mould* which interferes with the removal of the rib; or rather it is the crucible that you want to avoid marring by removal of the rib, whether a mould is used or not.

The mould is employed in combination with the rib for *forming* the crucible, and the device for guiding the rib does not come into play until the crucible is finished, and the mould has ceased to perform its function.

There is, therefore, no functional relation between the revolving mould, and the mechanism for removing the rib out of the crucible.

No new result is effected by the combination claimed, which is in any way due to the mould, or to the combination of the mould, the rib and the mechanism for guiding the rib to the centre of rotation in order to remove it.

The test of patentability is "that the combination must "produce a different force or effect or result in the combined "forces or processes from that given by their separate forces. "There must be a *new* result produced *by their union.* If not "so, it is only an aggregation of separate elements."

Reckendorfor vs. Faber 2 Otto, 347.
See also *Hailes vs. Van Wormer,* 20 Wall 352.

It is obvious that, in view of Salvetat's publication, and the admission in the reissue, Nimmo could not have claimed a patent for "mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn," as a separate device; and this being so, can it be made patentable by claiming it in combination with the mould, when, according to appellants' theory of the Salvetat device, it is equally applicable and operative with or without the mould?

I will now proceed to examine the anticipations of the Nimmo invention, set up in the appellees' answer.

SALVETAT'S LECONS DE CERAMIQUE.

This book was published in 1857, and is admitted to be prior in date to Nimmo's invention.

The drawing on the opposite page is copied from Salvetat's book, and illustrates the chapter of that book which is entitled "Hollow ware pressing in Plaster Moulds." A translation of this extract from Salvetat is given on page 257 of the record.

J. N. McIntire, appellees' expert says, (q 13,) "I find the exposition made in the work referred to, to involve about all the devices and substantially the same combination of devices constituting the machine shown and described in the Nimmo Reissue Patent." Record p. 208.

The Nimmo reissue assumes that while Salvetat shows a rib and devices for guiding the rib towards the centre of the crucible, substantially like Nimmo's, yet that he shows no mould.

The Reissue specification says, "Nimmo's invention is an "improvement on Salvetat's, the improvement consisting in a "different mode of presenting and supporting the ball." Rec. p. 150.

This I suppose to mean that Nimmo supports the ball by a mould, and that Salvetat has no mould. "But" (the specification continues) "we do not wish to be understood as claim-"ing this mode of presenting and supporting the ball as the "invention of said Nimmo." And again, "Nimmo's inven-"tion is substantially the same as Salvetat's, so far as shaping "the inside of the crucible is concerned." Record p. 150.

Leçons de Céramique,

Vol. 2, Page 119.

Fig. 228.

Fig. 229.

Fig. 232

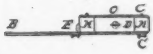


Fig. 233

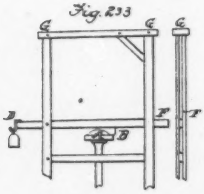


Fig. 230

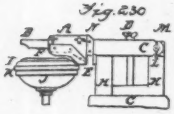


Fig. 231

Fig. 235.

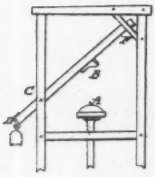


Fig. 236

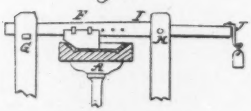


Fig. 237

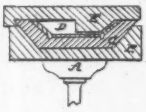


Fig. 238

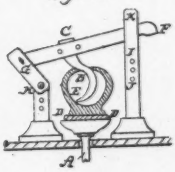


Fig. 239

Fig. 240.

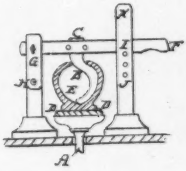


Fig. 241

The specification further states that Salvetat's apparatus was such "that the rib was guided so as to cause it to approach "the axis of the pot, where it was necessary that it should do "so to prevent injury to the pot." Record p. 150 - print p. 108.

In figures 238 and 240 are represented apparatus for making bilged vessels on a revolving potter's wheel by means of a rib. The rib is attached to a lever *F* which is connected to an arm *G* pivotted to the frame at *H*. The lever passes between two uprights, shown in figures 239 and 241, by which the lever is guided so that the rib can be brought to the centre of the mould (as in figure 238) when it is desired to remove it from the finished vessel. Thus the function performed as well as the devices employed are the same as shown in the Nimmo reissue. The only answer which appellants make to this is, that in figures 238 and 240, no mould is shown surrounding the vessel formed by the rib. Record p. 262.

Albert H. Spencer, appellants' expert, testifies as follows:

Cross-Ques. 28. "Supposing that in figures 238 and 240, "a mould were placed on the wheel and around the vessel be-"ing formed, would not those figures show a rib, a revolving "mould, and mechanism by which the rib may be guided to-"wards the axis of revolution of the mould as the rib is with-"drawn?"

Ans. "Yes." Record p. 105 - print p. 76.

It will be noticed that the question embodies the exact terms of the claim of the Nimmo Reissue.

The same witness says (*Int.* 7), that "the addition of the mould and lateral stop for the rib, transforms the incomplete apparatus of Salvetat into apparatus adapted to produce vessels of uniform compactness and thickness of wall;" and in the same answer he says, "there are then in Salvetat two *dis-*"*tinct* modes of manufacture described and shown, one hav-"ing the *mould* and *former* adapted to the production of shal-"low or wide mouthed articles only, and not requiring or ex-"hibiting the apparatus necessary to the manufacture of *bilged* "vessels; the other adapted to form the interior of a bilged "vessel by a rib, but having no outer mould." He further says, that Nimmo's invention consisted in combining these two. Record p. 88.

Rec. p. 86.

Rec. p. 88.

This expert seems to have forgotten that the Nimmo reissue drawing, and the original patent, do not show any mould adapted to the manufacture of *bilged* vessels, but only a mould adapted to the making of "shallow or wide-mouthed articles."

The Salvetat publication is so full and exact an anticipation of the Nimmo invention, that the only chance of escaping it lay in seizing upon the fact that in figures 238 and 240, the mould is not shown.

As we have seen it is admitted by appellants' expert, that the whole invention of Nimmo is shown on the one sheet of drawing in Salvetat's book, but in separate figures, and that Nimmo's invention consisted in bringing together the parts from the several figures.

So obvious is it that Salvetat designed to use a plaster mould with the apparatus shown in figures 238 and 240; that Spencer says (q37), "that deficiency [the absence of the mould] was the first thing about those figures that I noticed." Rec. p. 87.

Some of the figures show a mould, and others do not,; is not the use of a mould in those figures where it is omitted, suggested by their very juxtaposition with those figures which show the use of a mould?

The chapter in Salvetat's book which describes these drawings, is headed, "Hollow-ware, *pressing in plaster moulds.*" Rec. p. 257 That is the subject of the entire article. No one can read the printed description without understanding that in figures 238 and 240 as well as in the other figures, a mould is to be used.

Spencer says, that Salvetat used moulds only for shallow and wide mouthed articles, and not for bilged vessels. But in the printed description Salvetat speaks of using *moulds of several pieces*, which would only be necessary for bilged vessels. Record p. 259.

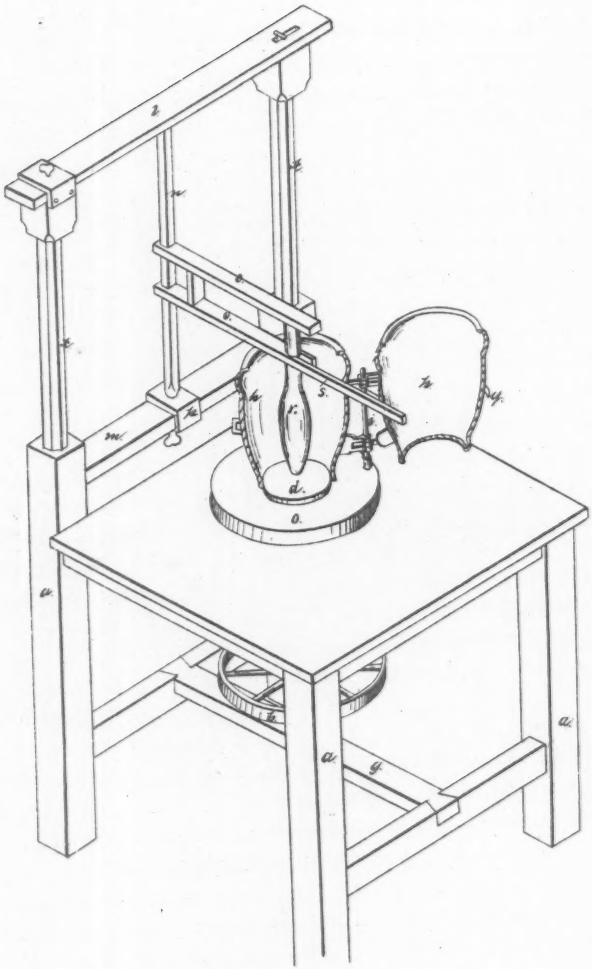
It would be absurd to use a mould for forming a wide mouthed vessel, such as shown in figure 229, and not to use it in making a bilged vessel, such as is shown in figure 238.

Appellants assume that with the apparatus shown in figures 238 and 240, the operator's hand was used instead of a mould. With the use of a rib, I believe this would be impossible, and the position of the rib and lever in figures 238 and 240 show that the operator's hand could not be used. One hand must

J & F. Wise,

Making Pottery.

No. 9,437. Patented Nov. 30, 1852.



be employed to operate the rib by means of the handle or lever *F*. Now, if you take hold of the lever *F* with the right hand (the handle being on the right side of the machine) it would not be possible to use the other hand to sustain the clay against the rib, because the rib touches the inside of the vessel, also on the right hand side. It is obvious, therefore, that a mould must have been employed.

Moreover, the description in Salveta t's book, says, "Some-"times the *profile* determines the interior form, when the "piece is formed in a mould, which gives the outside." p. 259.

The term "profile" is employed in this article to designate what we call the "rib" or "former."

I submit that the fact that the title of the chapter is "pressing hollow ware in plaster moulds," is conclusive proof that the devices described in that chapter were designed to be used with such moulds.

PATENT TO JACOB WISE AND FREEMAN WISE.

This patent is dated November 30, 1852, and was granted long prior to Nimmo's invention. It is a machine for the manufacture of earthen ware. The drawing on the opposite page is a copy of the drawing attached to the patent. Rec. p. 269.

The mould *h* is placed on a revolving wheel, on a shaft revolved by means of a belt. The specification says, "the mould "is constructed of *iron or other suitable material.* The interi-"or of the mould is polished and may be plain or figured, ac-"cording to the article to be manufactured, and forms a matrix "in which the pottery is shaped. The top of the mould is "furnished with a collar, which by lessening the diameter of "the mould at the top forms a resting place for the mandrel "or plunger and regulates the thickness of the earthen ware "when finished." Record p. 265.

In this machine the rib or former consists of a mandrel *made of wood or iron*, which revolves on its own axis, and is attached to a lever *o*. The lever slides on an upright post *u*, and the distance to which the mandrel is inserted in the mould is regulated by a pin, or by a collar and screw on the post.

In operating this machine, the mould is closed, and the batch of clay placed therein. The mandrel is then inserted perpendicularly into the clay in the mould and the lever is moved by hand and pressed outwards from the centre towards the circumference of the mould. By this means "the "clay is raised in the mould until it completely fills it, leav-"ing the sides of the vessel of uniform thickness. The plun-"ger is pushed out towards the circumference of the mould "till it rests against the collar at the top, which serves as a "gauge for the thickness of the earthen ware and prevents its "being made too thin. *The mandrel is now brought back to "the centre and raised out of the mould, and the mould thrown "open."* Record p. 267.

This patent contains all the elements of the claim of the Nimmo reissue, and is a complete anticipation. We find the revolving mould, a former for pressing the plastic material against the interior of the mould and giving shape to the vessel, and mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn.

It is true that there are minor differences of construction; that the devices for guiding the rib or former to the axis of rotation are different, and that as an organized machine the Wise machine is greatly superior to the Nimmo machine. But the fact of the inferiority of the Nimmo device does not prevent its being anticipated by the Wise patent; for as we have already seen, the appellants do not restrict their claim under their Reissue to the exact devices described, but claim any mechanism for guiding the rib towards the axis of revolution, when used with a rib and revolving mould.

The appellants seek to evade the force of this anticipation by pointing out differences of construction, which are outside of the claim of the Nimmo Reissue, and by alleging the impracticability and inoperativeness of the Wise machine. It is a desperate case and needs a desperate remedy.

Appellants' expert, Spencer, when called upon to compare the Nimmo Reissue and the Wise Patent, premises by giving us his interpretation of the Nimmo patent. He says, (*Int.* 4,) that "the Nimmo patent describes an improvement in mould-

"ing crucibles adapted to the formation of *bilged* vessels by "machinery. Record p. 73.

As we have already shown, the Nimmo Patent does not speak of making *bilged* vessels at all, and does not show any mould in which a bilged vessel could be made. Spencer then states that the essential features of the mechanism are, first, a revolving mould; second, a rib properly shaped and located, "this feature including suitable stops on the frame of the "machine regulating the position of the rib with relation to "the sides and bottom of the mould," and third, suitable mechanism for guiding the rib towards the axis of revolution of the mould as it is withdrawn. "The combination of these "parts *and the process of manufacturing crucibles therewith* "compose Nimmo's invention. Spencer's testimony, *Int.* 4. p. 73.

Now there is nothing whatever, either in the claim or in the specification, to warrant the making of *stops* on the machine a part of the rib, with which they are entirely disconnected; nor in making the *process* of manufacturing crucibles a part of Nimmo's patented invention.

In drawing the distinction between these two patents, Spencer says that the Wise patent is for making earthen ware, and Nimmo's for making plumbago crucibles. Surely the nature of the plastic material used can make no difference in the machines, especially as the claim of Nimmo's Reissue covers the apparatus consisting of certain elements without any reference to the material to be formed thereby.

The next difference pointed out by Spencer is that "Wise "describes a machine *destitute of the rib* and destitute of proper "stops for the rib if one had been provided." Rec. p. 73 - print p. 52.

It is true that the Wises use a rotary frame or mandrel, while Nimmo uses a stationary rib; but the function performed by these devices is precisely the same, and they are used in the same way. Besides the stationary rib was a known equivalent of the rotary mandrel, it being described and shown in Salvetat's book.

In the Nimmo Reissue there is no description of the rib. It is not stated how it is to be made nor of what material. It is assumed to be a well known device, and there is nothing in

the specification or claim limiting it to any special form or construction.

Spencer then proceeds to assert that "this machine could "never make a bilged crucible by any possibility. The prin-"ciple of the rotary former or plunger driven by contact with "the revolving clay is radically wrong. The inevitable re-"sult of an attempt to shape the plastic interior of the plum-"bago crucible by this rolling process, is to pull and tear "away parts of the interior surface instead of compressing and "finishing it: hence the revolving plunger of the Wise ma-"chine is not the rib of the Nimmo machine, nor the equiva-"lent of it." *Int.* 4. Record page 73- print p. 52.

This statement indicates the ground taken by appellants in answer to the Wise Patent, and to the Smith Patent, hereafter to be referred to. It is based on experiments made on a crude and imperfect machine constructed by appellants; the best answer to which is that the Smith machine, which also has a revolving former, has been, and is successfully operated by the appellees, as we shall presently see when we come to consider that patent.

This expert further states that there are no stops which are the same as, or the equivalent of, those in the Nimmo patent.

As to this last statement it is only necessary to say, that the Wise patent has stops for the exact purposes for which the stops are used in the Nimmo patent. These stops are designed to regulate the distance to which the plunger shall enter the mould, and the thickness of the vessel when finished. As to the first of these stops, the Wise patent, says: "It [the plunger] is prevented from sliding too far down, by a pin in the post *u*, or by a collar and screw." Rec. p. 266 As to the other stop the specification, says: "The top of the mould is furnished with a collar, which, by lessening the diameter of the mould at the top forms a resting place for the mandrel or plunger, and regulates the thickness of the earthen ware when finished." Record p. 265.

But as these stops form no part of the three elements of the combination claimed by the Nimmo reissue, it is unnecessary to dwell longer on this point.

As the question of the alleged inoperativeness of the revolving former will recur when we come to speak of the Smith Patent we will pass it for the present, and allude briefly to the experiments made by appellants, on which they base the allegation that a crucible could never be made on the Wise machine.

It is hardly necessary to say that in order to the successful working of any machinery it ought to be properly constructed, and operated by experienced workmen. Neither of these conditions was observed in the experiments made by appellants with the Smith machine.

Spencer tells us that "the lateral pressure of the "former" on the material, created such friction of the former in its bearings, that although constantly lubricated and drenched in oil, it smoked and was actually burnt with the heat produced thereby;" and, notwithstanding this, the "former" stopped its rotation three or four times, owing to its being pressed so forcibly against the plastic material." Record p.96.

(A. H. Spencer's testimony answer to question 10.)

William T. Macfarlane, another of appellants' witnesses, says in answer to question 2: "When the "former" had been pressed down into the crucible towards its side, it bound, and when it revolved at all by contact with the clay, it *wabbled very much*, and worked itself loose, and finally broke the lever in which it was held, and also the pin by which it was held in position." Record p.145. print p.106.

It is obvious from these statements, that the machine was improperly constructed and very roughly handled.

By looking at the drawing of the Wise patent and reading the description, it will be seen that the mandrel or former is designed to revolve on its axis by contact with the clay in the mould. It is very obvious that it would do so, as the mould containing the clay revolved on its axis, if the machine were properly constructed. But how was it made?

It appears from the testimony, that the lever in which the former worked was made of wood, and that the former worked in a hole bored in the wood.

(Testimony of George Brammer, + *Int.* 12. Rec. p.130.)

That there was no metallic or other lining in the hole in which the journal of the revolving former worked.

(Testimony of W. T. Macfarlane, + *Int.* 15. Rec. p. 147.)

Macfarlane, when asked if it is usual in machinery in the which a revolving part is supported at one end only, to make journal of a piece of wood with a hole bored through it, admits that he "should think something more would be required for a bearing." + *Int.* 16. Record p. 147.

He also says, that the former wabbled very much, and worked itself loose. (Answer to *Int.* 2.) Record p. 145.

Hiram Wallace, another of appellants' witnesses, testifies as follows, in regard to the breaking of the lever of the so-called Wise machine. Record p. 141.

Cross-Int. 23. "In what part did the lever break?"

Ans. "Broke where the former was fastened to, in the journal of it."

Cross-Int. 24. "Was there any iron or metallic bushing or journal box for the neck of the revolver to work in?"

Ans. "I don't think there was."

Cross-Int. 25. "If that lever had been made of wrought iron it would have been much less liable to break, would it not?"

Ans. "I think so."

Cross-Int. 26. "Do you consider that lever as it was before it broke, to have been a good mechanical job?"

Ans. "*Not for that purpose.*"

Another cause of the failure of this experiment was that the lever which supported the revolving former was made of wood instead of iron.

William Driscoll, the man who made it testifies: Rec. p. 134-5.

Cross-Int. 20. "Would not iron have been a more suitable material in making the lever than wood?"

Ans. "It would."

Cross-Int. 21. "Then why did you not make it of iron?"

Ans. "Simply because I got my instructions to make it of wood."

Cross-Int. 22. "From whom did you get these instructions?"

Ans. "From Mr. H. D. Atwood."

There is nothing in the Wise patent which warrants the making of the lever or other parts of the machine of wood, excepting the round block which forms part of the mould, and the mandrel, which is to be made either of wood or iron. Such machines are usually made of metal, and the very fact that the lever broke in use, is an evidence that it was improperly constructed. But the most absurd thing was the insertion of the neck of the revolving former into a hole bored in the wooden lever without any journal box. No amount of lubrication would suffice to make such a device operate successfully. And not only this, but the lever was not bound with iron at the point where the hole was bored for the insertion of the former, and it was impossible but that it should soon split.

The fact that the former wabbled very much and worked itself loose, as stated, by Macfarlane, is fully sufficient to account for the tearing of the crucible inside the mould.

It is also apparent that in trying the experiment with the apparatus constructed by appellants, to represent the Wise machine, undue force was applied to the lever: as Joseph Ryder, one of the appellants' witnesses states that one man had not strength enough to hold the lever in position.

(Ryder's Testimony *Cross-Int.* 14.) Record p. 143.

None of the men who experimented with this apparatus had any previous experience with the use of iron moulds or revolving formers in the manufacture of crucibles.

Henry D. Atwood says, *Cross-Int.* 28, 29, that he had no previous experience with revolving formers, or with any other than plaster moulds. Record p. 113

So says James F. Paine, *Cross-Int.* 21. Record p. 124.
And George Brammer, *Cross-Int.* 17. " p. 130.
And William Driscoll, *Cross-Int.* 34. " p. 136.
And Charles E. Gregory, *Cross-Int.* 9 & 10. " p. 138.
And Hiram Wallace, *Cross-Int.* 9 and 11. " p. 140.

Another cause to which these witnesses attribute the failure of these experiments with the Wise apparatus, is the use of iron moulds. But it is not a necessary part of the Wise

patent that the mould should be of iron, as the specification states that the mould is to be made of iron or other suitable materials.

Such testimony as this, is surely insufficient to overcome the obvious anticipation of Nimmo's invention by the Wise patent. When a patent is set up as anticipating an invention, it is no answer to it to construct a rough machine, in the most unworkmanlike manner, and put it into the hands of workmen unskilled in its use, and then prove that it would not do its work. The machine, as constructed by appellants, was made and operated by those who were directly interested in proving it to be a failure. Under such circumstances, success would have been little less than a miracle.

Appellants' counsel alleges, that the Wise and Smith patents are mere *paper* patents, and that therefore, they do not anticipate the invention of Nimmo. He insists that inasmuch as these machines are not proved to have ever been in operation, they are insufficient proof of prior invention. But it must be remembered that these patents are not set up in proof of *prior use* of Nimmo's invention, but they are offered to prove "that it had been *patented* prior to the supposed invention or discovery thereof" by Nimmo.

See Revised Statutes, §4,920, pl. 3.

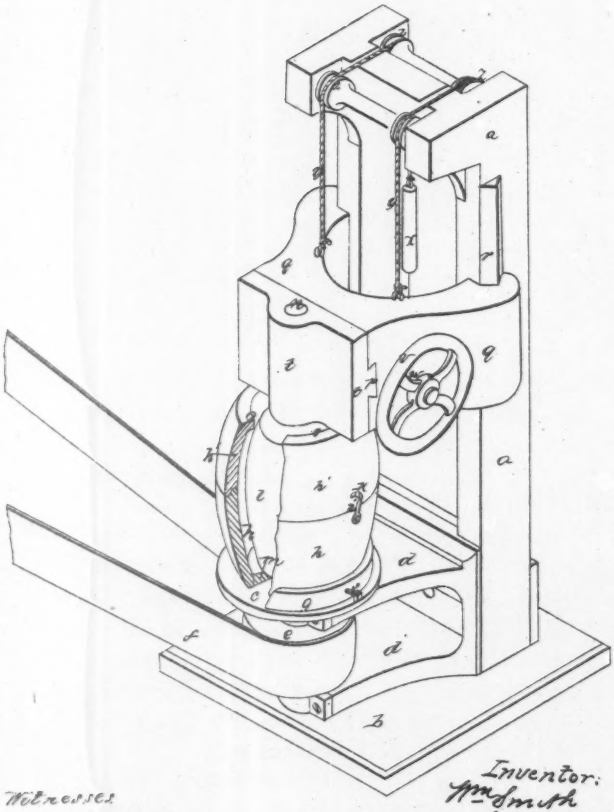
Under this defence it is sufficient to offer the prior patent, which, if it describes the same invention as claimed in the subsequent patent, renders the latter void for want of novelty.

The question which is raised by this defence, is not whether the Wise patent shows a sufficiently secure mode of attaching the mould to the revolving wheel; nor whether there are the same "stops" in the Wise machine as are described in the Nimmo patent, for regulating the thickness of the vessel to be made. These are points on which appellants' counsel relies to prove that there is a difference between the Wise and Nimmo patents. But these points are, both of them, outside of the invention claimed by Nimmo. It is not necessary that the Wise patent should describe all the parts of the machine, all that is required, is, that it should describe those parts which are claimed as new.

W. Smith,

Making Plumbago Crucibles

No. 40,506. Patented Nov. 3, 1863.



Witnesses
S. H. Gage
A Buckmaster

Inventor:
Wm Smith
by his Attorney
H. Bakewell

PATENT TO W. SMITH.

This patent is dated November 3rd, 1863, and was granted to William Smith, for the manufacture of plumbago crucibles. The drawing on the opposite page is a copy of the drawing attached to the patent. Record pp. 271-276.

It is a machine especially adapted to the manufacture of *bilged* crucibles, having a partible mould being made in two sections. The mould is divided horizontally in the middle. It is placed on a revolving wheel to which it is attached by set screws, motion being communicated to the wheel by a belt. It has a 'former,' which, like that in the Wise machine, revolves on a spindle by frictional contact with the material placed in the mould to make the crucible. The former is made of wood, and its length is equal to the inside height of the crucible. "The spindle *n*" (I quote from the specification) "to which the former *l* is attached, and on which it revolves, is rigidly attached to the face plate of the sliding bracket *q*, which projects horizontally from the upright frame *a* of the machine, and slides up and down on V slides *r r* on the sides of the frame." Record pp. 272-3.

The operation of the machine is as follows: The batch of plumbago being inserted into the mould and the mould revolved, the former (the frame of which is counterpoised by weights) is lowered into the mould. The hand wheel *t* is then gradually turned, forcing the revolving former towards the circumference of the mould, "thereby pressing the batch sidewise reducing its thickness and forcing it to rise uniformly all around the mould, until it overflows at the top, if there be an excess of batch in the mould. This side motion of the former is continued until the surface of the former touches the top of the mould, which projects inwards towards the centre, as seen at *o*, in the drawing, the projection *o* extending beyond the inner surface of the mould, a distance equal to the thickness of the crucible at top." * * Record p. 274.

The specification thus describes the manner in which the former is removed from the mould.

"When the crucible is formed, the former *l*, *is drawn back to the centre of the mould and elevated out of it by throwing up the bracket q.*" Record p. 274. print p. 196.

This machine, it will be observed has all the elements of the claim of the Nimmo Reissue, viz:

1. A rib [or former].
2. A revolving mould.
3. And mechanism by which the rib [or former] is guided towards the axis of revolution of the mould as it is withdrawn.

It will be noticed that in this machine the mechanism for guiding the former towards the axis of the mould, is a slide rest, operated by a hand wheel. This is a vast improvement on the guiding mechanism in the Nimmo patent, in which the guiding is really effected by the hand of the operator, the rib and its lever being loose and detached from the machine, while in the Smith machine, the former is fixedly attached to the slide rest which works in V grooves in the frame work of the machine.

The guiding mechanism is, therefore, different from, and greatly superior to, the guiding mechanism in the Nimmo patent; and if that element in the Nimmo Reissue be restricted to the specific devices therein described, the Smith patent would not anticipate the Nimmo invention. But if the Nimmo Reissue were thus restricted to the devices described, then appellees' machine would be no infringement of the Nimmo patent, because the guiding devices in the appellees' machine are almost exactly like those in the Smith patent, and differ from those in the Nimmo Reissue as widely as the Nimmo devices differ from Smith's.

The appellants seek to avoid the anticipation of their patent by the Smith patent, by alleging—

1st. That the Smith patent is a mere *paper* patent, and does not describe a machine which ever has been, or ever can be, put to any practical use.

2nd. That the revolving former is neither a substitute for, nor substantially the same as, the rib of the Nimmo machine.

3rd. That the Smith patent has neither lateral nor vertical stops.

This is substantially the same answer as they make to the Wise patent, and what I have already said in reply need not be repeated.

In order that we may understand exactly the position taken by appellants in regard to the Smith patent, and also in regard to the Wise patent, I quote from the testimony of their expert, Albert H. Spencer. Record pp. 105-6.

Cross-Int. 30. "Does the W. Smith Patent, No. 40,506, show and describe mechanism by which the former is guided towards the axis of revolution of the mould, for the purpose of withdrawing the same?"

Ans. "Yes."

Cross-Int 31. "Does not the patent No. 9,437, [the Wise Patent], also show and describe mechanism by which the former is guided towards the axis of revolution of the mould, for the purpose of withdrawing the same?"

Ans. "Yes."

Cross-Int. 32. "Do not both of these patents, No. 40,506 and 9,437, known as the Smith and Wise patents respectively, describe the use of a revolving mould?"

Ans. "Yes."

Cross-Int. 33. "And the Wise patent refers to the use of a revolving mould made of any suitable material, does it not?"

Ans. "Yes."

Cross-Int. 34. "And each of these patents (Smith and Wise) describes the use of a former within the revolving mould for shaping the vessel to be formed in the mould, does it not?"

Ans. "Each of the patents referred to, describes a revolving former, for shaping the vessels internally; but such former will not operate so as to shape the vessel internally and finish it."

Cross-Int. 35. "If the Smith Patent No. 40,506, were subsequent in date of invention and issue, to the Nimmo original patent No. 49,140, would you consider it any infringement upon Nimmo's reissue No. 6,166?"

Ans. "No; for the reason that the machine described in the Nimmo reissue is a *practical machine* for the purpose contemplated in the patent, and the machine described in the Smith patent is not, and also because the Smith machine is

not provided with *stops* upon the frame to regulate the thickness of the bottom and walls of the vessel."

The only reason, therefore, why the Smith and Nimmo machines are not the same, so far as the issue in this case is concerned, in the opinion of appellants' expert, is—

1st. Because the Smith machine is not practical.

2nd. Because it has no stops.

I will first consider the latter reason,—the alleged want of stops in the Smith machine.

It is true that the Smith machine has not precisely the same stops as the Nimmo machine has, but neither has the machine used by appellees, and which is alleged to infringe.

The reason is, that in the Smith machine the 'former' is fixedly attached to the slide rest of the machine, so that it operates as well without stops as with them; whereas, in the Nimmo machine the lever being loose and detached would not operate at all unless it had something to rest upon in the frame of the machine.

A great deal is said by this Expert Spencer, as to the stops in the Nimmo machine, which he calls 'the vertical stop, and the lateral stop.' Half of this is pure imagination, as the specification speaks only of *one* stop, and in the following words: Record p. 151.

"The stop *p* arrests the motion of the lever when fulcrumed at *o*, as soon as the working face of the rib is brought into the desired relation with the axis of revolution of the mould—that is as soon as the crucible is shaped." This is all that is said in regard to the construction, operation or function of "the stops." As the Nimmo lever which carries the rib is fulcrumed at *o* and moves in the arc of a circle, the stop or rest *p* is necessary, as otherwise the operator would never know when he had brought the face of the rib into a position parallel with the inside surface of the mould, and if it was not exactly so, the crucible would be of uneven thickness. This stop *p* is not capable of any adjustment, and must always make crucibles of the same thickness.

Now in the Smith machine, as also in the machines used by appellees, the former moves horizontally and always with its

face parallel to the inside surface of the mould; and as it is worked to and from the axis of the mould by a screw, it is held firmly in place (by reason of its rigid attachment to the machine), whenever the workman ceases to turn the screw by which it is operated.

The Smith machine is so constructed that the function of the lateral and vertical stops is performed by the mould in connection with the face plate of the sliding bracket in which the 'former' revolves.

The *vertical* stop we are told is necessary to regulate the thickness of the bottom of the crucible.

Smith's specification says "the length of the 'former' being "such that when the bracket *q* is pressed down as far as it "will go, the lower extremity of the 'former' *l* will be distant "from the surface of the false bottom *m* of the mould, *the* "*thickness which is required for the bottom of the crucible.*" Rec. p. 273-4.

It is objected by appellants' witness that if the face plate were pressed down on to the top of the mould it would make the mould tremble; but it is not necessary to force and hold it down in close contact with the top of the mould: a slight contact which permits of the mould revolving easily is obviously all that is necessary.

The lateral stop, which it is alleged by appellants, is necessary to regulate the thickness of the crucible, is also furnished in Smith's machine, by the mould, the top of which "projects "inwards toward the centre, as seen at *o* in the drawing; the "projection *o* extending beyond the inner surface of the mould "a distance equal to the thickness of the crucible at top." page 274.

Appellants' expert Spencer, says, that the vertical and lateral stops on the frame are an *essential feature* of the Nimmo invention, (Record p. 91 ans. to *Int.* 9).

As the Nimmo Reissue claim is for a construction of only *three* elements, viz: rib, revolving mould, and mechanism for guiding the rib to the centre of the mould, and if the *stops* are an *essential element* of the invention they certainly ought to be included in the claim.

This point evidentally troubles Mr. Expert Spencer: he deems it necessary to find the stops somewhere in the claim, and so at one time he makes them a part of the *rib*.

In answer to question 4, Record p. 73, he says, "the es-"sential features of this mechanism [Nimmo's] appear to me "to be these." *First*, a REVOLVING MOULD in which the plastic material is placed. *Second*, a RIB, properly shaped and located to give the correct internal shape, and proper internal finish to the crucible, *this feature including suitable stops* on the frame of the machine, &c., &c. *Third*, suitable mechanism for GUIDING THE RIB, &c.

But in his answer to question 9, Record p. 91, he makes the stops a part of the *third* element of the combination, he says: "These features constitute the *vital essential elements* "of the machine described in the Nimmo reissue as I under-"stand it: the *revolving mould* is essential to give the outward "form to the vessel. The stationary or non-rotating *rib* is "essential to give it the proper form inwardly, and the *guid-"ing mechanism* AND STOPS act together to bring the mould "and rib into proper relation to each other, &c."

I have already quoted all that the Reissue specification says in regard to the *stop* (not *stops*) from which it is evident that there is nothing to warrant the making of the stops an essential element of the invention. If they are so the specification should so state, and they are not in any way mentioned in the claim.

Let us suppose, however, that the terms in which the third element of the combination is described, are intended to include the stops, it only puts the appellants in a worse dilemma.

If the stops, or rather the stop *p*, (being the only stop mentioned in the specification) are a part of the "mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn," and are, as expert Spencer says, one of the 'vital essential elements of the Nimmo invention,' it follows as a necessary consequence that a machine which does not have these stops does not infringe. The appellees' machine has devices which serve as stops, but these stops do not in their machine aid in guiding the rib to the centre of the mould, and therefore do not form a part of the mechanism for guiding the rib, &c., which is the third element of the

claim of the Nimmo reissue; and as a necessary consequence the appellees do not infringe.

Appellants' theory about the 'stops' is evidently regarded as essential to avoid anticipation of the Nimmo invention by the Smith Patent.

In the printed argument of the present learned counsel for appellants, before the Patent Office, before the Smith and Wise patents and the Kier machine had been set up as anticipating the Nimmo patent, the Nimmo invention is made to rest solely on the feature of causing the rib to approach the axis of the mould as it is withdrawn. I quote the following extracts from that argument. (See Record p. 377-8)

"The facts are simple: apparatus *precisely like applicant's* "*in all respects*, except that the rib is so guided by suitable "mechanism that it does *not* approach the axis of the vessel "as it is withdrawn *is old and well known*. Such apparatus "had been constructed in many forms long prior to Nimmo's "invention; and all these forms contained a rib, not differing "in function from Nimmo's, a vessel not differing in function "from Nimmo's, and suitable mechanism for guiding the rib "as it is withdrawn; but in none of them was the rib so "guided that it would *approach* the axis of the vessel as it "was withdrawn." "The other reference" [referring to Salvetat's book] "shows an apparatus *which is precisely like* Nim-"mo's except that it has not a vessel for presenting the clay "to and supporting it under the action of the rib." * * * "If it could be shown that any apparatus existed prior to "Nimmo's, which had a *mould and rib*, and which was *capa-"ble* of use in the manufacture of vessels narrowed at the "mouth, that is to say which had, in addition to the mould "and rib, ANY mechanical means for *so guiding the rib* as it "was withdrawn, that it would approach the axis of revolu-"tion, *the present claims would be preposterous*." Record p. 380-1.

Now as appellees have produced two patents, both of prior date to Nimmo's invention, which have a revolving mould, and tool for forming the inside of the vessel inside the mould, and mechanism by which the forming tool is guided to the axis of rotation of the mould when it is withdrawn, I insist

in the words of the learned counsel for appellants, that Nimmo's claim is indeed preposterous.

The chief argument, however, of appellants in answer to the Smith patent, is that it is an inoperative machine. To prove this appellants had a machine constructed, which they proceeded to experiment with, with the result, as sworn to by many witnesses, that they could not succeed in making a good crucible in it, and that even if they could, the crucible could not be delivered from the iron mould without destroying it.

The appellants seem to have been masters of the art of 'how *not* to do a thing,' and they appear to have succeeded to their hearts' content.

Some of the appellants' witnesses attribute their failure to two causes: first, that a revolving former will not operate to form a crucible, because the plumbago batch sticks, sometimes to the mould and sometimes to the crucible; and because the crucible adheres so closely to the iron mould that it cannot be successfully removed.

But one of the appellants' experts, William T. Macfarlane, gives other reasons for the inoperativeness of the Smith machine, to which I desire specially to refer, as they indicate some of the causes of failure in their experiments on Smith's machine. These reasons (given in answer to question 6 of Macfarlane's testimony) are as follows: Record p.46.

"I think the machine shown and described in the Smith "patent is not practically operative for the following rea-"sons: *First*, the absence of *stops* other than the top and flange "of the mould, for determining the thickness of the bottom "and sides of the crucible is a great defect; for if the mould "is not held perfectly secure these portions of the mould are "worthless as stops. In the Smith machine, the mould is "held so insecurely as to be liable to be displaced and to have "a *wabbling motion, &c.*"

This 'wabbling motion of the mould, is of itself sufficient to account for all the failures of the trials made by the appellants of the Smith machine. In order to make crucibles successfully in such a machine it is absolutely necessary that the mould should be perfectly steady, so that the inside face of the

mould as it revolves, shall be at uniform distance from the surface of the revolving former. If this is not so, the former will sometimes leave the plastic material which is being moulded between the revolving former and the mould, tending to draw it away from the mould, by which means the crucibles will be ruined.

It certainly was the duty of those who experimented with this machine, to construct it in a workmanlike manner, and not to follow the drawing, in matters not claimed as new in the patent, so slavishly as to make it practically useless for want of ordinary mechanical skill in its construction.

It is noticeable, also, that this objection admits the existence of *stops* in the Smith machine, but alleges that because the mould was insecurely fixed to the wheel, the mould wabbled, and therefore failed to perform the function of stops to regulate the thickness of the clay.

The second objection is as follows: Record p. 46.

"Second, there is no proper support for the iron mould; "it is held by a flange and *two* set screws * * the screws "tend to force the mould out of the chuck, the face of the "screw not being at right angles to the side of the mould. "This support of the mould being so slight, the pressure of "the former upon the clay and the side of the mould tends "to give a wabbling motion to the mould and *practically de-* "*destroys the operation of the machine.*"

This objection refers to a minor point of construction, and it is obvious that it never could have been the intention of the patentee, Smith, to construct the bottom of his mould so that it would be liable to slip out of place, or to attach it so insecurely that the action of the revolving former would give it a '*wabbling motion.*' The proper fastening of the mould on the revolving wheel involved nothing more than mechanical skill, which it was the duty of those who experimented with the machine to exercise. If the mould was not securely held in place on the revolving wheel, as it obviously was not, the experiment was not a fair one. It is true that this witness says, that there were two differences between the Smith machine, as made by appellants, and the machine described in the Smith patent, "one was the manner in which the mould

sat in the chuck; this portion of the mould was not oval, but perpendicular, made so for the safety of the workman, the one described in the patent being unsafe to operate." The only other difference was, that the revolving former was made longer.

(Macfarlane's testimony, Question 17. Record p. 47.)

As we shall presently see, however, the machine as constructed by the appellants, was defective in construction; and especially in that the mould was not so attached to the wheel as to be steady.

The *third* objection is that the moulds have no handles, and being of iron, and smooth, are difficult to lift; and is not worthy of any notice. Record p. 46.

The *fourth* objection is that "*iron moulds are not practical*, "first on account of greater expense as many more of them "would be required than of plaster moulds. Second, on ac-"count of the difficulty of drying the crucibles, they would "dry only from the inside of the crucible, and the tendency "being to dry unevenly and to warp the crucible, no water "being absorbed by the mould, as in the case where the plaster "mould is used." Record p. 46.

This objection is made by a man used only to plaster moulds. It assumes that the crucible is to be left in the iron mould until it is dry, as in the case where plaster moulds are employed.

Smith, in his specification, says, that "when the crucible is "formed, the former *l* is drawn back to the centre of the "mould, and elevated out of it by throwing up the bracket *q*. "The hooks *i* of the mould are loosened and the upper sec-"tion lifted off, and the lower section being removed from "the wheel *c*, by loosening the set screws, the finished crucible "is raised up by means of the false bottom *m*, and is then "dried and annealed in the usual way." Record p. 274-5.

The practice is to remove the finished crucible from the iron mould immediately, as the above extract from the specification implies; whereas, with plaster moulds the crucible is left in the mould for several hours before it is removed. Consequently with the use of plaster moulds a large number are

necessary, while only *two* iron moulds are used with the Smith machine, one being used on the machine while the other is being emptied, and so on continuously. This second objection only serves to show more clearly the utter ignorance of appellants as to the proper mode of using the Smith machine.

The *fifth* objection is, that the top of the former only comes to the lower flange of the mould. Record p. 46.

The *sixth*, that the former is so large that the workman cannot get his hand inside the crucible while it is in motion.

To this we reply, that in the Smith machine it is unnecessary, as the machine does all the work and does not require any hand manipulation of the crucible.

The *seventh* objection is, that the machine is heavy and awkward and has no levers or handles to make the bracket *q* work easily on the slide *v*. Record p. 47.

Appellants object to the Wise machine, that it is too light, and to the Smith machine that it is too heavy. It is obviously possible to construct the machine of such weight as may suit the wants of the manufacturer without the exercise of much ingenuity. As to the want of handles to make the bracket work easily on the slide, they are obviously unnecessary as the bracket *q* with its attachments is counterpoised by weights, attached to ropes which pass over pulleys on top of the machine.

It is obvious from the testimony, that there were serious defects in the machine, as constructed by the appellants. Several of the witnesses speak of the trembling motion of the mould.

H. D. Atwood, *Int.* 20. Record p. 111.

And on one occasion, the chuck (*i. e.* the wheel which supported the mould) unscrewed from the spindle, caused by the pressure of the former on the batch.

James F. Paine, *Cross-Int.* 26½ and 27. Record p. 117.

Atwood speaks of the mould being *insecurely* held, and liable to shift in its position. *Int.* 20. Record p. 111.

Another of appellants' witnesses, Charles E. Gregory, in answer to *Int.* 2, Record p. 137. gives as a reason for the Smith machine not working, that "the revolving former takes up a considerable

quantity of the material of which the crucible is made, and leaves the interior surface of the crucible honeycombed. That's one reason. A further reason is, that it is not practicable to remove the crucible from within the iron mould."

George Brammer (*Int.* 28) also says, that it is impracticable to remove the crucible from the mould without injuring it. Record p. 128.

The chief reason of these failures with the Smith machine was undoubtedly the want of knowledge and experience of the workmen. They knew nothing but what they had learned at the works where they were employed. They had been accustomed only to the use of plaster moulds—had never heard of any other kind being used—although Nimmo got his original patent in 1865, and then claimed plaster moulds as new, so that prior to that date, moulds of other material must have been in general use, as otherwise Nimmo could not have supposed that he was the first to use plaster moulds.

The difficulty experienced arose solely from the clinging of the plumbago to the mould and to the revolving former. They oiled the mould, but did not oil the former, so that the plumbago adhered more to the 'former' than to the mould, and consequently caked on the 'former.'

W. T. Macfarlane, appellants' witness, in answer to *Cross-Int.* 9, 10 and 11, says as follows: Record p. 146.

Cross-Int. 9. "What was the revolving former made of in those trials of the Complainants' Smith machines?"

Ans. "It was made of hard wood."

Cross-Int. 10. "Was the former oiled?"

Ans. "The former was not oiled."

Cross-Int. 11. "Was it dusted with plumbago?"

Ans. "It was not?"

George Brammer, one of the men who experimented with the Smith machine, testifies: Record p. 127.

Int. 19. "Did you ever see the wall of the crucible leave the wall of the mould while you were shaping it on this machine?"

Ans. "I did; the suction of the 'former' is what caused it."

Int. 20. "Did you ever try the Smith machine by chalking the former?"

Ans. "I did not."

Int. 21. "Do you know what would be the effect upon the inside of the crucible?"

Ans. "*I should say the effect would be, that it would make a good smooth pot.*"

Here, then, we have the testimony of one of appellants' workmen, who experimented with the Smith machine, and from his experience he discovered what would remedy the difficulty and enable good, smooth pots to be made on the Smith machine. If the former had been chalked, so as to reduce the tendency of the plumbago to stick to the wooden former, this difficulty would be overcome.

But still the other obstacle remains, that the crucible would not deliver from the iron mould, owing to the adherence of the plumbago to the metallic surface.

This difficulty arose entirely from the ignorance of the appellants and their workmen, as to the proper kind of oil to be used with metallic mould. But even this lack of knowledge need not have prevented them from overcoming the obstacle, had they desired to do so, for a limited amount of mechanical skill would have taught them that if their iron moulds were parted vertically instead of horizontally, the difficulty of removing the mould from the crucible would have disappeared.

It is useless, however, to spend further time on these experimental failures on the part of appellants, in view of the fact that the Smith machine was erected at the works of McCullough, Dalzell & Co., the appellees, a short time before they closed their testimony in this case, and that it operated successfully. This fact is a sufficient answer to all the failures of the appellants.

I will refer briefly to the testimony, premising that it was taken before the testimony on part of appellants, in regard to their trials of the Smith and Wise machines.

J. N. McIntire, appellees' expert, in answer to Interrogatories 16 and 17, says: Record p. 211.

"I have seen in practical operation a machine for making crucibles substantially like the machine shown and described in the Smith patent, yesterday at the establishment of defendants."

He also says, that he saw the operation of the defendants' machines at their works, similar to '*Exhibit Defendants' Model.*' He is then asked: (p.211)

Int. 17. "How does the practical operation of the Smith "machine compare with the operation of defendants' machine?

Ans. "They appeared to be equally successful and practi- "cable as machines for moulding or making black lead cruci- "bles. I saw crucibles made with about equal facility, and of "about the same degree of perfection on the two machines. "About the only material difference I noticed in the produc- "tion of two crucibles of the same size and material, and "equal perfection of finish, made one on each of the two ma- "chines, was, that in the operation of the Smith machine, the "batch or ball put into the mould was all worked up into "shape *by the machine alone*, while in the case of the defend- "ants' machine, portions of the stock or material had to be "lifted and worked up to the action of the rib or former by "the right hand of the operator, which had to be inserted into "the mould during the rotation of the latter. What I mean "by the Smith machine, is one made substantially, identical "with the machine illustrated in the drawing of the Smith "patent, and described in the latter."

Three crucibles were produced by Mr. McIntire, marked X, XI and XII, two of which were made in the cast iron mould, parted horizontally, and one made in a plaster mould, such as was used by appellees on their other machines.

The 'former' used on this occasion in the Smith machine was made of metal. Mr. McIntire says, that owing to the fact that the workman was not an experienced hand, when he first started the machine he did not manage it properly, so that the stuff gathered some on the 'former', and he had to scrape it down with his hand, and move the 'former' up again towards the side of the mould, the crucible was then finished satisfactorily; and that the other two crucibles were made

without any trouble of the stuff gathering on the 'former.' *Cross-Int.* 31—33. Record p. 221.

He further says, that the workman wiped the former clean and oiled it. + *Int.* 37. Also, that he saw one of the crucibles removed from the iron mould, "there did not seem to be any troublesome tendency of the mould and the material to hang together, and I suppose that the inner surface of the metal mould had been oiled." + *Int.* 40. Record p. 223.

He further says, that he watched the operation of the machine to see whether the 'former' revolved or not, and observed that, "the former revolved most of the time, and so far as I could see always when in frictional contact with the mass of material being operated upon." x Int. 41. Rec. p. 223.

The testimony of the appellees proves most conclusively the successful operation of the Smith machine, with revolving 'former' made of *iron*, as well as with revolving 'former' made of *wood*.

This machine constructed by the appellees, and erected and put in operation at their works, was finished on September 10, 1877. (C. C. Arensberg's testimony, + *Int.* 64.} Rec. p. 237)

Mr. McIntire saw it in operation on the 12th September. The testimony of Arensberg, DuBarry, and Dalzell, in relation to the operation of this machine was taken between the 13th and 17th, of the same month. The machine as first constructed, and as testified to by these witnesses, had a revolving *iron* mould and a revolving *iron* former. As however, the complainants' counsel pointed out in the cross-examination, that the Smith patent called for a revolving 'former' made of wood; the appellees substituted a *wooden* revolving former instead of the iron one, and DuBarry and Arensberg are examined a second time on 10th October, 1877, as to the operation of the Smith machine with a wooden former. All of this testimony on part of appellees (defendants) was taken *before* the testimony on part of appellants as to their trials and failures with the Smith machine.

As the testimony of appellees, in regard to the Smith machine, abundantly proves its successful operation. I will give a brief abstract of it:

First, as to the use between 11th and 14th September, 1877, with an *iron* revolving former.

C. C. Arensberg's testimony. Record p. 228.

Witness says, that he has seen a machine substantially like the "Exhibit Smith model," in operation at the works of appellees (*Int.* 7) on Tuesday, Wednesday, Thursday and Friday of that week (11th to 15th September, 1877.) (*Int.* 9.) He saw crucibles made on it; as the workmen became used to the machine, it worked satisfactorily. (*Int.* 10.) The crucibles made on it were just as good as those made on their other machines. (*Int.* 16.) Eighteen crucibles were made on 14th September. It took DuBarry an average of one minute and a half to make each crucible. (*Int.* 21.) They used, sometimes, an iron mould, and sometimes plaster moulds, because they had only one iron monld. (*Int.* 22.) They intend using this machine in place of one of their other machines. (*Int.* 24.) It is better adapted to making large crucibles than their other machine, being stronger. (*Int.* 25.) Crucibles made on Smith machine are as well made as those made on their old machine. (*Int.* 27.) Rec. pp. 228-231.

+ *Int.* 28. "What prevented the material from sticking to and collecting on the revolving former, when you saw the machine used?" Record p. 232.

Ans. "In the first place, the stuff didn't stick to the revolving former as soon as the operator became used to the machine. In the second place, the ignorance of the workman in not knowing how to work the machine, caused it. As soon as he understood how to use the lever properly, *the material did not stick* to the revolving 'former.' By lever, I mean the wheel that works the screw shaft of the revolving former. + *Int.* 29. The 'former' revolved freely. (+ *Int.* 32.) "When you turn the wheel too fast, thereby pressing the revolving former right into the thickest of the material, it causes it to stick." + *Int.* 33. Record p. 232.

John H. Dalzell's testimony. Record p. 239.

I saw the Smith machine operated at our (appellees') works on Tuesday, Friday and Saturday of last week [11th, 14th and 15th September, 1877.] It operated very nicely for a

new machine. (*Int.* 4.) Saw one crucible made with it in an iron mould, in Mr. McIntire's presence. (*Int.* 8.) As to quality, it was entirely similar to the rest of the crucibles we manufacture. (*Int.* 11.) Saw other crucibles made in plaster moulds. (*Int.* 13.) Saw one made in one minute. (*Int.* 16.) Revolving former was used. (*Int.* 18.) Also saw Smith machine make crucibles with a stationary former—made them in 2½ to 3 minutes. (*Int.* 19—21.) Record pp. 240-241.

On our other machines, they make about 30 crucibles in an hour, I suppose. p. 242 (+ 30.) They used both plaster and iron mould on Smith machine. (+ 40.) To keep the material from sticking to and collecting on the revolving former, they kept it revolving by contact with the material. (+ 42—43.) "You couldn't put the 'former' in there without its getting dirty; when the 'former' was brought out there was not as much material adhering to it as I have seen on the stationary knife or rib in the other machines." (+ 44.) The material which adhered to the revolving former, appeared to be evenly distributed all over very thinly. (+ 46.) The operator put nothing on the revolving former or inside the mould, after the revolving former was forced down as far as it was meant to go. + 47. Record pp. 242-244.

H. E. DuBarry's testimony. Record p. 244.

Is the Superintendent of the defendants' (appellees') crucible works. The machines we have been using at the works were not as satisfactory in their operation when we first began to use them as they are now, (*Int.* 9.) We used to make 100 crucibles a day with two hands on one machine, now we make 150. (*Int.* 11.) In our machines like 'Exhibit defendants' model,' the crucible is not formed by the rib alone, the workman feeds the stuff in with the hand. (*Int.* 15.) Record pp 244-245.

Have used machine like the 'Exhibit Smith Model,' at our works several times this last week, for forming crucibles. (*Int.* 18, 19.) On first day we had difficulty with the machine. "It was, as far as I can tell you, on account of the stock being too stiff and the belt was too loose, it run too slow, and the material gathered on the 'former." (*Int.* 23.)

On Friday last, we made I think, 16 crucibles on this machine with the revolving former; (*Int.* 29.) I think by practice the Smith machine will make crucibles faster than the other machines. (*Int.* 32.) Record pp. 246-247.

We had no more difficulty in removing the crucibles from the iron mould than with the others. (*Int.* 37.) Record p. 247.

Crucibles made on the Smith machine are better than those we first made on the other machines, and equally as good as the crucibles we now make on the machine like 'Exhibit Defendants Model.' *Int.* 42. We put oil on the revolving
p. 250. 'former' sometimes and sometimes wet it. (+ 59.) We put nothing but oil in the mould to prevent the crucible from
p. 252. sticking. (+ 83–84.) + 95. "Can you give the reason why the material did not stick to and collect on the 'former' every time, as it did when making one of those three pots?"

Ans. "I can't tell any other reason only the way I moved the former ~~out~~ over." Record p. 253.

About a month afterwards DuBarry and Arensburg were examined again, as to the use of the Smith machine with a *wooden* 'former.'

H. E. DuBarry: Since testifying in this case I have made further use of the Smith machine with a *revolving wooden former.* (*Int.* 103–105.) Record p. 282.

Since last deposition have made over 600 crucibles on Smith machine, all with revolving wooden former, excepting 39 made with revolving iron former. (*Int.* 106–109.) page 282.

Eight of the crucibles made on Smith machine were tested by the Pittsburg Steel Casting Co. (*Int.* 111.) The crucibles made on the Smith machine are equally as good as crucibles made on the other machines. (*Int.* 114.) page 283.

One hundred and sixty-six crucibles have been made on the Smith machine in an ordinary days work. (*Int.* 115.) p. 283.

The skill of the workman prevents the stuff from sticking to the revolving mandrel. It stuck more or less the first or second day. We did nothing to prevent it but the care in working the machine. (+ 135–136.) The revolving former ran as fast as the stock would drive it from the time it touched the material until he drew it off the material. (+ 137.) page 285.

We only made 5 crucibles on the Smith machine with the stationary rib. (+ 150.) Record p. 287.

We have used the material a little stiffer, it seemed to work better with this revolving 'former' than the stuff we used in our other machines. (+ 155.) Record p. 287.

We found *wood* a better material for the revolving 'former' than *iron*. (*Int.* 156.) Record p. 288.

C. C. Arensberg: Since my last deposition, the Smith machine at defendants' works has been used *almost constantly with the very best results.* (*Int.* 73.) Between 630 and 640 crucibles have been made on it since my last deposition, with a revolving *wooden* 'former,' excepting 39 made with a revolving iron 'former.' (*Int.* 74.) These crucibles were just as good, and the appearance of them was better than those made on our other machines. (*Int.* 75.) In one ordinary day's labor we made 166 crucibles on Smith machine. (*Int.* 76.) Eight of the crucibles made on Smith machine with revolving 'former' were tested by the Pittsburg Steel Casting Co. (*Int.* 79.) Record pages 290-291.

As to the test of the crucibles made on the Smith machine, it was stipulated that the Superintendent of the Pittsburg Steel Casting Co., and the steel melter for said company, would testify that on 25th September, 1877, they received 8 crucibles from McCullough, Dalzell & Co., the appellees, and that they gave them a fair test; that they averaged ~~4⅛ heats~~ each, and were as good in all respects as the crucibles they had been using made by appellees, for the last 2 or 3 years. Rec. p.p. 292-3.

I have thus fully abstracted this testimony, because it is a better answer to the appellants' unsuccessful experiments than any argument I could make. This testimony was taken before hearing the testimony of appellants, and yet it is a complete answer to it. The testimony of a thousand experts that a machine will not work, will not weigh a feather against the practical proof that it does work, and work successfully too.

Appellants' counsel objected to the testimony of these witnesses who proved the successful use of the Smith machine at appellees' works, that the machine was not constructed as shown and described in the Smith patent.

When the first testimony was taken on this point, in September, 1877, the Smith machine erected by appellees had an iron former, but this was changed to a wooden former, as stated in Smith's patent, which was found to work better than the iron one.

All the points of difference, so far as I recollect, that are pointed out, between the Smith patent and the Smith machine, as constructed and operated by appellees, are, that the mould is more securely attached to the revolving wheel, and that the revolving spindle is made long enough to come to the top of the mould, whereas, the patent says, "the length of the former *l* is equal to the inside height of the crucible." These points of difference have no bearing whatever on the issue in this case. DuBarry says, he does not know why this change was made unless it was a mismeasurement. (+ *Int.* 90.) Record p. 252.

Appellants also assumes that the former in the Smith machine was of smaller diameter than is shown in the patent. All that the patent says on this point is, "its diameter is less than that of the cavity of the crucible, so that it may be drawn up out of the mould when the crucible is finished. I insist that there was no variation from the patent in this respect.

Another point of difference alleged, is that the spindle of the former in the machine made by appellees has a collar on it, over which a cap is placed, which is screwed to the 'former.' This is the ordinary way of fastening a revolving spindle to its journal box. There must be some mode of attachment, and as the patent does not define any special method, it was open to the appellees to use any known way of securing a spindle to the machine. It is not necessary in a specification to go into minute details of construction, not involved in the claim of invention, and which any skilful mechanic can supply. Parts of machinery and processes generally known need not be described.

Brooks vs. Jenkins, 3 McLean, 432.
Dorsey Co. vs. Marsh, 6 Fish, 387.
Mowry vs. Whitney, 14 Wall, 620.
Union Paper Bag Co. vs. Nixon, 6 Fish 402.

If these points of alleged difference render the Smith machine, constructed by appellees, a different machine from that shown in the Smith patent, much more is *not* the Nimmo machine as used by appellants (see complainants 'Exhibit Nimmo Machine,') the same as that described in the Nimmo Patent. The substitution of a bilged crucible mould in two pieces for a flaring mouth mould in one piece; and the addition of a guide for the lever of the rib, not shown at all in the Nimmo Reissue, and the change in the shape of the rib, are far greater departures from the Nimmo Patent, than any found in the appellees' Smith machine from the Smith Patent.

PRIOR USE OF NIMMO'S INVENTION, AT KIER'S CRUCIBLE WORKS, IN PITTSBURG.

The drawing on the opposite page represents a machine for making plumbago crucibles, invented, constructed and used by Joseph Winkle, at the crucible works of S. M. Kier, in Pittsburg, prior to the date of Nimmo's invention. This drawing was made under the direction of William L. Winkle, brother of the inventor, who says that it represents the machine shown to him by his brother, in September, 1864. He says, "I know this to be the exact thing, as near as I can remember of the machine, as I saw it at Stevenson Street, as shown to me by my brother. (*Int.* 13.) Record p.156.

This drawing is also identified by Frank Wright, (*Int.* 8), Rec. p.177. and Andrew Graham (*Int.* 4) as being a correct representation Rec. p.186. of the machine operated at Kier's works, in 1864; both these men having worked there at that time.

The correctness of the drawing receives strong confirmation from the testimony of John Stewart, one of *appellants'* witnesses, who, after attempting to describe the machine, is shown the drawing, and exclaims: (*Int.* 10.) "This is exactly what I was trying to describe; I don't know where you got it." Record pp.32-33.

The accuracy of this drawing may therefore be taken for granted, as it is proved by the witnesses on both sides; and the

naivete with which appellants' witness, John Stewart, exclaims on first seeing it: "This is exactly what I was trying to describe; I don't know where you got it." (Stewart's testimony, *Int.* 10), shows that he was fully persuaded of its correctness, and is more persuasive than any amount of description. Record p. 33.

Rec. p. 157.

This drawing is so plain that it is scarcely necessary to explain in detail. There is the revolving mould *a*, which was made of plaster of paris—a bilged mould in two pieces, parted horizontally in the middle. There is the rib *c* attached to the lever *d*, which passes through a slot in the post *n*, which serves as a guide. The lever *d*, being counterpoised by weights *h i*, is drawn down when in operation, by the treadle *f*, worked by the operator's foot. The rib-lever is jointed at *g* by a hinge with long arms, so that as the lever is raised, the hinge opens, and the rib, attached to the forward end of the lever, is guided to the axis of rotation of the mould and may be withdrawn without injury to the newly formed crucible.

W. L. Winkle says on this point: Record p. 160.

Int. 40. "In the use of the Kier machine, making as it did "a crucible which was narrower at the mouth, what prevented "the rib from striking the narrow mouth and breaking it?"

Ans. "The principle of the double-jointed lever."

Int. 41. "How did that keep the rib from striking the mouth of the crucible while being withdrawn?"

Ans. "By releasing the foot from the treadle it gave motion "to the rear joint, which spread the hinge, then *carrying the* "*rib to the centre* of the pot, by the springing of that hinge, "which front end of the lever *d* is carried out by the small "weight *i*."

J. N. McIntire, expert for appellees, in his testimony says: (*Int.* 14.) "I also find these two machines [Kier machine and Nimmo's machine] to be substantially alike in the particular, that in each the hand-lever is so made and arranged with the rest of the machine, that in the withdrawal of the forming rib from the interior of the moulded article, said handle and rib may be so manipulated by the workman, as to cause the

Arthur. Pickering et. al.

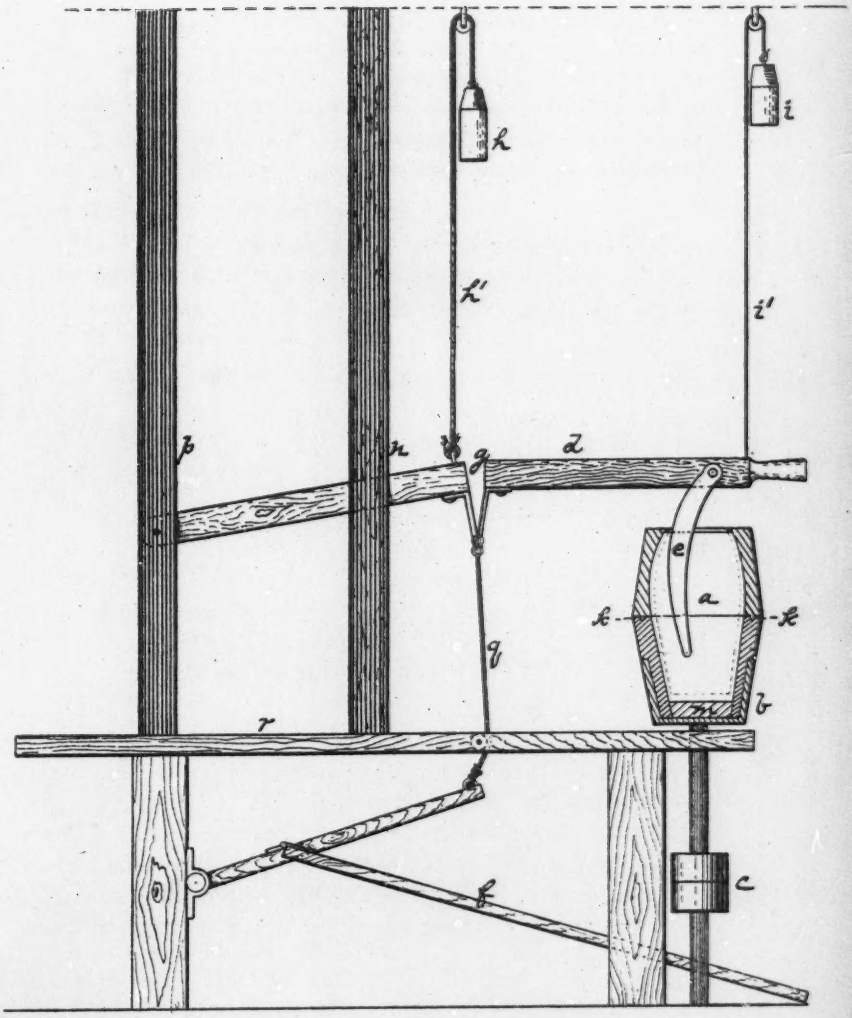
vs

McCullough - Dalzell & Co

"Defendants Exhibit Kier Machine"

James L. Kay

Examiner



rib to be moved first towards the axis of rotation of the mould, and then upward and out of the finished article." Rec. p. 210.

Here, then, we have all the elements of the Nimmo reissue claim: 'the rib, the revolving mould, and mechanism for guiding the rib towards the axis of rotation of the mould.'

Mr. McIntire, however, points out the following differences: that the Kier machine has a two-part bilged mould, and is, therefore, capable of making bilged crucibles, while the Nimmo machine has a mould in one piece, not bilged and not capable of making bilged crucibles; also, that in the Kier machine, the rib and its lever are operated partly by means of a treadle, while in the Nimmo machine, the lever is manipulated entirely by the hand of the operator. Record p 210.

Date of use of the Kier machine.

No attempt is made on part of the appellants to disprove the date assigned by appellees' witnesses, for the use of this machine at Kier's works, nor is it alleged that it was subsequent to Nimmo's invention.

William L. Winkle saw it in operation in September, 1864, fixing the date by the time he was in the army. He says:

Int, 33: "Do you know whether this machine was in steady and continuous operation from September, 1864, until June, 1865?"

Ans. "It was, with the exception of the time taken up in finishing the work." Record p. 159.

Frank Wright (*Int.* 2) says, that he worked at Kier's crucible works, on Stevenson Street, Pittsburg, in the summer and fall of 1864. He describes the machine (*Int.* 4) and then identifies it with the drawing "Exhibit Kier machine." (*Int.* 8.) And *John Stewart*, appellants' witness, says (*Int.* 28), that he thinks it must have been in 1865, when they *quit* making crucibles at Kier's works, on Stevenson Street; so that it must have been before that time. Record p. 34. (Rec. p 176) (Rec p. 177)

Extent of use of the Kier machine.

Joseph Winkle says, that he worked that machine himself at Kier's works, during the latter part of 1864. (*Int* 26.) That he run a hundred crucibles for one filling of mould. (*Int.* 27.) Rec. p. 159.

That he worked on that machine a great many times. (*Int* 31.) And that it was in *steady and continuous operation* from September, 1864, until June, 1865. (*Int.* 33.) Record p. 159.

Frank Wright, another workman at Kier's crucible works, on Stevenson Street, Pittsburg, says, (*Int.* 10.) that he used the Kier machine frequently. He is then asked: Record p. 177.

Int. 11. "Can you state how frequently the Kier machine was used in the works in 1864, and thereafter?"

Ans. "It was used every working day more or less."

Int. 12. "How many crucibles was it the custom to make on the machine on ordinary working days when it was used?"

Ans. "I used to make a hundred a day, and finish them and a hundred covers."

Int. 26. "How long did you continue to work, and see worked, the Kier machine after the year 1864?"

Ans. "I was there until December, 1867, *and saw it worked until that time.*" Record p. 178.

Andrew Graham, another workman at the same factory, after identifying the Kier machine by the drawing, says, that he saw Joseph Winkle and Frank Wright work at that machine, and that he saw kiln fulls of crucibles made on it. Int 11. p. 186.

This testimony is corroborated by that of appellants' witness *John Stewart,* he is asked: Record p. 35.

+ *Int.* 31. "Who operated the machine represented by the drawing 'Exhibit Kier Machine'?"

Ans. "Joseph Winkle was the one I saw using it, and others, but he was the principal one."

+ *Int.* 32. "How often did you see Joseph Winkle operate the machine, or at work using it?"

Ans. "I could not answer. *I have seen it so often.* I saw it every day I was there. I was back sometimes every day in the week. I might not have seen it every day I was there."

That this machine was a successfully operative one, is evident from the rapidity with which crucibles could be made on it.

Frank Wright testifies: "I have seen sixty crucibles an hour made on the machine by Joseph Winkle." (*Int.* 15 and 16.) Record p. 177.

On cross-examination he is asked:

+ *Int.* 102. "Are you positive that Joseph Winkle, with the help of one ball maker and one mould runner, made sixty No. 50 pots in an hour?"

Ans. "I am positive; I made the balls." (Record p. 185)

Appellants' counsel objected at the argument that the machine could not have been worked so rapidly, as to make sixty crucibles in an hour.

The best reply to this is the testimony of appellants' own witness, *John Stewart.* (Record p. 35.)

+ *Int.* 35. "Have you any recollection of how long it took to mould one with it?"

Ans. "Well, I couldn't exactly say, but he could make one *in half a minute*, and perhaps less. It was quick, I know."

In reply to this testimony, which, as I think, clearly establishes the character and construction of the Kier machine, its similarity to Nimmo in every point covered by his claim, its priority to Nimmo's invention, and its successful and long continued use, appellants attempt to prove that the crucibles which Joseph Winkle made on it, were not good. The reason for this is alleged to be, that the machine was ricketty and not strong enough to sufficiently compress the material.

Supposing this were so, it would avail nothing to avoid the anticipation, if the machine contained all the patented elements of the Nimmo machine, and was continuously used during two or three years in making crucibles. If all the substantial difference between Nimmo's machine and the Kier machine is, that the one is stronger than the other, this is not a difference which involves dissimilarity of invention or construction. The machines are mechanically the same, with the exception before pointed out, that the Nimmo machine has not a bilged mould, while Kier's machine has; as also have the machines used by appellees.

The first witness offered by appellants in relation to the Kier machine, is James Glover. He thinks he was in part-

nership with S. M. Kier, in the business of making crucibles; began on Second Avenue, Pittsburg, then moved to Stevenson Street. He says, that Winkle did not make a success—that he tried to make crucibles by machinery, and did not succeed. That witness lost about seventeen thousand dollars in the business, and *that he (witness) left the buiness sometime in* 1863 *or* 1864. Glover's testimony, *Int.* 2—9. (Record pp 29-30.

As the Winkle machine was put in operation in the fall of 1864, and continued in use until December, 1867, it is clear that the failure of Winkle to make crucibles by machinery, referred to by this witness, occurred prior to the getting up of the Kier machine.

This testimony, therefore, amounts to nothing, as far as this case is concerned.

The other witness is *John Stewart*, whose testimony has been before referred to, he identifies the drawing of the Kier machine, and testifies as to its frequent use and the rapidity with which it made crucibles.

He says the machine was troublesome to keep in order from being too weak, and that "the trouble was in getting the thing out that I was trying to describe after the crucible was formed." *Int.* 12 and 13. (Record p. 33)

He says, that they had to make deductions in sales of crucibles to Park Brother & Co. *Int.* 22, but he does not know whether these crucibles sold to Park Brother & Co., were made on the Kier machine, "Exhibit Kier Machine," or not. + *Int.* 42. (Record p. 36)

He says that the crucibles made on the Kier machine were smooth when finished, as smooth when they came out of the mould, when made by defendants' 'Exhibit Kier Machine,' as those moulded by hand before they began to use the machine. + *Int.* 43–45. (Record p. 36)

The testimony of this witness only goes to strengthen the proof of the identity of the Kier machine with the drawing, and of its use at Kier's works; and if, as he says, the machine worked quickly, making a crucible in half a minute, (+ *Int.* 35,) and if the crucibles made on this machine were as smooth when they came out of the mould as those made by hand, the

difficulties, he speaks of in working the machine, were certainly not very serious.

As to the loss on the crucibles sold to Park, Brother & Co. Mr. Park testifies that their firm used crucibles made by Kier and that some of them stood properly and some did not. (*Int.* 3.) And that "the failure was due, as I have always found it to be with all other makes of crucibles, chiefly in the character or quality of material used in them, or to the admixture of materials." (*Int.* 4.) He further says that he thinks the last crucibles he tried of Kier's make was in 1864 or 1865. (Rec. pp 254-5)

This I submit disposes of the feeble attempt to throw doubt on the successful operation of the Kier machine.

It is contended, however, by appellants' counsel, that this machine used at Kier's works was an abandoned experiment.

A machine which is proved to have been in public and daily use at a factory, from the Spring of 1864, until December, 1867, cannot come under the category of abandoned experiments.

It is true that we have no proof of the use of this machine after December, 1867, but it is not necessary nor is it always possible in proving prior use, to prove the continuance of that use down to the time when the proof was taken.

We have proved the continuous and successful use of the Kier machine until after the grant of Nimmo's patent, and that is certainly sufficient.

The mere disuse of a prior machine does not render it an abandoned experiment. *Snow vs. Tapley*, 13 Off. Gaz. 548, Shepley J.

The desertion of an invention, consisting of a machine never patented, may be proved by showing that an inventor, after he had constructed it, and before he had reduced it to practice broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided, that those acts were done without any definite intention of resuming his experiments and of restoring the machine. *Seymour vs. Osborne*, 11 Wall 516.

If a machine has been in public use, whether it fell into disuse or not, a subsequent inventor cannot obtain a patent

for it so as to exclude others from using it. *Evans vs. Hettich*, 3 Wash. 408; 7 Wheat 453.

If the machine was capable of doing work, then the fact that it was operated but a short time, and abandoned for other reasons than because it failed as a machine, is of no consequence. *Stimpson vs. Woodman*, 3 Fish 98.

Prior knowledge and use by a single person is sufficient. *Coffin vs. Ogden*, 18 Wall 120.

Even if Winkle did abandon his machine after three years public use of it, such abandonment would prevent *his* getting a valid patent for it, but would not give Nimmo, a subsequent inventor, any right to a patent. Such abandonment is in favor of the public, not of subsequent inventors. *Gayler vs. Wilder*, 10 How. 498.

It may, perhaps, be argued by appellants, that this Reissue Patent of Nimmo's was sustained and declared valid by Mr. Justice Clifford, in the case of *Pickering vs. Phillips*, reported in 10 Off. Gaz., 420. In that case, however, although the defence was set up that Nimmo was not the first inventor, no notice of special matter was given in the answer. The Court says: "Such a notice was never given in this case, and of course the first defence must be overruled." The other defences were estoppel and non-infringement.

None of the questions which arise in this suit, were raised in the case decided by Mr. Justice Clifford, so that there was no judicial examination or decision of the validity of the patent.

NON-INFRINGEMENT.

It is not necessary to say much on this point, as the question depends on the construction, which this Court may put on the Nimmo reissue.

Apart from the question of novelty of the invention claimed by this patent, the claim of the Nimmo reissue must receive a very broad construction in order to establish any infringement by the appellees of the patent on which suit is brought.

The single claim of the Nimmo reissue is for a combination of three elements.

1. The revolving mould.
2. The rib.
3. The mechanism by which the rib is guided towards the axis of revolution of the mould as it is withdrawn, as set forth.

The revolving mould shown and described in the Nimmo reissue, is a mould made in one piece, with a flaring mouth, in which it is impossible to make a bilge-shaped crucible.

The machines used by appellees, have a mould made in two parts, and of bilge shape, for the express purpose of making bilged crucibles.

In view of the state of the art, and of the essential difference between bilge-shaped crucibles, and flaring-mouth crucibles, I contend that these elements are dissimilar, and are not equivalents for the purpose set forth.

The *second* element is the rib. This, in the Nimmo patent, is so constructed that the top of the rib is further from the axis of the mould than any other point on its operative face; and that it is not adapted to make bilge-shaped crucibles.

The rib of defendants' machine is so constructed that the top of the rib is nearer the axis of the mould than any other point, excepting the bottom of the rib, and is especially adapted to making bilged crucibles; and therefore for the purpose set forth, the one is not the equivalent of the other.

The *third* element is the mechanism by which the rib is guided towards the axis of the mould when it is withdrawn.

This function is utterly unnecessary in the Nimmo machine, because the mould is widest at top. Supposing, however, that the Nimmo rib is capable of such movement, the mechanism by which the specification of the Nimmo patent says the rib is so guided, consists of the cross-piece *p*, and uprights *g g*. The specification says, that the lever "may be readily lifted bodily, and *guided* by the cross-piece *q* and uprights *g g*, in such a way that the rib will not strike against the interior of the crucible." (Record page 152)

In the machines of the appellees, no such mechanism is found, nor does the rib have the same movement as the rib in the machines of the appellees.

Appellants' expert, Spencer, thus describes the movement of the rib in the Nimmo machine. "In practice, and as a "matter of plain common sense, the operator would naturally "lift the handle *m* of the lever slightly, as the first operation "in withdrawing the rib, then the lever and rib are moved "towards the operator far enough to release the notched end "*o* from the part *q*, and permit the lever and rib to be raised "out of the pot and sustained by the counter-balance." (Answer to *Int.* 3.)(Record p 71-2)

That is as I understand it, all the guiding that is done is to draw the end of the lever from out of its fulcrum, and then let the counter-balance lift it out of the mould.

In the appellees' machines the rib is not a detached piece as in Nimmo's machine, it is attached to a slide rest (as in the Smith patent) and is moved horizontally by the mechanism to the centre of the mould. There is no cross-piece *p*, nor any equivalent of it, because appellants do not use a lever in connection with their rib, and there are no uprights *g g*, because in appellants machine the rib is rigidly attached and does not need the uprights *g g*, which in the Nimmo machine are merely useful in preventing the lever swinging to and fro when released from its fulcrum at *o*.

If however, this Court is of opinion that the Nimmo claim can be construed so broadly as that the mould shall mean any kind of mould, and the mechanism for guiding the rib, shall mean any device by which the rib is moved to and from the centre of the mould, then I contend that there is no infringement, because the claim is not sustainable, and there is no infringement because the patent is invalid.

If the guiding mechanism in appellees' machines is the equivalent of the cross-piece *p* and uprights *g g*, of Nimmo's machine, then I contend that the guiding mechanism of the Smith machine, and of the Wise machine are the equivalents of the guiding mechanism in the Nimmo machine; and that the revolving former of the Wise and Smith machine is the equivalent of the rib in the Nimmo machine, and the mould

in the Smith machine, being precisely like the mould in the appellees' machines (except that it is made of iron) must be the equivalent of the mould in the Nimmo machine.

The doctrine of equivalents must be applied in the same way as to all the elements of the combination. If the iron mould of Smith and Wise is not the equivalent of the plaster mould of Nimmo, then the slide rest which forms the guiding mechanism of the appellees' machines, with its rigidly attached former or rib, is not the equivalent of the cross-piece *p* and uprights *g g*, and loose detached former or rib of the Nimmo machine.

In conclusion, I respectfully submit that the Nimmo reissue is void.

Because the claim is too broad.

Because there is no co-active combination between the elements of the claim.

Because the state of the art, as set forth in the Nimmo reissue specification, shows that there is no novelty in the alleged combination.

Because the Nimmo reissue is for a different invention from that described in the original patent.

Because the alleged invention of Nimmo, is fully anticipated.

1. By the Salvetat publication.
2. By the Wise patent.
3. By the Smith patent.
4. By prior knowledge and use of the alleged invention at Kier's works, in Pittsburg.

And lastly, that on any construction of the claim of the Nimmo reissue, the appellees do not infringe.

Respectfully submitted.

W Bakewell

~~W. Bakewell~~,

Counsel for Appellees.

14-319

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~352.~~ 106

GARDNER A. SAGE, JR., APPELLANT,

vs.

JONATHAN G. WYNCOOP, AS ASSIGNEE IN BANKRUPTCY OF JOHN H. FOWLER, A BANKRUPT, IMPLEADED WITH DAVIS COSSITT, AS SHERIFF OF ONONDAGA COUNTY, AND JOHN H. FOWLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 352.

GARDNER A. SAGE, JR., APPELLANT,

VS.

JONATHAN G. WYNCOOP, AS ASSIGNEE IN BANKRUPTCY OF JOHN H. FOWLER, A BANKRUPT, IMPLEADED WITH DAVIS COSSITT, AS SHERIFF OF ONONDAGA COUNTY, AND JOHN H. FOWLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1 United States circuit court, northern district of New York. In equity.

GARDNER A. SAGE, JR.,
vs.
JONATHAN G. WYNCOOP, AS ASSIGNEE IN BANKruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler.

The complainant in the above entitled-cause filed his bill of complaint, which is hereto annexed, on the 14th day of October, 1875, and the writ of subpœna was thereupon issued, and was served personally previous to the return day thereof on the defendants.

An appearance was duly entered for the defendant, Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, by A. J. Northrup, as his solicitor, and on the 27th day of November, 1875, an answer of said defendant Wyncoop to said bill of complaint was filed, the same being hereto annexed.

2 On the 14th day of Jan'y, 1876, the complainant filed a replication to said answer, the same being hereto annexed.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said circuit court.

Afterwards, and at a term of said court held at Canandaigua on the 11th day of July, 1877, present, the honorable Hoyt H. Wheeler, judge, the said cause came on for a hearing on the pleadings and proofs, and was submitted, and was thereafter argued by counsel.

On the 12th day of November, 1877, a decree of said court was filed and entered in favor of the said defendant, by which it was adjudged that the bill of complaint in said cause be dismissed with costs, the same being hereto annexed.

3 United States circuit court for the northern district of New York. In equity.

GARDNER A. SAGE, JR.,
ag'st
JONATHAN G. WYNKOOP, AS ASSIGNEE IN BANKruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler.

To the honorable the judges of the circuit court of the United States for the second circuit, within and for the northern district of New York:

3½ Gardner A. Sage, jr., a citizen of the State of New York, brings this his bill of complaint against Jonathan G. Wynkoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler, each and all citizens of the city of Syracuse, in said northern district of New York.

And thereupon your orator complains and says:

That heretofore, to wit, on the 19th day of May, 1875, the said Gardner A. Sage, jr., then and now a citizen of the city of New York, in said State, but then and now temporarily absent from said city and State of New York, duly recovered a judgment in the supreme court of the State of New

York, which was then a court of general jurisdiction, duly created by the laws of that State, against the said John H. Fowler, for the sum of $4,052, damages and costs, the record or roll of which said judgment was duly filed, and the said judgment was duly docketed in the office of the clerk of the city and county of New York upon the day last above named.

And your orator further shows unto your honors that afterward, to wit, upon the 29th day of May, 1875, a transcript of said judgment was duly filed, and the said judgment was duly docketed in the office of the clerk of the county of Onondaga, in said northern district of New York.

4 And your orator further shows, that afterward, to wit, on 31st day May, 1875, the said Gardner A. Sage, jr., caused and procured to be issued and delivered unto the said Davis Cossitt, as sheriff of the said county of Onondaga, the said Davis Cossitt then and there being and still being the sheriff of said county of Onondaga, an execution in due form of law upon said judgment, directed to the sheriff of said county of Onondaga, that being the county wherein the said John H. Fowler then resided and still resides, against the property of said John H. Fowler, in and by which said execution the said sheriff was directed and commanded to satisfy the said judgment out of the personal property of the said John H. Fowler; and if sufficient personal property to the said John H. Fowler then and there belonging could not be found, then out of the real property of the said John H. Fowler to him belonging on the said 29th day of May, 1875, the day upon which the said judgment was so, as aforesaid, docketed in said county of Onondaga, or at any time thereafter, which execution was before the delivery thereof duly endorsed with a direction to the said sheriff to levy the sum of $4,052, with interest thereon from said 19th day of May, 1875, besides the fees and poundage of said sheriff.

And your orator further shows that on the said 31st day of May, 1875, the said sheriff, through his duly authorized deputies, and under and by virtue of the said execution, duly levied upon a large quantity

4½ of personal property, consisting of boots, shoes, trunks, and a general stock and assortment of merchandize of like character, of the value of $8,000 and upwards, contained and being in a certain store in the said city of Syracuse and the county of Onondaga, known as number 3 Wieting Block, and then and there occupied by the said John H. Fowler as a place of business, and all of which personal property so as aforesaid levied upon by said sheriff then and there belonged to and was in the possession of the said John H. Fowler.

And, further complaining, your orator shows unto your honors, that heretofore, to wit, on the 2d day of June, 1875, the said Gardner A. Sage, jr., duly recovered another judgment in the said supreme court of the State of New York, against the said John H. Fowler, for the sum of $1,023.35 damages and costs, the record or roll of which was duly filed, and the said judgment was duly docketed in the office of the clerk of the city and county of New York, upon the said 22d day of June, 1875.

And your orator further shows that afterward, to wit, upon the 3d day of June, 1875, a transcript of said judgment, in due form of law, was duly filed, and the said judgment last hereinbefore described was duly docketed in the office of the clerk of the said county of Onondaga.

And your orator further shows that afterward, to wit, upon the same day, the said Gardner A. Sage, jr., caused to be issued and de-

5 livered unto the said Davis Cossitt, as sheriff of the said county of Onon'aga, an execution in due form of law upon said judgment,

directed to the sheriff of the county of Onondaga, within which county the said John H. Fowler still resided, against the property of said John H. Fowler, in and by which execution the said sheriff was directed and commanded to satisfy the said last-described judgment out of the personal property of the said John H. Fowler; and if sufficient personal property to the said John H. Fowler then and there belonging could not be found, then out of the real property of the said John H. Fowler, and to him belonging on the said 3d day of June, 1875, the day upon which the said judgment was so, as aforesaid, docketed in said county of Onondaga, or at any time thereafter, which execution was, before the delivery thereof, duly endorsed with a direction to the said sheriff to levy the sum of $1,023.20, with interest thereon from said 2d day of June, 1875, besides the fees and poundage of said sheriff.

And your orator further shows that on the said 3d day of June, 1875, the said sheriff, through his duly authorized deputies, and under and by virtue of the said last-mentioned execution, duly levied upon the same personal property, to the said John H. Fowler belonging, as by said sheriff had previously been levied upon, under and by virtue of the said first execution herein described.

6 And your orator doth further show that the said sheriff kept and retained the possession of the said goods and personable property so as aforesaid levied upon by him, and duly inventoried the same, and caused the same to be separated into parcels convenient for sale at public auction, and duly advertised the same for sale under said executions as the law directs, and in the manner by law directed, and in addition thereto he further caused notice of the time, place, and subject of said sale to be given in the public prints, including the three daily newspapers published in the said city of Syracuse, which sale was so advertised to be held at the said store, known as number 3 Wieting Block, in the city of Syracuse, so as aforesaid occupied by said John H. Fowler, upon the 10th day of June, 1875, at 10 o'clock in the forenoon of that day.

And your orator further shows that at the time of the recovery of the two judgments hereinbefore described, and the filing of the transcripts thereof and the docketing of the same in the office of the clerk of the county of Onondaga, and the issuing of the executions thereupon to the sheriff of the county of Onondaga, and the levy of said sheriff upon the personal property of said John H. Fowler under the said executions, the said Gardner A. Sage, jr., did not have reasonable cause to believe that the said John H. Fowler was insolvent, or that he was acting in contemplation of insolvency, nor know that a fraud

7 was intended upon the act of Congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the act or acts supplementary thereto and amendatory thereof; but on the other hand the said judgments were recovered, executions issued and levies made in the usual and ordinary course of business, and without notice, either actual or constructive of acts done or acts contemplated by the said John H. Fowler, in violation of either the letter or the spirit of the said acts.

And your orator further shows that after the levy of said sheriff under both of the executions hereinbefore described upon the goods and personal property of the said John H. Fowler, and upon the 4th day of June, 1875, the said John H. Fowler caused to be duly filed in the office of the clerk of the district court of the United States for the northern district of New York, at the city of Buffalo, his petition in bankruptcy under the provisions of the said acts, setting forth, among other things,

that he owed debts provable in bankruptcy exceeding the amount of three hundred dollars; that for six months next preceding the filing of such petition he resided at the said city of Syracuse, in said district; that he was unable to pay his debts in full, and that he was willing to surrender all his estate and effects for the benefit of his creditors, and desired to obtain a discharge from his debts, and annexed to his said petition, which was duly verified and duly addressed to the judge
8 of the United States district court for said district, the schedule, inventory and valuation required by the provisions of said acts; whereupon such proceedings were duly had in said district court that the said John H. Fowler was duly adjudged and declared a bankrupt upon his own petition within the meaning of said acts.

And your orator further shows that after the filing of the said petition in bankruptcy by the said John H. Fowler, and upon the 9th day of June, '75, upon the application of A. Judd Northrup, esq., as attorney for Edwin Wallace and Henry Elliot, alleged creditors of said John H. Fowler, an order was granted by the United States district court for said district, restraining the said sheriff of Onondaga County, his deputies and agents, from selling or disposing of the property of said John H. Fowler, and from all proceedings to enforce the collection of said two executions from the property of said John H. Fowler until the further order of said court.

And your orator further shows that afterward, and upon the 15th day of July, 1875, such proceedings were duly had in said district court of the United States for the northern district of New York in the matter of John H. Fowler, a bankrupt, being the same bankruptcy proceedings instituted as hereinbefore described, that the said Jonathan G. Wynkoop was duly appointed sole assignee of the estate of
9 the said John H. Fowler in bankruptcy, which appointment was duly confirmed and approved, and thereupon the said Jonathan G. Wynkoop duly qualified and entered upon the duties of said office, and has ever since been the sole assignee of the estate of said John H. Fowler in bankruptcy.

And your orator further shows that afterward, and upon the 17th day of August, 1875, and while the said levies by said sheriff under the said executions still remained in full force and effect, and while the said sheriff still remained in full possession, under said levies, of the said goods and personal property, upon the application of said Jonathan G. Wynkoop, as such assignee as aforesaid, an order was duly made by the district court of the United States for the northern district of New York, authorizing said assignee to sell said goods and personal property at private sale to Messrs. Thing and Norris, in accordance with the terms of a certain agreement in writing before that time entered into by them with said assignee and approving said written agreement, and further directing that the claim and lien of said sheriff of Onondaga County and of said Gardner A. Sage, jr., be released from said goods upon such sale and transferred to so much of the monies realized upon such sale as should be sufficient to pay the same, and that the said assignee deposit with the clerk of the said United States district court for the northern district of New York the sum of five thousand and two
10 hundred dollars, to which the liens of said sheriff and of said Gardner A. Sage, jr., to the extent of said executions and the sheriff's fees thereon should attach until the further order of the court, with the same force and effect as before the making of said order then attached to the said goods, and finally ratifying in all respects the sale of said goods by said assignee.

And your orator further shows that afterward, and in pursuance of said last-named order, the said goods & personal property were sold by said assignee to said Thing and Norris in pursuance of the provisions of said order, for the sum of $8,000 and over in cash, and that said assignee afterward, and upon the 1st day of September, 1875, in accordance with said order, deposited of said moneys so by him realized upon such sale, the sum of five thousand two hundred dollars with the clerk of the United States district court for the northern district of New York, with whom it still remains, subject to the final decision of the court in relation thereto, and with the liens of said sheriff and of said Gardner A. Sage, jr., still existing thereupon.

And your orator further shows that neither of the said judgments of said Gardner A. Sage, jr., has been satisfied or paid, and that they still remain in full force and virtue; that the sum of $320.34 has been credited upon the second and smaller of said judgments by reason of the collection of that amount thereon by the sheriff of Cayuga
11 County, in said State; and that said executions still remain in full force and virtue in the hands of said the sheriff of Onondaga County.

And your orator further shows that the legal fees, poundage, and necessary expenses of said sheriff of Onondaga County upon the said executions amount to the sum of $148.27, which sum is a lien to said Davis Cossitt, as sheriff of Onondaga County belonging, upon the said fund as deposited by said assignee with the said clerk of said United States district court.

And your orator further shows, that more than twenty days prior to the filing of this bill in equity, he caused due notice of this action, specifying the cause thereof, to be given the said Jonathan G. Wynkoop, as such assignee, to the end that he might have an opportunity of tendering amends, should he see fit so to do; but so has it happened that said assignee has ever refused and still refuses to tender amends, or to make any reparation to your orator, or to said Davis Cossitt, as sheriff of Onondaga County.

And your orator further shows that the said assignee has ever refused and still refuses to pay over or to consent to the payment over to your orator, upon demand duly made, the amount of his said judgments, and interest thereon, from the date of the recovery thereof, or any part of said judgments and interest, and that the said assignee claims, as such assignee, the entire amount of the said fund,
12 so as aforesaid deposited with the said clerk of said district court, and disputes the right of your orator to any part thereof, all which acting and doings are contrary to equity and good conscinece, and tend to the manifest injury of your orator in the premises.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters and things of this kind are made cognizable by statute and otherwise:

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their corporal oaths, and according to their best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged.

And that the said defendants may answer the premises, and that it may be decreed that the amount of your orator's said judgments and interest thereon from the date of the recovery thereof may be paid to your orator, out of the said fund so deposited as aforesaid, and costs, and if the said fund be not sufficient for that purpose, that said assignee be decreed to pay the same out of any other funds in his hands

to said estate in bankruptcy belonging, and that your orator's lien by virtue of the said judgments, transcripts, executions and levies,
13 be decreed first and prior and superior to any claim of said assignee, or of said John H. Fowler, and that the said lien and claim of said Davis Cossitt, as sherifi of Onondaga County, be likewise established and paid in the same manner, out of said fund, and by said assignee, and that the said assignee be decreed to have no interest in said fund except in the surplus, if any there be, after the satisfaction of the said liens of your orator and of said sheriff of Onondaga County.

And that your orator may have such further and other relief as the nature of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator a writ of subpœna, directed to the said Jonathan G. Wynkoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler, commanding them on a day certain therein to be named to be and appear in this honorable court, and then and there to answer the premises, and to stand to, perform and abide such further order, direction and decree as may be made against them.

And your orator, as in duty bound, will ever pray, &c.

AMBROSE MONELL,
Solicitor for Complainant.

IRVING G. VANN,
Counsel for Complainant.

14 UNITED STATES OF AMERICA,
Southern district of New York, ss:

At the city of New York, in the county of New York and district aforesaid, personally appeared J. Henry Fowler, who, being duly sworn according to law, deposeth and saith: That he is attorney in fact for Gardner A. Sage, jr., the complainant in the that foregoing bill, and has read the same and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on information and belief of the complainant, and as to those matters he believes it to be true.

J. HENRY FOWLER.

Subscribed and sworn to before me, this 12th day of October, 1875.

J. I. DAVENPORT,
U. S. Com'r So. Dist. of N. Y.

(Endorsed on back:) United States circuit court, northern district of New York, second circuit. Gardner W. Sage, jr., complainant, vs. Jonathan G. Wynkoop et al., defendants. 70. Bill. Ambrose Monell, sol. for complainant, 261 Brooklyn, N. Y., City. I. G. Vann, of counsel for compl't, Syracuse, N. Y. Filed Oct. 14, 1875.

15 United States district court, northern district of New York. In equity.

GARDNER A. SAGE, JR.,
against
JONATHAN G. WYNKOOP, AS ASSIGNEE IN BANKRUPTCY of John H. Fowler, a bankrupt; Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler.

The answer of Jonathan G. Wynkoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, to the bill of complaint of Gardner A. Sage, jr., complainant.

The defendant, Jonathan G. Wynkoop, assignee as aforesaid, now,

and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for his separate answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says:

That the defendant, John H. Fowler, residing at Syracuse, Onondaga County, N. Y., was, on the 7th day of June, 1875, duly declared and adjudged a bankrupt, upon his own voluntary petition, filed in voluntary proceedings in bankruptcy, on the 3d day of June, 1875, in
16 the office of the clerk of the district court of the United States, in the northern district of New York, in the city of Buffalo, State of New York, said proceedings being duly had in and before the United States district court, in and for the northern district of New York, he, the said John H. Fowler, having been for some time engaged in mercantile business at said city of Syracuse, and being, in fact, a merchant and trader within the meaning of the bankrupt law.

That afterwards such proceedings were had in the said district court in bankruptcy, that on the 3d day of July, 1875, this defendant, Jonathan G. Wynkoop, was duly appointed the assignee in bankruptcy of the said John H. Fowler, in pursuance of the act of Congress entitled "An act to establish a uniform system of bankruptcy throug'out the United States," passed and approved March 2d, 1867, and the several acts amendatory thereof, and did soon thereafter give the security required by said act, and did enter upon the discharge of the duties of his said office, and did take possession of the property and assets of the said John H. Fowler, so far as he was able, and the same came to his knowledge.

That the defendant, John H. Fowler, said bankrupt, was largely indebted and insolvent, and the amount of his indebtedness was far in excess of the value of his assets, and for a period of over four
17 months next preceding the filing of the said petition in bankruptcy by him, was, in fact, utterly insolvent and unable to pay his debts in full.

That within the period of four months next preceding the filing of said petition, as this defendant is informed and believes, said John H. Fowler gave out and represented that he was indebted to the plaintiff herein, Gardner A. Sage, jr., in about the sum of five thousand dollars, but the precise sum the defendant cannot now state, for money lent to said John H. Fowler, and used by him in the course of his business as a merchant and trader as aforesaid, and for which pretended indebtedness said plaintiff held five several promissory notes, of which the following are copies, to wit:

I.

SYRACUSE, NEW YORK, *Dec.* 15, 1874.

Three months after date I promise to pay to the order of Mrs. Ellen A. Fowler one thousand dollars, for value received, at Wieting block, Syracuse.

$1,000.00.

R. CARMAN COMBES.

(Endorsed:) Protest waived. E. A. F. J. H. F.

ELLEN A. FOWLER.

Protest waived.

JOHN H. FOWLER.

II.

SYRACUSE, NEW YORK, *Dec.* 28, '74.

18 Three months after date I promise to pay to the order of Mrs. Ellen A. Fowler one thousand dollars, for value received, at No. 3 Wieting block.

$1,000.00.

R. CARMAN COMBES.

(Endorsed:) Demand and protest waived.

ELLEN A. FOWLER.
JOHN H. FOWLER.

III.

SYRACUSE, N. Y., *January* 18, 1875.

Three months after date I promise to pay to the order of Mrs. Ellen A. Fowler one thousand dollars, for value received, at No. 3 Wieting block.

$1,000.00.

R. CARMAN COMBES.

(Endorsed:) Demand and protest waived.

ELLEN A. FOWLER.
JOHN H. FOWLER.

IV.

$1,000. SYRACUSE, N. Y., *Feb.* 5, 1875.

Three months after date I promise to pay to the order of Mrs. Ellen A. Fowler one thousand dollars, at 3 Wieting block, Syracuse, N. Y., value received.

R. CARMAN COMBES.

(Endorsed:) Demand and protest waived.

ELLEN FOWLER.
JOHN H. FOWLER.

19 V.

$1,000.00]. SYRACUSE, N. Y., *Feb.* 10*th*, 1875.

Two months after date promise to pay to the order of myself one thousand dollars, at No. 5 Wall street, New York, value received.

JOHN H. FOWLER.

(Endorsed:) Protest waived.

JOHN H. FOWLER.

That the first four notes were claimed by said defendant Fowler to have been made for his accommodation.

That said Ellen A. Fowler in said notes mentioned is the wife of said John H. Fowler, and said R. Carman Combes was for several years, and until on or about Aug. 18th, 1874, the principal in carrying on business in the boot and shoe trade in Syracuse, N. Y., and for whom and in which said John H. Fowler was the agent, the said relation of principal and agent terminating at said last-mentioned date by said Fowler's buying, or pretending to buy, from said Combes all the stock in trade and other

interests which said Combes had in said business in Syracuse for a nominal consideration, but without paying any consideration therefor, and assuming and agreeing to pay all the indebtedness existing in said business against said Combes, as said Fowler alleges.

That said several notes, by the terms thereof, fell due, respect-
20 ively, in the order herein named and described, as follows, to wit, March 18th, 1875; March 31st, 1875; April 21st, 1875; May 8th, 1875, and April 13th, 1875.

That on or about the 28th day of April, 1875, said John H. Fowler was in New York City, where the plaintiff in this action then resided and still resides, as defendant is informed and believes, and there had an interview with one J. Henry Fowler, who is the son of said John H. Fowler, and an attorney at law, and is and was the attorney and agent of the plaintiff herein; that then and there said John H. Fowler made his five several promis'ory notes for one thousand dollars each, payable on demand with interest, payable to the order of said Gardner A. Sage, jr., as defendant is informed and believes, and dated the same, respectively, March 18, 1875; March 31, 1875; April 21, 1875; May 8, 1875, and April 13, 1875, which were the dates at which the said above-copied notes became due and payable, respectively, according to the terms thereof.

And thereupon said John H. Fowler gave said J. Henry Fowler, as the attorney and agent of the plaintiff herein, said five new notes so made, and took up and cancelled the said five notes copied as above, falling due at the dates of said notes; and the plaintiff, by his said attorney and agent, and said John H. Fowler, then and there agreed to and did exchange notes as aforesaid for the purpose and with the intent, as this defendant verily believes and charges the fact to be, thereby to
21 release from all liability on account of said indebtedness, to the extent of four of said notes so exchanged, said Ellen A. Fowler and said R. Carman Combes, who, as defendant is informed and believes, were then and still are in good pecuniary standing and repute, and able to pay all their obligations, and to leave only said John H. Fowler liable to pay the same, while he, said John H. Fowler, was then bankrupt and insolvent, and unable to pay his debts, and while four of said notes so taken up had been overdue from the respective dates when they became due as aforesaid, and while said J. Henry Fowler, plaintiff's attorney and agent as aforesaid, had just cause to believe, and knew, as defendant believes and charges the fact to be, that said John H. Fowler was bankrupt and insolvent, or in contemplation of bankruptcy, and unable to pay his debts in full.

That on the 28th day of April, 1875, being the same day on which said five promissory notes were given by said John H. Fowler, the plaintiff herein, by one Ambrose Monell, his attorney (said J. Henry Fowler having that day in the afternoon sailed for Europe), commenced an action in the supreme court of the State of New York, in and for the city of New York, upon the four of the notes above mentioned and made that day, which bore dates prior to said April 28, 1875, against said John H. Fowler, the complaint in which action was verified by said attorney, and the summons and complaint in which were served
22 upon said John H. Fowler at Delmonico's, in the city of New York, on said 28th day of April, 1875, and judgment thereafter, and on the 19th day of May, 1875, was entered in said action against said John H. Fowler, in said city of New York, upon his default to appear and answer, for $4,052.00, which is the same judgment first described and set forth in the plaintiff's bill of complaint in this action.

And the defendant admits the recovery of said judgment as in said complaint stated, and that a transcript thereof was, on the 29th day of May, 1875, duly filed and said judgment docketed in the office of the clerk of Onondaga County, as stated in said complaint; and that on the 31st day of May, 1875, an execution thereon was issued to the sheriff of said county, as stated in said complaint; and that the said sheriff on the said 31st day of May, 1875, made a levy upon the stock of goods of said John H. Fowler, at Syracuse, as stated in said bill of complaint.

And this defendant, further answering plaintiff's bill of complaint, says:

That on the 10th day of May, 1875, the plaintiff herein, by his said attorney, Ambrose Monell, commenced an action upon the other of said notes, which bore date May 8th, 1875 (but which was made April 28th, 1875, as before set forth), against said John H. Fowler, in the supreme court of the State of New York, in and for the county of New
23 York, the complaint in which action was verified by said attorney, and the summons and complaint in which were served on said John H. Fowler at the city of Syracuse on the 12th day of May, 1875, by J. H. Leyboult, who was then a law student in the law office at Syracuse, State of New York, of Messrs. Ruger and Jenny, who then were and are the attorneys of said John H. Fowler in the bankruptcy proceedings wherein he was adjudicated a bankrupt on his own petition; that on June 2d, 1875, judgment was entered against said Fowler in said action, upon his default and failure to appear and answer for the sum of $1,023.38, which is the same judgment secondly described and set forth in plaintiff's bill of complaint.

And this defendant admits the recovery of said judgment as in said complaint stated, and that a transcript thereof was on the 3d day of June, 1875, filed, and said judgment docketed in the office of the clerk of Onondaga County (which transcript was so filed at 11 oclock a. m. of that day); and that thereafter, and on that day, an execution thereon was issued to the sheriff of said county, and that said sheriff, under said execution, levied on the stock of goods in Syracuse of said Fowler, and that the said sheriff made an inventory of said goods, and advertised to sell the same upon the 10th day of June, 1875, at 10 o'clock in the forenoon of that day, substantially as set forth in the complaint.

24 But the defendant denies that at the time of the recovery of said two judgments, or either of them, or the filing of said transcripts, or either of them, or the issuing of said executions, or either of them, or at any of said times, the plaintiff did not have reasonable cause to believe that the said John H. Fowler was insolvent, or that he was acting in contemplation of insolvency; and the defendant further denies that said plaintiff did not know that a fraud was intended upon the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the act or acts supplementary thereto or amendatory thereof; and the defendant further denies that said judgments were recovered, or said executions issued, or said levies made without notice, either actual or constructive, of acts done, or acts contemplated by the said John H. Fowler in violation of either the letter or spirit of said act.

But on the other hand the defendant charges the fact to be, and upon the foregoing facts and facts hereinafter stated, and his information and belief, alleges that the giving by the said John H. Fowler, and the receiving by said plaintiff of said five promissory notes so as aforesaid made by said Fowler on April 28th, 1875, was done while said Fowler

was bankrupt and insolvent, or in contemplation of bankruptcy or insolvency, and that the plaintiff herein (and his said attorney and confidential agent, J. Henry Fowler) had reasonable cause to believe
25 him insolvent, and did actually know him to be bankrupt, insolvent, and unable to pay his debts in full; and that said notes were so given and received with the intent and under the fraudulent and corrupt agreement between said Sage and said John H. Fowler, that the security of said Sage on four of the notes herein copied and described, made by said Combes and endorsed by said Ellen A. Fowler, should be surrendered, and said new notes should be sued, put into judgment, and executions issued thereon, and said executions levied upon said stock of goods, so as to obtain an unlawful and fraudulent preference, and that then, and after such preference should be obtained, said John H. Fowler should go into voluntary bankruptcy; that said actions were commenced, and said judgments obtained and suffered to be procured, and said executions were issued and said levies made with the like fraudulent and corrupt intent, and in pursuance and execution of said corrupt and fraudulent agreement as aforesaid, and said unlawful and fraudulent preference was thus as aforesaid sought to be obtained; and the pretended claim and lien upon said goods, by virtue of said judgments, executions, and levies, is the same claim and lien sought to be enforced by the plaintiff in this his present action.

All of which was contrary to the provisions of the said bankrupt law, and whereby the plaintiff herein did obtain a preference over the
26 other creditors of the said John H. Fowler, contrary to the provisions of the said bankrupt law, and which the plaintiff still insists upon and seeks to enforce by this action.

This defendant, further answering, says, that as he is informed and believes, for several days prior to said June 3d, 1875, said John H. Fowler had been preparing his petition in voluntary bankruptcy, and the schedules connected therewith, and the same were fully completed as early as May 31, 1875, and said petition was on that or the following day duly certified by the bankruptcy register at Syracuse aforesaid, D. F. Gott, esq., he being the register before whom such petition would properly come, and said petition was on said May 31st, or the following day, sent to Buffalo to be filed with the clerk of the United States dist. court, when he, said clerk, should be notified to file the same, and he was directed not to file the same until such notification should be given.

That after the filing of the transcript of said second judgment, and after the said sheriff had had ample opportunity to make a levy thereunder on said stock of goods, said clerk was notified by telegraph by said John H. Fowler, or by some person under his direction, to file said petition, and the same was filed at 2 o'clock p. m. of said June 3d,
27 1875. All of which was done, as defendant believes and so charges, in further pursuance of the plot, plan, and scheme by which said Sage was to procure, and said Fowler was to permit and aid in procuring for said Sage an unlawful preference, and to cheat and defraud the other creditors of said bankrupt.

This defendant admits the filing of said John H. Fowler's petition in bankruptcy; the procuring of the injunction order of the district court, on June 9th, 1875, restraining the said sheriff from selling or disposing of the property of said Fowler, and from all proceedings to enforce the collection of said two executions until the further order of the court; and that afterwards this defendant was duly appointed assignee in bankruptcy of said Fowler, but said appointment was made on July 3d, 1875, and not on July 15th, 1875, as alleged in the complaint; and that

on the 17th day of August, 1875, the further order of the court was made, authorizing the defendant, as such assignee, to sell said goods and personal property at private sale, free and clear of the claim or lien of the plaintiff herein and said sheriff, and directing that the claim and lien of said sheriff and said Sage be transferred to so much of the monies to be realized from said sale as should be sufficient to pay the same if finally held good, and that the assignee deposit with the clerk of the district court the sum of $5,200.00 to cover the amount of said executions and sheriff's fees thereon to which said sheriff's and Sage's
28 lien should attach until the further order or judgment of the court in respect thereto, with the same force and effect as before said order they attached to said goods, and ratifying said sale; and that in pursuance of said order said goods were sold, and on September 1st, 1875, said sum of $5,200 was deposited with the clerk of the court as directed by said order, with whom it still remains subject to the final decision of the court, and with liens still attaching; and that said judgments still remain unpaid and unsatisfied except as to the sum of $320.34 credited upon the smaller of said judgments, and that said executions still remain in the hands of said sheriff, substantially as set forth in said bill of complaint.

And as to the all'gations in said bill of complaint that the legal fees, poundage, and necessary expenses of the said sheriff upon said executions amount to $148.27, this defendant denies that he has any knowledge or information thereof sufficient to form a belief.

This defendant further admits due service of a notice of this action upon him more than twenty days prior to the filing of the bill of complaint herein, and that this defendant has ever refused to pay over, or to consent to the payment over to the plaintiff the amount of his said judgment and interest thereon, or any part thereof, and that this
29 defendant, as assignee, claims the entire amount of said fund so as aforesaid deposited, and disputes the right of the plaintiff to any part thereof.

And this defendant, further answering, charges the truth to be that by reason of the premises the plaintiff herein had reasonable cause to believe said John H. Fowler was insolvent, and unable to pay his debts as a merchant and trader, as they became due in the regular course of his business, or to pay his indebtedness in full.

And this defendant further charges the truth to be that said John H. Fowler, being bankrupt and insolvent, or in contemplation of bankruptcy or insolvency, and within four months next preceeding the filing of his petition in bankruptcy as aforesaid, with a view to give a preference to said plaintiff or creditor having or pretending to have a claim against him, did procure or suffer his property as aforesaid to be seized on said executions issued as aforesaid under said judgments, which he as aforesaid procured and suffered to be taken against him, with said fraudulent intent to thereby give said judgment creditor an unlawful preference, contrary to the provisions of the bankrupt law, such judgment creditor having reasonable cause to believe said John H. Fowler to be insolvent, and knowing that such seizure was made in fraud of the provisions of such bankrupt act.

30 And the defendant further shows to the court that he is informed and believes, and he charges the fact to be, that the said John H. Fowler, at the time of giving said several notes, to wit, on April 28, 1875, was not indebted to the plaintiff herein in any sum of money whatever, and that said debts upon both said judgments were and are entirely fictitious, and that the said notes, and each of them,

were made and delivered by said John H. Fowler, and received by said plaintiff with intent to cheat and defraud the creditors of the said John H. Fowler, and to create a secret trust for the benefit of said John H. Fowler.

All of which matters and things the said defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays to be hence dismissed with his reasonable costs and charges in that behalf sustained.

A. J. NORTHRUP,
Solicitor for the Defendant.
JONATHAN G. WYNKOOP,
Assignee, &c.

GEO. N. KENNEDY, *of Counsel.*

NORTHERN DISTRICT OF NEW YORK,
Onondaga County, ss:

31 Jonathan G. Wynkoop, of said county, being duly sworn, says that he is one of the defendants in the above-entitled cause; that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JONATHAN G. WYNKOOP.

Sworn to before me this 15th day of Nov., 1875.

D. F. GOTT,
U. S. Commissioner, Northern Dist. of New York.

(Endorsed:) United States circuit court, northern district of New York. Gardner A. Sage, jr., ag'st Jonathan G. Wyncoop, assignee, &c., & others. Answer of def't Wyncoop. A. J. Northrup, solicitor for def't Jonathan G. Wyncoop, Syracuse, N. Y. Filed Nov. 27, 1875.

32 United States circuit court, northern district of New York. In equity.

GARDNER A. SAGE, Jr.,
ag'st
JONATHAN G. WYNKOOP, AS ASSIGNEE IN BANKruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler.

The replication of Gardner A. Sage, jr., complainant, to the answer of Jonathan G. Wynkoop as assignee in bankruptcy of John H. Fowler, a bankrupt, defendant.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in
33 law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, that each and every allegation and statement, motion or thing whatever in said answer contained, material or effectual in the law to be replied unto, is hereby positively and expressly denied.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

AMBROSE MONELL,
Solicitor for Complainant, No. 261 Broadway, New York City.

IRVING G. VANN,
Counsel for Complainant, Syracuse, N. Y.

(Endorsed:) United States circuit court, northern district of New York. Gardner A. Sage, jr., vs. Jonathan G. Wyncoop, as assignee, et al. Replication to answer of defendant Wyncoop. Ambrose Monell, sol. for compl't, Irving G. Vann, counsel for compl't. Filed Jan'y 14, 1876.

34 At a stated term of the circuit court of the United States held in and for the northern district of New York, at the village of Canandaigua, State of New York, commencing on the third Tuesday in June, 1877, Hon. Hoyt H. Wheeler, judge presiding.

Circuit court of the United States, northern district of New York. In equity.

GARDNER A. SAGE, JR.,
vs.
JONATHAN G. WYNCOOP, AS ASSIGNEE IN BANKruptcy of John H. Fowler a bankrupt, impleaded with Davis Cossit as sheriff of Onondaga County, and John H. Fowler.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

35 That the complainant's bill in this action be dismissed, and that the said complainant pay the said defendant Jonathan G. Wyncoop, as assignee, &c., impleaded, &c., his costs in this suit, to be taxed, and that he have execution for such costs.

(Endorsed on the back:) U. S. circuit court, north. dist. of N. Y. In equity. Gardner A. Sage, jr., vs. Jonathan G. Wyncoop, assignee, &c. Decretal order. Filed Nov. 12, 1877.

36 And the costs of the said defendant having been taxed by the clerk at three hundred and twenty-two dollars and two cents, the pleadings and decree together with other papers in said cause are duly annexed hereto.

Wherefore, let the said defendant Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, recover of said complainant Gardner A. Sage, jr., the said sum of three hundred and twenty-two dollars and two cents as adjudged in said decree.

Signed and enrolled this 1st day of December, A. D. 1877.

CHARLES MASON,
Clerk.

37 (Endorsed on back:) U. S. circuit court north. dist. of N. Y. In equity. Gardner A. Sage, jr., vs. Jonathan G. Wynkoop, as assignee in bankruptcy of John H. Fowler, deceased. Final record. A. J. Northrup, def't's solicitor. Costs $322.02. Filed Dec. 1, 1877, 4h. 30m. p. m.

United States district court, northern district of New York.

In re John H. Fowler, a bankrupt.

SIR: In pursuance of § 5056 of the United States Revised Stat-
38 utes, being the part thereof relating to bankruptcy, notice is hereby given you on behalf of Gardner A. Sage, jr., that he desires and intends to commence an action against yourself and others, to recover and to cause to be paid over to him from monies by you deposited as assignee of said bankrupt, with the clerk of said court at Buffalo, N. Y., the amount of two judgments recovered by said Sage, against said bankrupt, in the supreme court of the State of New York, one recovered May 19th, 1875, for $4,052, and the other recovered June 2d, 1875, for $1,023.28, upon the ground that said judgments, together with the executions issued thereon, and to the sheriff of Onondaga County, and levies made thereunder, were liens upon the goods of said John H. Fowler, before the filing of the petition in bankruptcy herein, which goods were afterwards sold by you, and produced said fund so deposited with said clerk.

You are requested to tender amends within the next twenty days, should you see fit so to do.

On behalf of said Sage, demand is hereby made of enough of said fund to satisfy said judgments, interests, and sheriff's fees, amounting in all to $5,200.

Dated, September 16th, 1875.

Yours, &c.,

FULLER & VANN,
Att'ys for said Sage.

To JONATHAN G. WYNKOOP, Esq.,
Assignee in bankruptcy of said bankrupt.

39 United States circuit court, northern district of New York.

GARDNER A. SAGE, JR.,
vs.
JONATHAN G. WYNKOOP, AS ASSINGNEE IN bankruptcy of John H. Fowler, a bankrupt, Davis Cossitt, as sheriff of Onondaga County, and John H. Fowler.

Depositions of Ambrose Monell, J. Henry Fowler, and George W. Lange, taken in pursuance of the foregoing notice.

JUNE 8TH, 1876.

Ambrose Monell, esq., of counsel for complainant.
G. N. Kennedy and A. J. Northrup, esqrs., for defendant Wynkoop.

Examination of witnesses in the above action, taken in pursuance of § 863 Revised Statutes of the United States, upon due notice to
40 the assignee in bankruptcy, before me, Joseph Weeks, a notary public in and for the county of New York, taken at my office, No. 1321 Nassau street, in the city of New York, this 8th day of June, 1876.

AMBROSE MONELL, a witness called in behalf of complainant, being duly sworn, testified as follows:

I am an attorney and counsellor at law, practicing twelve years and

upwards. I am the attorney for Gardner A. Sage, jr., the above-named complainant in this action, and was his attorney in two actions brought in the supreme court of the State of New York, in the county of New York, brought by him against John H. Fowler, upon five promissory notes, each for the sum of $1,000.

Q. By whom did the notes purport to have been made?

A. By John H. Fowler, the above-named bankrupt. I know J. Henry Fowler, am attorney and counsellor at law of this city. Prior to the 28th of April, 1875, I had acted as counsel in a number of cases in which said Fowler was the attorney, and in several instances Gardner A. Sage, jr., was the plaintiff or defendant in the actions in which I appeared as counsel, and J. Henry Fowler as attorney.

I have known J. Henry Fowler in the neighborhood of five years, our relationship being merely professional. I know that J. Henry Fowler was the agent and attorney in fact of Gardner A. Sage,
40*a* jr., for several years past, and I believe is so still. Prior to the 28th day of April, 1875, being counsel for said Sage in a proceeding in the surrogate's court, I had occasion to see Fowler quite frequently. Sage at this time was in Europe, some time before the 28th day of April, 1875.

Q. Who employed you, if any one, to commence action upon the promissory notes by you hereinbefore referred to?

A. J. Henry Fowler.

Q. State what, if anything, was said by him to you at the time of such employment, and what instructions, if any, did he give you with referrence to commencing actions on these notes?

(Objected to as incompetent and immaterial and as hearsay.)

A. Mr. Fowler some time before April 28th, 1875, had informed me that he was going to Europe on that day, and also informed me that he held certaim promissory notes made by his father, John H. Fowler, and which had been discounted or cashed by Gardner A. Sage.

(The testimony thus far given is objected to as not responsive to this question.)

He referred to these notes on several occasions, and finally,
40*b* shortly before his departure for Europe, he put the notes into my hands, telling me that he was going to leave them with me for collection; that his father had no unpaid notes outstanding; was engaged in business in Syracuse, in this State, and he thought quite likely that he would be able to pay the notes at their maturity; that Gardner A. Sage, jr., was his client; that he, J. Henry Fowler, had advanced this money by virtue of his power of attorney from Sage, and that he wanted me to see that Sage was protected, and that at the same time that his father should not be unnecssarily harrassed.

I was somewhat embarrassed in the position in which I was placed by J. Henry Fowler, in reference to those notes, and hesitated for some time as to how I should act. On the 28th day of April, 1875, I went down to the steamer Bothnia to see J. Henry Fowler off to Europe, and had some further conversation with him in reference to my action on these notes. I asked him the question point blank, "Fowler, for whom am I to act with reference to these notes? I want to understand distinctly what my position will be in reference to them."

After again telling me that he thought his father would be able to meet his obligations, and that he did not wish to have him unduely pressed, he finally said to me, "Monell, John H. Fowler is the
40*c* author of my being; if you can assist him in any way I want you to do it, but Gardner Sage is my client; this is his money and I want him protected at all hazards."

(The foregoing testimony is given by the witness by a voluntary statement, and without intero'gatories.

The def'ts' counsel now moves to strike out and suppress all the above evidence relating to and stating conversations between him, the witness, and J. Henry Fowler, as incompetent and inadmissable. Defendant's counsel makes no question as to the manner of the examination of the witness without interrogatories.)

I had met John H. Fowler (the bankrupt) on the steamer, and I think I had met him once before, at his son's house. I had a conversation with John H. Fowler.

Q. What was it?

(Objected, as incompetent.)

A. He informed me that he was going back to Syracuse that night, and that he would in all probability call at my office in the afternoon, to bid me "good-bye." Upon leaving the steamer I went to my office and gave directions to have a summons and complaint prepared upon these notes, which was done, the complaint being verified by me. I also directed one of my clerks, George W. Lange, that as John H. Fowler (the bankrupt) would probably call at the office that afternoon to have a copy of the summons and complaint ready, and in case
40*d* he did call to follow him and *and* serve him after he had left my office.

Q. Was it an unusual thing for you to direct your clerk to make a service in this way?

(Objected, as immaterial and irrelevant.)

A. It was not, as it is invariably my rule not to commence an action in my office. Some time after commencing this action, and before the time to answer had expired, I received a letter from John H. Fowler (the bankrupt). I cannot now find this letter. I have made diligent search for it among all my papers, but have been unable to find it.

Q. Can you recollect the contents of the letter?

A. I can.

Q. Please state them.

(Objected, as incompetent and the declarations of a third party.)

A. As near as I can recollect now, he desired an extension of two or three months upon these notes, and stated that in that time he thought he would be able to pay them. It was quite a short letter. I paid no attention to the letter, did not reply to it, and entered judgment when the time to answer had expired. I did not issue execution until some days after. Between the time of the service of the summons and complaint in the first action, and the entry of judgment therein, the 5th note for $1,000 had matured, and I commenced an action on it in
41 the supreme court of the State of New York, County of New York, and entered judgment therein on the default of John H. Fowler (the bankrupt). I issued executions on both of these judgments to the sheriff of Onondaga County, and wrote to him in relation to the executions.

Cross-examination:

Q. Where did Gardner A. Sage, the plaintiff, reside during the year 1875?

A. In London, England, temporarily.

Q. Was his permanent place of residence in the city of New York?

A. It was.

Q. What was his business?

A. He was a gentleman of wealth, having no business.

Q. Do you know what, if any, relationship he bore to J. Henry Fowler?

A. I don't know what, if any.

Q. J. Henry Fowler was the son of John H. Fowler, the bankrupt?

A. He was.

Q. Was he ever connected with you in business?

A. Never, except as I have stated in my direct testimony.

Q. Was he ever in your office as a clerk, or otherwise engaged?

A. He never was.

42 Q. Where was your office in the spring of 1875?

A. No. 261 Broadway, in the city of New York.

Q. Where was J. Henry Fowler's office at that time?

A. No. 5 Wall street, in the city of New York.

Q. Has Gardner A. Sage ever been engaged in any business to your knowledge?

A. I can't say positively as to particulars, but generally I can say he was not.

Q. Do you know R. Carman Combes?

A. I do.

Q. Where did he reside in the spring of 1875?

A. He told me that he resided at 175th street and St. Nicholas avenue, in the city of New York.

Q. Was he in 1875, and is he now, a man of large wealth and means?

A. He has so stated, and I believe that at one time he was wealthy, but do not know what was his financial condition in 1875.

Q. Did you understand him to be a gentleman of large means in 1875?

A. I suppose he owned some property. I knew him to be an executor of a large estate, but as to the amount of his wealth I know nothing.

Q. Did you at any time during the year 1875 make, or cause to be made, any inquiry as to his pecuniary responsibility?

A. I did not.

43 Q. Was he one of the executors of the will of Richard J. Carman, late of New York?

A. He was.

Q. Did the complainant in these cases acquire his property from that estate?

A. I believe he did, or the greater portion of it.

Q. Do you know what, if any, was the relationship between R. Carman Combes and John H. Fowler (the bankrupt)?

A. I do not.

Q. Do you know where John H. Fowler is now?

A. I do not.

Q. Or where the complainant is?

A. From a commission received in a case in which I am counsel, in the latter part of April, 1876, he was in London, and I believe him to be there still. He has not been in this country to my knowledge since November, 1874. I know of no one except J. Henry Fowley who has done any business for him as agent or attorney in fact.

Q. Did J. Henry Fowler leave these notes with you for collection (the notes which were sued)?

A. In the ordinary sense of collection, no. He left them with me as the representative of Gardner A. Sage, jr., to see that the money due on these notes was obtained.

Q. On what day did he leave them with you?

44 A. I cannot state from memory the exact date, but my best impression is that it was a few days. I cannot give the exact number before his departure for Europe on the 28th of April, 1875. I should think within a week, although I had been spoken to about this indebtedness some time before that.

Q. Who was the maker of the note that was left with you—the first note received by you?

A. John H. Fowler.

Q. How many were there?

A. My impression is five of $1,000 each.

Q. Do you remember if they were each payable on demand?

A. I cannot now recollect.

Q. Do you know as a question of fact when the notes were given, if at all?

A. I do not.

Q. Did you learn from J. Henry Fowler when they were in fact given?

A. I did not.

Q. Did you learn from any source previous to the time the notes were left with you of the existence of certain other five notes of $1,000 each, given by R. Carman Combes to Mrs. Ellen A. Fowler, the wife of John H. Fowler (the bankrupt)?

A. I had.

45 Q. Were you informed at that time, previous to, and at the time these notes were left with you, that they were given to retire said notes of R. Carman Combes?

A. I had heard something to that effect before or at the time the notes in suit were handed to me.

Q. Where are the five $1,000 notes upon which the suits were brought?

A. They are either in my safe or else I have returned them to J. Henry Fowler.

Q. If in your possession, will you produce them?

A. I will.

Q. You are the attorney for the complainants in this case?

A. I am.

Q. Do you know the handwriting of J. Henry Fowler?

A. I do; I have received letters from him.

Q. Were those several notes in his handwriting?

A. My best recollection is that they were not. I never saw the notes but once, when I received them, and my clerk prepared the complaint.

Q. Can you, from recollection, state in whose handwriting the body of the notes was?

Q. My best recollection is that the body and the signature was the same, but whose it was I cannot say as a legal fact.

46 Q. Do I correctly understand you as saying that J. Henry Fowler told you at the times these notes were left with you that John H. Fowler had no outstanding notes unpaid?

A. If I so testified it was a mistake.

Q. Did you have any communication, orally or otherwise, with the complainant in this case upon the subject of these notes before the judgments were obtained and the executions issued?

A. I did not.

Q. Have you had any communication with him since that time upon the subject of this demand?

A. I cannot recollect positively, but think that in my letters to him

I have referred to this in connection with other business matters which I had in charge for him. I met Mr. John H. Fowler (the bankrupt) on the steamer in which his son J. Henry Fowler sailed, shortly before 10 o'clock in the morning. He said he was going to Syracuse that afternoon, and might call at my office to bid me good-bye. I do not know that he knew that I had these notes at that time; he was not present at any conversation between myself and J. Henry Fowler when these notes were spoken of. When he said he might call at my office, he did not allude to these notes or this debt. I saw him at my office that day; he called in the afternoon, about 4 o'clock; I cannot say if any one came in with him; he was not acquainted with any one in my office to my knowledge. He remained at my office a short time, and the summons and complaint were served after he
47 left my office. He did not give an admission of service; that service was made by a clerk in my office. I understood that he was staying with his son; his son was living at the Lennox House, corner of 5th avenue and 13th street, about two miles from my office. The Grand Central depot is 1½ miles above that. The steamer on which I met the Fowlers sailed about 10 o'clock in the morning; up to that time I never had any business with any member of John H. Fowler's family, except J. Henry Fowler, and was not interested in any business that John H. Fowler was interested in, except these notes. I have seen John H. Fowler since that time; I did not see him until executions had been issued on both these judgments; I think I saw him about the 17th of June, 1875, at Syracuse; I did not go there for that purpose; that was his place of business then; I have seen him since at my office in New York, in the summer of 1875; he came to tell me of the headway he was making settling with his creditors. When I first went to Syracuse in June, 1875, my business was in consultation with Irving G. Vann, whom I had retained as counsel to protect the interest of Gardner A. Sage, jr.; the question of John H. Fowler's compromising had not then at this time been presented. I cannot say whether I saw John H. Fowler more than once in my office in the summer of 1875; it was more than once; I saw him in Syracuse in September; I was
48 there on business: I had no conversation with him on the subject of this controversy; it was a casual meeting; I was in attendance at the Democratic convention; I had not been J. Henry Fowler's only counsel, so far as I know, up to the time the notes were given; so far as I know our office had been; J. Henry Fowler had been the attorney in suits for Mr. Sage as well as the attorney in fact. I directed the complaint to be prepared in the second suit; I directed where to send it for service; I had it sent to Messrs. Ruger & Jenney, Syracuse, N. Y.; I did not know they were attorneys for Mr. John H. Fowler in bankruptcy. Before J. Henry Fowler left for Europe I asked him who there was in Syracuse to whom I could send the summons and complaint for service on his father in case I commenced action on the notes, and he told me that he knew Col. Jenney, who was the former partner of Judge Wallace, and if I sent papers to them they would be served. I don't know if I have sent other papers to their office to be served; I delayed issuing the execution in the first suit partly because the second suit was not yet in judgments, and also to carry out the request of J. Henry Fowler that I would not unnecessarily press his father.

Q. Can you assign any reason for issuing the execution at the time you did on the $4,000 judgment?

A. I can.

Q. Why?

49 A. I had received an intimation that John H. Fowler was not in as good circumstances as he or his son would have had me believe.

Q. From what source did you receive that information?

A. My impression is that I received it from Mr. Daniel B. Childs, who has an office in the same building as my own.

Q. Was that before or after you got the judgment?

A. After.

Q. Had you any conversation with him as to Fowler's business condition before that?

A. No.

Q. You knew that Childs was from Syracuse?

A. I did, about that time.

Q. Did you communicate with John H. Fowler before issuing execution?

A. I did not.

Q. If desirous of saving him from embarrassment as you have stated, why didn't you, upon receiving a suggestion from Childs, write him before issunig execution?

A. Because my instructions were positive and peremptory to protect Gardner A. Sage's interest at all hazards, and when I received the report which I did I considered it my professional duty to pursue the course I did.

50 Q. Having received instruction to protect the interest of Gardner A. Sage at all hazards, why did you delay issuing executions upon the recovery of the judgment?

A. Because judgment had not been perfected in the second action, and I was fearful that if I should issue execution upon one judgment it might prejudice the collection of the second; and besides, I had received no intimation that I was prejudicing the interest of my client by the delay.

Q. Did you see or have any communication, oral or otherwise, with John H. Fowler or J. Henry Fowler, or a person a member of the family of either, upon the subject of John H. Fowler's business between the time you left the steamer on the 28th of April and the time you issued executions upon these judgments?

A. None whatever, except the letter from Mr. Fowler, asking for delay.

Q. Have you given all the conversation which you now remember bearing upon the business of John H. Fowler, which took place between you and J. Henry Fowler previous and up to the time you left him upon the steamer on the morning of the 28th of April, 1875?

A. My conversations with J. Henry Fowler were frequent, and about the same matter gone over at each interview, and I have given the substance of all the conversations as near as I can remember.

51 Q. Did you know at that time that John H. Fowler resided at and did business in the city of Syracuse?

A. I did.

Q. Did you know that that business was a retail dealer in boots and shoes?

A. I did know that fact, as a fact, but when I ascertained it I do not know, but my impression is that it was before I received the notes.

Q. At the same time you issued *issued* execution upon the $4,000 judgment to the sheriff of Onondaga County, did you issue an execution on the same judgment to the sheriff of Cayuga County?

A. I did not.

Q. Was an execution issued at any time to the sheriff of Cayuga County?

A. After my interview with Mr. Vann, in which I instructed him to act for Gardner A. Sage, jr., I received a letter from him to the effect that he had issued an execution to the sheriff of Cayuga County, having ascertained that John H. Fowler (the bankrupt) had property in that county. I was not present at the sale of the property in either Cayuga or Onondaga County. My impression is that Mr. Vann and myself had some consultation as to whether the sheriff was enjoined by the order of the bankruptcy court, and we came to the conclusion that the sheriff was not restrained. I do not personally know
52 whether the sale was anterior to the issuing of the injunction.

Q. Why did you have a consultation with Mr. Vann with regard to the right of the sheriff of Cayuga County to sell upon the execution in disregard of the injunction, if you were without information upon the question of its having been granted?

(Objected to by complainant's counsel as assuming a fact not proven, and as immaterial and irrelevant.)

A. If I did have such consultation with Mr. Vann it must have been after the issuing of an injunction in bankruptcy proceedings. My impression is that I did not know how much property the sheriff of Onondaga had levied upon before the levy of the sheriff of Cayuga County. I did not give any instructions or direct any to be given to the sheriff of Cayuga County as to the time or manner of sale of the property levied on by him. My interview with Mr. Vann was about the 17th of June. I cannot recollect, with reference to this date, when it was that I ascertained when it was that the execution to the sheriff of Cayuga had been issued; the times were close together; the interview was previons to the issuing of the execution. I knew that a petition had been filed and an injunction had been issued, and I went to Syracuse in consequence of that; it had not been served upon me, as the attorney of Mr.
53 Sage, so far as I recollect. I have got an indistinct recollection of receiving a copy by mail, but further than that I have no recollection now.

Q. Since your examination this forenoon have you made examination in your office for the notes upon which suits were brought against John H. Fowler (the bankrupt) as requested?

A. I have made such search as the limited time afforded me, but I was unable to find them. I found an envelope in my safe which I think was the one in which they were deposited.

Q. And you still have no recollection as to what became of the notes, and no knowledge as to where they now are?

A. As before stated, I have no recollection of seeing these notes but twice; once when they were delivered to me, when I put them in my safe, and again when I delivered them to my clerk to prepare the complaints. I have no recollection what became of the notes, and no knowledge as to where they now are.

Redirect examination:

(Counsel for complainant offers in evidence the letter referred to by him, in his direct examination, from John H. Fowler, bankrupt.

Objected to by defendant's counsel as incompetent.

Counsel for complainant offers the letter to correct any irregularity which might exist from the failure to produce the original.)

4 During my cross-examination my recollection has been refreshed in regard to the notes in controversy. I now recollect that the

original indebtedness from John H. Fowler (the bankrupt) to the complainants was upon promissory notes made by R. Carman Combes, and discounted by the complainants; that these notes were returned, and the notes sued on were the original notes of John H. Fowler (the bankrupt). The exact number of these new notes I cannot now recollect. In my conversation with J. Henry Fowler he gave me to understand that there were no other obligations outstanding against his father matured and unpaid, except this indebtedness to Sage, and that, as his father had a large stock of goods, he was satisfied that if his father could meet his other obligations we would run no risk in giving time to him on this Sage indebtedness.

(The foregoing evidence, in regard to conversations between the witness and J. Henry Fowler, was in due time objected to by the defendant's counsel as incompetent.)

I did not mean in my direct examination to testify that J. Henry Fowler told me that John H. Fowler (the bankrupt) had no matured obligations unpaid except as last above stated.

My office is at the corner of Broadway and Warren street, opposite the county court-house, and I now recollect that on the morning
55 that J. Henry Fowler sailed for Europe, John H. Fowler, the bankrupt, said to me that ——

Q. What did he say?

(Objected as incompetent.)

A. He said that all his business was done in Warren street, and that in all probability he would call in my office in the afternoon to bid me "good bye."

The note which is the subject of the action in which I recovered the second judgment against John H. Fowler, I did not receive until after I had commenced the first action.

Recross examination:

Q. When did you receive it; how long after the commencement of the first action?

A. I cannot state from memory, but it must have been between the 28th of April and the 10th of May.

Q. Is that as near as you can fix the time?

A. As near as I can fix it now.

Q. From whom did you receive it?

A. My recollection is that it was sent to me from the office of J. Henry Fowler, but by whom I do not know.

Q. Who had charge of his office in his absence?

A. I don't know.

56 Q. Had you any personal knowledge of the original notes of R. Carman Combes that you have mentioned as having been retired by the notes upon which the judgments were obtained?

A. I have an indistinct recollection of seeing notes in possession of J. Henry Fowler, signed by R. Carman Combes, and which he told me had been discounted by the complainant; I have no other personal knowledge.

(The answer to the interrogatory is objected to as not being responsive.

Question repeated, coupled with the request that the witness answer the interrogatory.)

A. I cannot answer more concisely than as last above.

Q. Had you personal knowledge of the discount of the R. Carman Combes notes by this complainant?

A. I had not.

Q. Was your knowledge or information upon that subject derived from conversations with J. Henry Fowler?

A. It was.

Q. Were the notes upon which the judgments in question were obtained as you understood given to retire the R. Carman Combes notes which you have mentioned?

A. That is the best of my recollection now.

57 Q. What do you wish to be understood as meaning when you say that the notes sued were the original notes of John H. Fowler (the bankrupt.)

A. Notes in which he was the maker in distinction to endorser, and that is the extent of the meaning of my testimony.

Q. Have you since the recess in this examination had a conversation or conversations with J. Henry Fowler upon the subject of these notes, by which your recollection has been refreshed?

A. I have have had such conversation, but my recollection was not refreshed thereby, but was refreshed solely by the cross-examination by the counsel of the assignee in bankruptcy, and I made a minute of the fact at the time of such cross-examination so that I might correct my testimony on my redirect-examination.

AMROSE MONELL.

Taken, subscribed and sworn to before me, this 8th day of June, 1876.

JOSEPH MEEKS,
Notary Public, New York County.

AMBROSE MONELL, being further examined, testified as follows:

I did not recollect until this evening that I was present at the time of the service of the summons and complaint on John H. Fowler; I now remember that Mr. Fowler came to my office just as I was

58 about to leave for the day, and he and I left the office together; I think I invited him to go to Delmonico's for some refreshments, and while there my clerk came in and to my surprise handed Mr. Fowler the summons and complaint; I immediately left Mr. Fowler and went to my home alone.

AMROSE MONELL.

Taken, subscribed and sworn to before me, this 8th day of June, 1876

JOSEPH MEEKS,
Notary Public, New York County.

GEORGE N. LANGE, a witness called in behalf of complainant, being duly sworn, testified as follows:

Q. How old are you?

A. I am seventeen years and upwards; I am a clerk in the office of Elbridge T. Gerry and Ambrose Monell, in the city of New York, and was such in April, 1875. I know John H. Fowler (the bankrupt).

Q. Do you recollect serving him with a summons and complaint in the month of April, 1875, in an action in the supreme court in the State of New York, county of New York, in which Gardner A. Sage, jr., was the plaintiff and John H. Fowler was the defendant?

A. I do.

59 Q. Where was such service made?

A. At Delmonico's, on the corner of Broadway and Chambers streets, in the city of New York.

Q. Do you recollect the day of the month when you served him?

A. I think it was the 28th of April; that is what the office register says.

Q. Had you seen Mr. Fowler at any time before the day you so served him; and, if so, where?

A. I had seen him at the office.

Q. Before, or at the time, you saw John H. Fowler at Mr. Monell's office, had Mr. Monell given you any instructions with reference to serving a summons and complaint on said Fowler?

A. He had.

Q. What instructions did he give you?

(Objected to.)

A. Mr. Monell told me that probably Mr. Fowler would come around to the office that afternoon and that I should follow him up and serve him.

Q. Did he tell you that he did not wish him served in the office?

A. I don't know whether he did or not, but I know it is a rule of the office never to serve a person in the office.

Q. What time did you see Mr. John H. Fowler in Mr. Monell's office on the day that you served him?

60 A. I don't know whether it was before or after 5 o'clock, but it was around that time.

Q. When Mr. Fowler left Mr. Monell's office did you follow and serve him with a summons and complaint?

A. I did.

Q. What did you do?

A. I followed him to Delmonico's and there handed him the papers; I left them with him and walked out. I subsequently made an affidavit of the service of said summons and complaint.

Cross-examined.

Q. Had you ever seen Mr. John H. Fowler before that period?

A. I had seen him once or twice, I think, in Mr. Monell's office; I think once when Mr. Monell was not there, and once when he was; I saw him in the same week when Mr. Monell was not there, or the week before; he came there and inquired for Mr. Monell; he came alone; I don't know if Mr. Wilkinson was in the office or not. The first time that Mr. Fowler called he did not see Mr. Monell; when he did see him it was after that, one or two days after that, and that was two or three days before I served the papers, or perhaps longer, and on that

61 occasion he came alone; he saw Mr. Monell in his own private room; they remained in the private room together for half an hour to three-quarters of an hour; they were there alone.

Q. At that interview did you hear any conversation between *him*?

A. No. Mr. Fowler never remained long; I don't think the door was closed; I was in the office alone. The next time I saw him was that day I made the service; I have seen him at the office since the service; I don't know how long after; I think it was two months after; I think Mr. Monell was not in; I think he called the same day again and did not see Mr. Monell. He called again the next day; he went in the private office and came right out again; he was not in more than fifteen minutes. The next time I saw him was in Warren street; I saw him out of the window; he did not come in the office at that time. Two or three days after that I saw him in the office; he was in Mr. Monell's private office; I had to go down to the post-office, and when I returned he had gone; I do not remember seeing him after that. I don't think I made out the papers I served on him; I made copies of papers in 1875.

Delmonico's is one block above our office. I was in the *the* habit of serving papers from the office. I had served papers before that, and have since; I had served other papers, but I do not remember the names. Mr. Fowler was talking to Mr. Monell at Delmonico's when I made the service; he did not express any surprise at being sued. I handed
62 him the papers and walked out. Mr. Monell went out of the office with Mr. Fowler. As soon as Mr. Fowler came in the office he and Mr. Monell went out, and I went out right after them.

Redirect examination:

Q. At the time when you say you served John H. Fowler, had Mr. Monell locked up the safe and left the office for his home?

A. I think he had.

Q. Did he come back to the office that day?

A. I don't know; I did not come back; I had locked up the office.

Q. How long before the service of the papers by you had Mr. Monell given you the instructions which you have testified to?

A. It was the same day, after 12 o'clock. It was before Mr. Fowler had come to the office.

Q. He did not say anything to you about the service while Mr. Fowler was in his office?

A. No, sir.

Redirect:

Q. Did he say this is Mr. Fowler upon whom the papers were to be served?

63 A. No; he came out and said, "That is Mr. Fowler in there," or words something like that.

Redirect:

Q. What is the arrangement of Mr. Morell's office in regard to the rooms?

A. There are 3 rooms, one used by Mr. Gerry, one by Mr. Monell, and the outer office by the clerks.

Q. Was, or was it not, an unusual occurrence for Mr. Monell to see callers in his private office?

A. He most generally saw the clients in his private office. It was not an unusual thing for him to see callers in his private office. The door of his private office is generally open.

GEORGE W. LANGE.

Taken, subscribed, and sworn to before me this 8th day of June, 1875.

JOSEPH MEEKS,
Notary Public, N. Y. County.

J. HENRY FOWLER, a witness called in behalf of complainant, being duly sworn, testified as follows:

Q. What is your business?

A. I am a counsellor at law, practiscing in the city of New York.

64 Q. Do you know Gardner A. Sage, jr., the complainant, and how long have you known him?

A. I do; I have known him for more than seven years last past.

Q. Are you related to him in any way?

A. I am by marriage; his mother is my wife's cousin, my wife being a niece of the late Richard F. Carman.

Q. What business relations have you had with the complainant, during what period, and to what extent?

A. I have acted as his legal adviser and attorney in fact for about five years last past, and have received and disbursed for him about a quarter of a million of dollars. Mr. Sage, the complainant, is a man of large wealth. I know Ambrose Monell, the witness who last testified.

Q. About how long have you known him, and what business transactions, if any, have you had with him?

A. I have known Mr. Monell three years, or more, and he has acted with me, together with Mr. Elbridge T. Gerry, his associate, as counsel in several cases, as he did also in this case, representing me more especially in this case in the prosecution of the indebtedness of John H. Fowler, the bankrupt), to the complainant after my departure to Europe.

Q. When did you leave for Europe?

65 A. In the month of April, 1875; I cannot exactly fix the day; it was in the latter part of the month; if the 28th fell on Wednesday. I sailed on the 28th.

Q. Prior to your departure for Europe, did you have any interviews and conversations with Mr. Monell with reference to his taking charge of business matters for you during your absence; and, if so, how many, and where had?

A. As early as December, 1874, I had frequent interviews and conversations with Mr. Monell, at my office, in court, and at his office, relative to my going to Europe, with a view of engaging Mr. Monell to represent me as counsel, &c., in several cases which were likely to be reached and required attention during my absence.

Q. Prior to your departure for Europe, did you place in Mr. Monell's charge any business matters; and, if so, what was their nature?

A. I did; they consisted of pleadings in various suits; also, papers, bonds, and mortgages belonging to Gardner A. Sage, jr., upon which interest principally fell due in May, 1875, other evidences of debt of my client, and the notes in suit.

Q. In whose handwriting were these notes, and by whom were they signed?

(Objected, on the ground that the notes are the best evidence.)

A. In the handwriting of the bankrupt, John H. Fowler, and signed by him.

66 Were they in your handwriting?

(Objected, on the same ground.)

A. They were not.

Q. What is the relationship between you and John H. Fowler?

A. He is my father.

Q. From whom did you obtain the notes which you say were signed by John H. Fowler, and by you delivered to Mr. Monell?

A. From John H. Fowler, the maker.

Q. What consideration, if any, was there for these notes?

A. The notes of R. Carman Combes, which were accommodation notes, and which I discounted as the attorney-in-fact of Gardner A. Sage, jr, by virtue of his power of attorney to me, which moneys I paid over directly or through John H. Fowler's bank to him in Syracuse, or the bank at which he did business, to John H. Fowler, as agent or otherwise.

(Objection by counsel for defendant to the evidence relating or having reference to any power of attorney held by the witness as incompetent and secondary.)

Q. Did you discount for John H. Fowler, acting for Gardner A. Sage, jr., and using his money, certain promissory notes made by R. Carman

Combes? and, if yea, to what amount, between what periods,
67 and state the amount of money so paid by you to John H. Fowler.

(Objected to as leading.)

Q. What business transactions have you had, acting in behalf of Gardner A. Sage, jr., with which R. Carman Combes was connected?

(Objected as immaterial.)

A. I had discounted the notes of R. Carman Combes, upon the application of John H. Fowler for said Fowler's benefit, to the extent of several thousand dollars; about $8,000, if not more; using the money of Gardner A. Sage, jr., and for his benefit, which notes were discounted at the rate of seven per cent. and the amount of which notes John H. Fowler had the benefit, less the discount, and which should appear upon his books.

Q. Had you prior to April 1st, '75, using the money and for the benefit of Gardner A. Sage, jr., discounted notes for John H. Fowler which had been paid by said Fowler at their maturity?

A. I had.

Q. Shortly before your departure for Europe did you have in your possession promissory notes which you had discounted for said Fowler with complainant's money, and for his benefit, and which were unpaid?

A. I had.

Q. To what amount?

68 A. $5,000 or more.

Q. Had any of these notes matured prior to your departure for Europe?

A. Several of them had matured.

Q. Were these notes drawn by R. Carman Combes?

(Objection as leading and as secondary.)

Q. Have you these notes in your possession, or under your control, or do you know where they now are?

A. The original notes of R. Carman Combes were returned to John H. Fowler upon their maturity, and retired by his delivering to me his notes in extension therefor. They are not in my possession, and not in my control.

Q. By whom were they drawn?

A. By R. Carman Combes.

(Objection by defendant's counsel.)

Q. Did you have any conversation with John H. Fowler, at or before the maturity of these notes, with reference to their payment?

A. I did.

Q. What did he say?

(Objected to.)

A. After the first note fell due I demanded payment of him by letter, and he requested me in response thereto by letter to wait until he came to New York, which he said would be in a few days, and he would arrange as to the payment thereof.

69 (Defendant's attorney objects in due season as to these letters and their contents.)

He finally came to New York and I saw him.

Q. Did you have any conversation with him in reference to these notes; and, if so, what was it?

(Objected to as incompetent.)

A. I did. He informed me that he had been disappointed in his receipts from his business, and was unable to pay that note, and offered me his hote for the same amount, to take up the same, which I accepted,

and as fast as these notes matured I accepted these notes in place of them, he telling me that he had reason to believe that he would shortly obtain money from his wife and from his business sufficient to take up these notes in suit.

Q. Do you know as a fact whether your mother was negotiating a sale at this time of her Syracuse property?

(Objected as immaterial.)

A. I knew that she was endeavoring to sell her property, and had offers made for it.

Q. Did you have any conversation with R. Carman Combes, with reference to surrendering the notes which you say you surrendered for the notes in suit?

A. I did.

Q. What was it?

(Objected to.)

70 A. About the time of the maturity of the first note made by Mr. Combes, which I discounted, in a general conversation Mr. Combes told me that he should decline giving John H. Fowler any more of his accommodation paper, to take up any such paper which was still outstanding and unpaid.

Q. Prior to the giving of the notes of R. Carman Combes, above referred to, had said Combes helped your father financially?

A. He had.

Q. Did you receive from John H. Fowler notes for the full amount of the notes surrendered, and which you say you discounted with complainant's money?

A. I did up to the time of the maturity of the first notes before my leaving for Europe.

Q. What did you do with these notes last referred to?

A. A few days before my departure for Europe, I delivered them to Mr. Ambrose Monell, as heretofore referred to. I had previously spoken to Mr. Monell in regard to this indebtedness of my father to Gardner A. Sage, jr.

Q. What instructions did you give Mr. Monell with reference to this indebtedness on the evidence thereof?

(Objected to.)

A. I told him that I was very much annoyed to think that when my father knew several months prior that I had engaged passage to
71 Europe for myself and family, that he had compelled me to renew the original notes, and after renewing them I had additionally loaned him from my own funds about $500, which latter sum, together with at least the amount of the two first notes, he would surely pay before I went abroad; that I was sorry to hear that he had been disappointed, and would probably be unable to fulfill that promise in whole, and that I should be obliged to leave those evidences of debt against him in his, Mr. Monell's, hands to collect as he saw best.

Q. (Question repeated.)

A. I additionally told Mr. Monell, after I had placed the notes in suit in his possession as my representative, that I desired him to protect the interest of the complainant our client, as against John H. Fowler, notwithstanding that he was the author of my existence. At the same time stating to Mr. Monell that from John H. Fowler's representations to me, I believe it was a question of a reasonable time within which he would pay these notes in part or in whole, and that I believed he was responsible, and if he would pay on account of these notes a reasonable

sum to be as lenient with him as possible without jeopardising the interest of the complainant herein.

Q. Did you ever send your father to Mr. Monell's office on any business not connected with this controversey, and before your departure for Europe?

72 A. I did send him to Mr. Monell's office on two or three occasions just before I sailed for Europe, with papers or mortgages which I desired to leave in charge of Mr. Monell, but with no papers or message in connection with this controversy, and with no reference tc Mr. John H. Fowler's affairs.

Cross-examination:

Q. What relation is R. Carman Combes to your father's family?

A. He married my father's neice.

Q. Is he a man of wealth?

A. He is so reputed to be, and has been for several years past. My father at one time was engaged in business in the city of New York.

Q. Did he fail in business here?

(Objected to.)

A. He did, at the breaking out of the war.

Q. Was that the last time he failed in New York?

(Objected to.)

A. It was.

Q. Subsequent to that failure did he do business as the agent of and in the name of R. Carman Combes?

(Objected to.)

73 A. He did, commencing soon after his failure in the city of New York. He continued doing business as such agent in New York, but I don't remember how long—about two years or thereabouts. He subsequently carried on business in Syracuse as agent for R. Carman Combes.

Q. Down to what time did he conduct business as agent for Mr. Combes in Syracuse?

(Objected to.)

A. Down to the summer of 1874. I don't recollect the month.

Q. At the time of his failure in New York, at the beginning of the war, what business did he carry on, and was it a wholesale or retail business?

(Objected to.)

A. He carried on the wholesale and retail business, and as manufacturer of boots and shoes in Syracuse and New York.

Q. Did R. Carman Combes receive or take into his possession the whole or part of the goods which Mr. Fowler had at the time of that failure?

(Objected to.)

A. He purchased what was left at the hands of the assignee.

Q. Were these goods used in the commencement of business anew, as the agent of Mr. Combes?

(Objected to.)

A. I do not know.

74 Q. Do you mean to say that you do not know what Combes did with these goods?

A. I do. I was in college at the time.

Q. Was Mr. Combes ever engaged in the boot and shoe business to your knowledge, except through the agency of your father?

A. I do not know; not to my knowledge.

Q. Coming down to the summer of 1874, did your father receive from R. Carman Combes the stock of goods which he was using in his business as agent of R. Carman Coombes?

(Objected to.)

A. I believe he did.

Q. From the time of that transfer up to the time of his going into bankruptcy did he carry on business in his own name?

A. I believe he did.

Q. Had he any means, to your knowledge, at the time of the transfer of the goods from Combes to him?

(Objected to.)

A. He had.

Q. How much?

A. $5,000 that he received from his wife, $2,000 that I advanced him.

Q. Was he indebted to his wife for that $5,000, and to you for the $2,000?

75 A. He was. I had notes for my indebtedness; my mother had a note.

Q. Were either of these notes paid in the spring of 1875?

(Objected to.)

A. The $2,000 note was paid. The $5,000 was never, to my knowledge. I think the $5,000 note was a demand note. I lent him $500 that I have mentioned before I went to Europe

Q. Was he indebted to you in that sum at the time you went to Europe?

A. He was. I had a note for it.

Q. Had he promised to pay that to you before you went abroad?

A. He had.

Q. And had failed to keep that promise?

A. He had.

Q. Your note was past due at the time you went abroad?

A. Past due by virtue of a demand whcih I had made for its payment.

Q. When was that demand made?

A. Several times before I went to Europe; at least three weeks before.

Q. Had payment upon your mother's note been demanded before you went to Europe?

(Objected to as immaterial.)

A. I don't recollect.

76 Q. At the time you went to Europe was your father also indebted to R. Carman Combes?

A. I believe not; he was not to my knowledge, as far as I know.

Q. The notes of R. Carman Combes, which you have mentioned, did you ever see?

A. I did, and held a long while; I first saw them when I discounted them.

Q. When did you discount them?

A. At divers times during the latter part of 1874.

Q. Have you any memorandums to show when you discounted them?

A. I have an envelope, which I hold in my hands.

Q. Can you now tell, after examining that, when you discounted the R. Carman Combes notes?

A. I cannot.

Q. Can you tell from any other entries when you discounted these notes?

A. I think I have another memorandum at my office.

Q. What is it in?

A. On a loose paper. I have some of the vouchers on which I loaned the money, and which I took off on a paper, which paper I think I have in my office.

Q. How did you pay the money upon this discount of the notes?

77 A. Usually on a draft to the New York State Banking Company of Syracuse, or by a check to them.

Q. What banks did you draw checks upon to pay these discounts?

A. Union Trust Company, or Mechanics' Bank of New York.

Q. Those notes you discounted at the request of your father?

A. I did.

Q. How many were there?

A. Five, I think, were the origin of this indebtedness. Five notes, I think, of $1,000 each.

Q. And were they all made by R. Carman Combes?

A. I believe they were.

Q. And were they all payable to the order of your mother, Mrs. Ellen A. Fowler?

A. I believe so.

Q. Where was the application made to you by your father to discount the first note?

A. At my office in New York. No one was present but myself and him.

Q. Where did he make the application to discount the other notes?

A. Possibly in Syracuse when I was there.

Q. Were they discounted upon his application, or upon your mother's, those in Syracuse?

78 A. Directly by him.

Q. Am I to understand you to say that you have any of the vouchers in the shape of checks given for these notes?

A. I have; they are to be found in my safe in the Safe Deposit Company.

Q. Do you know when the first of the R. Carman Combes notes matured?

A. I do not now recollect.

Q. Can you tell when any did?

A. I think I can.

Q. How?

A. By the envelope which I hold in my hand, and which contained them.

Q. Referring to the memorandum upon the envelope, state when the notes matured.

A. From the memorandum it appears that two notes fell due in the month of March; the first, 18th of March, 1875; the second, March 31, 1875; the third, April 13, 1875; the next, April 21, 1875; and the other, May 8, 1875.

Q. You held those notes past due down to the times that those notes you gave to Mr. Monell for collection were given?

A. I did not.

Q. What had you done with them?

A. My impression is that I returned them to John H. Fowler.

79 Q. Were you present at the examination of John H. Fowler before the register in Syracuse, in regard to the origin of the notes which you left with Mr. Monell for collection?

(Objected to as immaterial and incompe'ent.)

A. I was not.

Q. Were not those notes which you left with Mr. Monell for collection given by your father on the 27th or 28th of April, 1875?

A. No, sir.

Q. Were they not given at one time?

A. No, sir.

Q. Where were they given?

A. Some in Syracuse, and others in New York.

Q. When those were given in Syracuse were you there?

A. Yes, sir.

Q. And when the notes were given in New York was your father here?

A. Of course he was; on two occasions to my positive knowledge.

Q. When you were in Syracuse did you make it your home with your father and mother?

A. I did.

Q. And when in New York did he stop at your house?

A. Sometimes.

80 Q. You knew your mother owned the dwelling house in which the family lived in Syracuse?

A. I did. She has owned it for ten years or more, I think.

Q. What time did your father come to New York on the occasion of your departure for Europe in 1875?

A. 2 or 3 days prior. He made my house his stopping place, partially so.

Q. When was he in New York next previous to that?

A. I cannot remember.

Q. Was he here in the spring of 1875, or winter of 1875, after January 1st?

A. My impression is that he was. I am not positive.

Q. Were you in Syracuse during the winter or spring of 1875?

A. I was within 3 months of my going to Europe; I think within 6 weeks; I stayed there only a day or so; my visit there was to visit my father's family and bid them good bye.

Q. Did you transact any business with your father there?

A. I did.

Q. What, sir?

A. I looked about his store, inquired in reference to his stock, as to his general business. I cannot state now definitely any other
81 business. At that time, or prior thereto, I arranged that my father should secure my mother for his indebtedness to her of $5,000, and obtained his note therefore payable to my mother. That is all that I have a present recollection of.

Q. When was you in Syracuse next before the time you have mentioned?

A. I think in the fall of 1874.

Q. What time in the fall?

A. In the early part. I saw my father there; I transacted business with him there.

Q. Was your father in New York in the fall and winter of 1874, and prior to January 1, 1875?

A. Quite likely, several times to my recollection he was.

Q. How long previous to the 1st of January, 1875; was he here in the winter of 1874?

A. I think he was here in December, 1874. I do not recollect distinctly now.

Q. Where is your father now?
A. I think at St. Thomas.
Q. When did he go there?
A. In January or February. I expect him to return, but when, I could not tell. He went there for his health.
Q. What is your age?
A. Thirty-three years old.
Q. Did your father give to you the five notes that are included in these judgment rolls?
82 A. He gave me four of the notes at least.
Q. Whom did he give the other to?
A. I cannot remember.
Q. Were they all given before you went to Europe?
A. He gave me four.
Q. Was any one authorized to take the fifth note?
A. Mr. Monell was authorized by me, in the event of the fifth note not being paid, to take John H. Fowler's note in lieu thereof.
Q. Did anybody else have any authority of that nature?
A. I don't remember, unless it might have been Mr. Combes.
Q. Do you wish to be understood as testifying that you authorized Mr. Monell to take your father's note for R. Carman Combes' note, maturing after you went to Europe?
A. I so did, to the best of my recollection.
Q. Did you authorize R. Carman Combes to exchange his note for your father's note after you went to Europe?
A. I don't remember.
Q. Have you any recollection or idea that you authorized any one besides Mr. Monell, or possibly Mr. Monell, to exchange that note?
A. I think not.
83 Q. Where was your office when you left for Europe?
A. No. 5 Wall street. Mr. Lester Newell was in my office; he transacted business for me; he looked after some minor suits and attended to general business for me.
Q. Did you leave any of Mr. Sage's notes with him?
A. I did not.
Q. Did you hear Mr. Monell testify that he received the last note from somebody in your office after you left for Europe?
A. I did.
Q. Assuming that note to bear date on the 8th day of May, 1875, and to be written payable on demand, can you account for the giving of it in any other way than that it was taken by you before your departure for Europe?
A. I can, sir.
Q. How?
A. That Mr. Fowler sent it to New York to take up the other note which I said I would not deliver the Combes note to him, due May 8th, 1875, unless he paid it before I departed for Europe. Otherwise, I now recollect of having placed it in my safe and left it there during my absence in Europe, and directed John H. Fowler to send Mr. Monell a new note after it had matured, or else send him the money wherewith to take up the same.
84 Q. And this you now recollect?
A. I do.
Q. Your father did not attend to your office business after you left for Europe, did he?
A. He did.

Q. What?

A. He attended to seeing Mr. Clarke, of the firm of Fithian & Clarke, in reference to obtaining a settlement with a house in New York against which I held a claim for a house in Paris.

Q. Do you know that your father has testified that this note was given before you went to Europe, and dated May 8th, 1875, the time when the note it was given to retire would have matured?

(Objected to as not best evidence, and as immaterial and irrelevant.)

A. I do not.

Redirect examination:

Q. Mr. Monell never had any of the R. Carman Combes notes in his possession, did he?

A. No, sir.

J. HENRY FOWLER.

Taken, subscribed, and sworn to before me this 8th day of June, 1876.

JOSEPH MEEKS,
Notary Public, New York County.

85 At a special term of the circuit court of the United States of America, for the northern district of New York, in the second circuit, held at the city of Utica on Monday the 13th day of November, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the Hon. Alexander S. Johnson, circuit judge.

GARDNER A. SAGE, JR. vs. JONATHAN G. WYNKOOP, ASSIGNEE, &c., IMpleaded, &c.	In equity.

On filing stipulation signed by the solicitors for the respective parties, and on motion of A. J. Northrup, defendant's solicitor, ordered that the time for taking proofs in the above action be, and the same is hereby, extended until the first day of December, 1876, and all informalities and irregularities of the parties in regard to taking
86 proofs herein, by reason of lapse of time prior to this stipulation, are hereby expressly waived.

It is further ordered, that C. W. Smith, esq., be, and he hereby is, appointed special examiner for the purpose of taking proofs for the parties in the above-entitled action at Syracuse, N. Y., pursuant to the 67th Rule in Equity.

A true copy.

Witness my hand and official seal at my office in Utica this 14th day of December, A. D. 1876.

[L. S.] CHARLES MASON, *Clerk.*

United States circuit court, northern district of New York. In equity.

GARDNER A. SAGE, JR. *vs.* JONATHAN G. WYNKOOP, ASSIGNEE, &c., IMpleaded, &c.	

Deposition in the above-entitled cause on part of the defendant
87 taken before me, Cornelius W. Smith, as special examiner, appointed such by the annexed order, at the office of Messrs. North-

rup & Wicks, 13 and 14 Syracuse Savings Bank Building, in the city of Syracuse, N. Y., on the 27th day of November, 1876, at which time Irving G. Vann, esq., appeared for the complainant, and A. Judd Northrup, esq., and George N. Kennedy appeared for the defendant.

Upon request of the complainant, the taking of the depositions was adjourned by consent of counsel until Dec. 11th, 1876, at same place and time of day as above specified.

And the respective counsel make and file with me a stipulation extending the time for the taking of proofs to and until Dec. 15th, 1875.

C. W. SMITH,
Special Examiner.

88 U. S. circuit court northern district of New York. In equity.

GARDNER A. SAGE, JR.
vs.
JONATHAN G. WYNKOOP, AS ASSIGNEE, &c., impleaded, &c.

It is hereby stipulated that the time for taking proofs herein be and the same is extended to the fifteenth day of December, 1876.

Nov. 27, 1876.

IRVING G. VANN,
Counsel for Complainant.
A. JUDD NORTHRUP,
Solicitor for Defendant.

OFFICE OF NORTHRUP & WICKS,
Syracuse, Dec. 11th, 1876.

Parties appeared pursuant to adjournment.

Present: J. Henry Fowler, esq., and Irving G. Vann, counsel for complainant, and A. Judd Northrup, esq., and Geo. N. Kennedy, counsel for defendant Wynkoop, assignee, &c.

89 Counsel for defendant offer in evidence certified copy of judgment roll, New York supreme court, city and county of New York, Gardner A. Sage, jr., plaintiff, against John H. Fowler, defendant.

Judgment May 19, 1875, in favor of plaintiff against defendant, for damages	$4,033 63
Costs	18 37
Total	$4,052 00

AMBROSE MONELL,
Plaintiff's Attorney.

Marked defendant's exhibit No. 1, of December 11, 1876.

And also a transcript of same judgment, as docketed in Onondaga County clerk's office, May 29, 1875, marked defendant's Exhibit No. 2, of December 11, 1876.

Also offer in evidence a certified copy of another judgment roll, same plaintiff against same defendant, in same court and county, and same attorney.

Entered in office of clerk of city and county of New York, in favor of plaintiff against defendant, June 2d, 1875	$1,004 86
Costs	18 42
Total	$1,023 28

Marked Defendant's Exhibit No. 3, of December 11, 1876.

90 And also a transcript of said last above judgment from the docket of the clerk of Onondaga County.

Judgment docketed in said county June 3, 1875, at 11 o'clock a. m., marked Defendant's Exhibit No. 4, of December 11, 1876.

Also execution and the endorsements thereon as to time of receipt and levy thereunder, on the first judgment above described, as Exhibit No. 1, marked Defendant's Exhibit No. 5, of December 11, 1876.

Also execution and endorsements thereon as to time of receipt, and of levy thereunder on the second judgment above described as Exhibit No. 2, marked defendant's Exhibit No. 6, of December 11, 1876.

Defendant also offers in evidence a certified copy of the petition in bankruptcy of John H. Fowler, together with the schedule of assets and liabilities of the bankrupt, sworn to by him on the 1st day of June, 1875, and filed in the office of the clerk of the United States district court in bankruptcy, at Buffalo, on the 3d day of June, 1875, at 2 o'clock p. m. Bankruptcy case No. 4749.

Plaintiff objects to this evidence as incompetent, immaterial, not binding upon the plaintiff.

Certified copy of same to be produced, &c., marked Defendant's Exhibit No. 7, of December 11, 1876.

91 EDWIN A. BENNETT, a witness produced on the part of the defendant, being duly sworn, did depose and say as follows:

Q. What is your age?

A. Fifty-two. I reside at No. 76 Burnet street; occupation, shoe clerk. I am acquainted with John H. Fowler, and have known him since 1861; he was engaged in boot and shoe business at retail at No. 3 Wieting Block, in the city of Syracuse. I was at one time a clerk in his store; it was from 1861, for about five years, and also in 1875, for about four weeks, perhaps two months; my last employment continued up to the time he filed his petition in bankruptcy; I was engaged selling goods. Mr. Fowler's son, Orville, was behind the desk as bookkeeper. I do not know where John H. Fowler now is; I couldn't say when I saw him last.

Q. Do you know of John H. Fowler's buying goods of different persons between the 28th day of April, 1875, and the 3d day of June, 1875, which came into his store at Syracuse.

(Objected to by plaintiff, as immaterial and incompetent.)

A. I know that goods came into the store between those dates, but I can't say that he bought them.

Q. Can you state some of the houses from which they came?

92 (Plaintiff objects same as before, and because even John H. Fowler is not shown to be connected with them.)

A. Yes, sir.

Q. State some of the houses from which they came.

(Same objection as last before.)

A. From Whitelam Brothers, here in the city of Syracuse; Mallon and Houghton, of Boston, Mass.; Ellison & Stoddard, of Rochester; and from Wm. O. Headley & Son, of New York City. I do not remember any other.

Q. Were there goods received from other houses during this period, than those you have named?

(Same objection.)

A. Yes, sir.

Q. What was done with these goods when they were received at the store?

(Plaintiff objects, as immaterial and incompetent.)

A. Some were put into the stock and sold, and some remained in the cases.

Q. State whether those remaining in the cases were used as they were called for.

(Same objection.)

A. I think some of them were; there were some that were not.

Q. Were you there at the time the store was closed?

93 A. I was. I assisted in taking an inventory afterwards for both the sheriff and the assignee in bankruptcy.

Q. State whether these goods that came into the store between April 28 and June 3d, and which remained unsold on the 3d day of June, 1875, were included in the inventory which you thus assisted to make.

(Same objection.)

A. I think not all of them.

Q. What part of them were not included in the inventory?

(Same objection.)

A. I can't tell the amount. Some were claimed from Rochester.

Q. With the exception of the Rochester goods, were all the others included in this inventory?

(Same objection.)

A. No; I think there were others not included.

Q. Name the parties or places from which the other goods came.

(Same objection.)

A. I can't tell the parties, it is so long ago, nor the places.

Q. State whether there were or not goods received at that store which remained in the boxes unopened at the time the store was closed?

(Same objection.)

A. There were goods that had not been opened.

94 Q. Do you know if any part of them were reclaimed by the sellers after the closing of the store?

(Same objection.)

A. There were.

Q. With the exception of the goods that were thus reclaimed by the sellers were all of the goods that were received at the store while you were there included in the inventory?

(Same objection)

A. I think they were.

Q. Do you know who closed the store?

A. I think it was Wm. Evans, the under sheriff of this county.

Q. When goods were received at the store, were they compared with the bills of invoice, and were the bills checked off?

(Same objection, and witness not shown to know.)

A. The goods were generally counted and reported at the desk.

Q. For what purpose?

(Same objection.)

A. I do not know.

Q. To whom were they reported?

A. To either the father or one of the sons, whoever happened to be in the desk at the time.

Q. By whose directions was the examination of the goods and the report at the desk made?

A. Generally by Mr. John H. Fowler himself.

95 Q. What other persons were engaged in the store during the time you were last there?

A. Mr. Fulmer, Mr. Hughes, Mr. VanTassell, Orville and Alonzo Fowler, the sons of John H. Fowler.

Q. What did Alonzo Fowler do in the store?
A. He made change at the desk and sales.
Q. What did John H. Fowler do in store?
A. He made change at the desk and sales.

Cross-examined by Mr. VANN:

Q. All you know about the houses from which goods came as stated by you on your direct examination, is inferred by you, is it not, from the marks you saw on the boxes and cases?
A. Yes. Not altogether, part I should infer from the make of the goods.
Q. This is all the knowledge you have on the subject?
A. Yes, sir, what I have stated.
Q. Did Mr. John H. Fowler do some jobbing business?
A. Not to my knowledge.
Q. When you were first with him?
A. I think he did then.
96 Q. Will you swear that he did not when you were last with him?
A. I won't swear that he did not.
Q. Will you swear that the goods which you say had not been opened were not opened after they reached that store and before it was closed by the sheriff, positively?
A. Yes, sir.
Q. You did not see them all the time after they came to the store, did you?
A. No, sir.
Q. And it was customary in that store to open the boxes and count the goods, was it not?
A. It was usually the custom.
Q. The new goods were usually put in the back part of the store or down cellar, were they not?
A. Yes, sir; what were not wanted in the stock.
Q. Your duties called you most of the time to the front half of the store, did they not?
A. They called me to any part of the store where goods were that were called for by customers.
(Objected to as not responsive.)
Q. Question repeated.
A. The two last weeks I was there they did; before that they called me mostly to the back part of the store.
Q. You did not have the keys of the store?
A. No, sir.
97 Q. You had to go down cellar into basement in the discharge of your duties?
A. Yes, sir.
Q. You were also absent for meals?
A. Yes, sir; twice a day, from forty-five to sixty minutes each time.
Q. These boxes may have been opened while you were engaged in other parts of the store or not looking, might they not?
A. Some of them may, but not all.
Q. Do you know what the business of Headley & Son was?
A Trunk manufacturers.
Q. They are the parties named by you on your direct examination, are they not?
A. Yes, sir.
Q. Were they in the habit of stenciling their names on the trunks

A. No, sir.
Q. The goods from Headley & Son were trunks and satchels?
A. Yes, sir.
Q. Satchels coming inside of the trunks?
A. Yes, sir.
Q. And the trunks were not cased, but matted separately?
A. Yes, sir.
98 Q. Were any of Headley & Son's goods reclaimed or sent back?
A. Not that I know of.

Redirect:

Q. Were the goods received from Headley & Son received with their card attached?
(Objection—leading.)
A. No, sir, not usually.
Q. State what evidence, if any, was contained in or upon the package received from Headley & Son indicating that they came from them?
A. The marks on the matting and the card of the firm, and the make of the trunks, particularly the make of trunks.
Q. Were you familiar with the goods manufactured by Headley & Son at that time?
A. Yes, sir.
Q. State whether you recognized them from the make.
A. Yes, sir.
Q. Were you acquainted with the goods manufactured by other firms, that were received at the store during the last time you were there?
A. Yes, sir.
99 Q. State whether there were goods shipped from Mr. John H. Fowler's store in Syracuse, to any other place—and if so, where—during the last time you were there?
(Plaintiff objects, immaterial and incompetent.)
A. I think there were goods shipped to Auburn; don't know of anywhere else.
Q. How soon before the store was closed by Mr. Evans was the last shipment of goods to Auburn, to your knowledge?
(Same objection.)
A. As near as I can remember, from three to six days.
Q. And what quantity of goods were then shipped?
(Same objection.)
A. I could not say the quantity.
Q. Did Mr. Fowler keep a book called the shipping-book?
A. There was such a book, I believe.
Q. How soon before Mr. Evans closed the store did you see that book last?
(Same objection; immaterial.)
A. It was the last time goods were shipped to Auburn.
Q. Do you know where that book was at the time the sheriff closed the store?
(Same objection.)
A. I do not.
100 Q. Did you see it while taking the inventory?
A. No, sir.
Q. How long before the sheriff closed the store were the goods received which were subsequently reclaimed by the sellers?
(Objection, immaterial and incompetent.)
A. But a few days, some of them.

Q. State how many days.

(Same objection.)

A. From three to six days, perhaps.

Q. Were goods received at that store during the time you were engaged there last which were not required or used in the stock from which the daily sales were made?

(Plaintiff objects as immaterial and incompetent, and calls for an opinion; witness not an expert.)

A. I should say there were.

Q. Can you give some idea of the amount of such goods?

(Objection—immaterial and incompetent; witness not shown to know —mere guesswork)

A. I couldn't give the amount.

Q. What was done with them at the store when they came?

101 A. They were partly put in the back part of the store and partly on the shelves; none in the cellar, that I recollect of, the goods which were reclaimed.

Recross-examination:

Q. Were you ever in Headley & Son's manufactory; and when last?

A. I have been; I think the last time was in 1871.

Q. Mr. Fowler bought trunks of other manufacturers than Headley and Sons?

A. Yes, sir; I presume he did.

Q. Had you been in their manufactories?

A. Yes, sir; in the year 1871, in one or two of them, but not since.

Q. At the time these goods were shipped to Auburn Mr. Fowler had a branch store there, did he not?

A. Yes, sir; I suppose he had.

Q. Had he it there for some time?

A. A couple of months or so.

Q. When you were with Mr. Fowler the first time did he have one or more branch stores outside of Syracuse?

(Defendant objects as immaterial.)

A. It was generally supposed he had.

Q. You saw goods shipped to them, did you not?

102 A. Yes, sir; I assisted in selecting and picking them out.

Re-redirect:

Q. Did Mr. Fowler open that store at Auburn after you come there?

A. He did.

Q. About what time?

A. I should say about the first part of April and middle of May, 1875.

EDWIN A. BENNETT.

Sworn to before me December 11th, 1876.

C. W. SMITH,
Special Examiner.

FRANK O. FULMER, a witness produced and sworn on behalf of the defendant, testified as follows:

Q. What is your name, age, residence, and occupation?

A. Frank O. Fulmer; 22 years; Syracuse; shoe clerk. I knew John H. Fowler, and have known him about two years; I have not seen him since summer of 1875; don't know where he is now; he was in shoe business; I was in his employ as clerk about two years before he was closed up and at the time; I don't remember date store was closed;

103 it was in 1875; my particular business was to sell and mark goods; I opened and distributed goods.

Q. Do you know of Mr. Fowler receiving goods from various parties between the 28th day of April and the time the store was closed?

(Objected—incompetent and immaterial.)

A. Yes, sir.

Q. Name all you can of the houses from whom goods were so received.

(Same objection.)

A. Studwell Bros., New York City; Ellison & Stoddard, Rochester. That is all I remember.

Q. Did he receive goods from other houses which you are unable to name?

(Same objection.)

A. Yes, sir.

Q. When the goods came to the store, state in what form they came, and what was done with them by the employees.

A. They were received from the cartman. Mr. Fowler looked them over generally, and told me what to mark them the cost price. Then part were put in stock and part in duplicate stock.

Q. What do you mean by put in stock?

A. Put into the goods we were selling from.

Q. What do you mean by duplicate stock?

104 A. The duplicate stock was the part we were not selling from, and were kept in back part of store on shelves, and part down cellar.

Q. Can you tell what proportion of the goods received at the store between the 28th day of April, 1875, and the 3d day of June, 1875, were put into the duplicate stock?

(Objection—calls for an opinion, immaterial, and incompetent.)

A. We generally put a dozen or two pairs in stock, and if there were more, we put them back.

(Question repeated.)

(Same objection.)

A. There were but few put in stock, the rest were put back into the duplicate stock, where we could get them when we needed them.

Q. Were there invoices with the goods?

A. I think there were.

Q. Who receivod them?

A. Mr. Fowler himself; they generally came by mail.

Q. What did he do with them?

A. I did not see many of them; when a good many kinds came at one time, he would take the invoice, tell us what to mark them; we would mark the cases and the goods when the cases were opened.

Q. State whether the goods, when received and opened at the store, were compared with the invoices received.

105 (Objection—immaterial.)

A. As a general thing, they were.

Q. State if, when that comparison was made, the invoices were checked.

(Same objection.)

A. Yes, sir.

Q. By whom?

(Same objection.)

A. Usually by Mr. Fowler himself.

Adjourned to 2 p. m., for dinner.

Examination of Mr. FULMER resumed.

Q. Could you identify any of those invoices, if you could see them?

A. I think I could, some of them.

Defendant's counsel presents to the witness several invoices of goods, and asks the following questions:

Q. Will you please examine the several invoices now presented to you, and state which of them you recognize as invoices of goods received, examined, and marked at the store of John H. Fowler in the manner you have before stated?

106 (Objection—immaterial, incompetent; it is not shown that witness ever saw any of them before Mr. Fowler's failure.)

A. I never saw the invoice of Studwell, Bros. & Co., of April 27th, 1875, but I recognize the goods mentioned in that invoice as being goods that were received at that store.

(Objection not responsive.)

Q. State what of the goods contained in that invoice you recognize as having been received at the store of John H. Fowler.

(Objection—immaterial and incompetent; too remote, there being no limitation as to time.)

A. I remember distinctly about the two first items; the first item is 36 pair women's blue inlaid kid ties. The second item is 36 pair of the same kind.

Q. Do you recognize any other of the items in that invoice?

A. Not as plainly as the first two.

Q. What circumstance occurred in regard to the first two items that calls your attention particularly to them?

(Plaintiff objects—immaterial and incompetent, and it does not appear that any such circumstance occurred.)

A. Because there was more of them came in of that kind of shoe than he was in the habit of buying.

107 Q. What circumstance, and what instructions in regard to marking them did you receive from Mr. John H. Fowler?

(Plaintiff objects, immaterial and incompetent, and no such circumstance shown.)

A. The first lot that came in I think we marked all of them; put part of them in the stock we sold from, and part in the duplicate stock. The next lot that came in Mr. John H. Fowler told us not to mark. He said let them be in the case. I think they were not marked.

Q. Was John H. Fowler in the city of New York at the time these goods were brought?

(Objected, immaterial.)

(A. I think he was.

Q. Another invoice shown witness.

A. I recognize the goods shown in the invoice of Ellison & Stoddard; I don't recognize the invoice.

Q. Do you recognize the goods as having been received at that store?

(Objection, leading.)

A. I do.

Q. What was the date of the invoice in which the goods appear?

(Objection, immaterial and incompetent.)

A. May 3, 1875.

Q. About what time were the goods received at Fowler's store?

108 A. About May 3, 1875; the invoice says so. It was a short time before the store was closed.

Q. The witness is shown invoice of goods bought of Ellison & Stod-

Q. Did Mr. Fowler, previous to the time the store was closed, ship a quantity of goods to Auburn from the Syracuse store?

(Objected; immaterial.)

A. There were goods being shipped there more or less all the while.

Q. For how long a time before the store was closed?

A. I don't remember exactly; for some little time.

Q. Who was the shipping clerk?

A. I was, as a general thing.

Q. Was there a book kept by Mr. Fowler showing the invoices of those shipments?

A. There was.

Q. When did you last see it, with reference to the time the store was closed?

A. The last time I got goods out to send away, I think, was about eight or ten days before the store was closed; I made the entries in it; I do not know what became of it; the entries upon that showed the amount and values of the goods shipped.

Q. Did you see Mr. Fowler take any books or papers from the store at or about the time it was closed by the sheriff?

(Objected; immaterial.)

A. I remember seeing him take a package of papers and put them in a pasteboard box, and either handed them to his driver or took
114 them to the carriage himself; this was about a week or ten days before the store was closed; I never saw the book after that; the last time I got goods out after that I found the book; I don't know whether the last time I used it was during this week or ten days or not; I could always find the book when I wanted it.

Cross-examined by Mr. VANN:

Q. In relation to what you have testified to as to the amount of certain papers purporting to be invoices, have you any knowledge, or did you simply take it from the paper before you?

A. I have no knowledge of the amount.

Q. Did you take the amount from the writing before you?

A. Yes, sir; I did.

Q. Had you ever seen the writing before to-day?

A. Not that I remember.

Q. Did you know anything about the date of these papers called invoices, except as you read it from the writing before you?

A. I did not.

Q. State from recollection any goods, giving the amount and description as near as you can, which you can swear John H. Fowler bought of Ellison & Stoddard, and which are included in these papers called invoices about which you have been testifying?

115 A. I know that there were several cases came into the store, not very long before the store was closed, some were boots, and some were shoes various styles, some buckle shoes, different patterns.

Q. Is that your only answer?

A. That is all.

Q. Can you give any item from any one of these purported invoices concerning which you have been testifying?

A. There were about twenty-four pairs of a kind as a general thing.

Q. Is that the only answer that you can give to the last question?

A. Yes, sir.

Q. Do you know, of your own knowledge, that John H. Fowler ever bought any goods of Ellison & Stoddard?

A. I supposed he bought them, that is all.

Q. Were Ellison & Stoddard, manufacturers at Rochester, who made the goods after the orders were received?

A. Yes, sir.

Q. The duplicate stock was a sort of reservoir to draw from, as needed, to fill up the selling stock?

(Defendant objects on the ground that it assumes a fact not proven and without propounding an interrogatary.)

A. Yes, sir.

116 Q. Was there some wholesaling or jobbing from this duplicate stock to country merchants?

A. Not to my knowledge.

Q. Will you swear that there was not, positively, or simply that you do not know of any?

A. I am pretty sure that there was none at all. I have a faint recollection, when I first went there, of his selling a few pairs of boots to a country man.

Q. You had nothing to do with the buying of goods for that store?

A. No, sir.

Q. Who did the buying?

A. Mr. Fowler himself.

Q. Did Mr. Fowler give orders to the agents of manufacturers at the store occasionally?

A. Yes, sir; he did.

Q. Did it take some time for the manufacturers to make the goods and fill the orders?

A. From two to four weeks.

Q. Will you swear positively that any goods came to that store which were not ultimately marked by John H. Fowler or under his direction, or simply that there were some that you don't know of being marked?

A. I swear that there were some that were not marked.

Q. When did you last examine that part of the stock which you now swear was not marked?

117 A. When they first came in they were opened; Mr. Fowler said, not mark them.

Q. How do you know but what they were afterwards marked without your knowledge?

A. I was the one that generally had orders to mark goods.

Q. Is that the only answer you give to my last question?

A. They might have been marked after the store was closed; I do not think they were before the store was closed.

Q. Is that as strong as you will put it?

A. Yes, sir.

Q. When there were a large number of pairs in a case of the same kind of goods, and a portion were marked and placed upon the shelves, was it not customary to leave the balance unmarked until they were needed?

A. Sometimes we marked all of them; at other times we would not.

Q. That was the custom while you were there?

A. Yes, sir; as a general thing we did not mark all of them.

Q. Aside from the purported invoices of Ellison & Stoddard, can you give any of the items of the other purported invoices shown you by defendant's counsel?

118 A. We had twelve pairs of shoes from Whitelam Bros., at one time; and another time he ordered ten pairs, and I had a pair made to measure for myself, making eleven pairs.

Q. Can you give any other items?

A. There was 24 pairs of low shoes, square box toe. I forget the name of the firm.

Q. Any others?

A. Kid slippers from Studlaw Bros.

Q. Can you give any others?

A. That is all I remember.

Q. Did John H. Fowler do a large business?

A. Nothing extra.

Q. Was there any other shoe store in Syracuse that did a larger business, with one single exception at that time?

A. I think there was.

Q. Whose was it?

A. Ed. McDougall, G. D. Wallace, or S. Rosenbloom & Son.

Q. There were a large number of shoe stores in Syracuse aside from those you have mentioned, were there not?

A. Yes, sir; there were.

Q. How many clerks, at one time, as a general thing, did Mr. Fowler have in his employ?

A. He had two, with the exception of Mr. Fowler's sons.

Q. How many did he have including them?

119 A. He had three or four, but they were not all there all of the time.

Q. Question repeated.

A. There were five clerks including the boy.

Q. Did not he have as many as five clerks regularly in his employ some of the time?

A. Yes, sir; but they were not all in the store.

Q. Did you have access to the books of the concern?

A. No, sir; I did not, except the shipping book.

Q. Did Mr. Fowler, as a general thing, order of Ellison & Stoddard through their traveling agent?

A. I think he did.

Redirect:

Q. How many clerks were employed in the store at a time after the first of January, 1875?

A. Mr. Mansell and myself. Alonzo made change and sold goods. After Bennett came there were three, Mr. Mansell, Mr. Bennett and myself; that comprised the working force.

Recross:

Q. Was not Orville Fowler there?

120 A. Yes, sir; he was there, but did not pretend to do anything much.

Q. Was not Orville the bookkeeper?

A. When I first went there he was.

Q. Was he not the bookkeeper at the time the store was closed?

A. No, sir; Alonzo was.

Q. Do you know Orville's handwriting?

A. Yes, sir.

Witness shown a book purporting to be a cash book of John H. Fowler, 1875.

Q. Look at the entries from January 1, 1875, continuously until June 1, 1875.

A. These are all in Orville's handwriting.

Q. Did not John H. Fowler sell goods also?

A. He did.
Q. Was he not a good salesman?
(Objected to. Question withdrawn.)

Re-redirect:

Q. Do you know that the book shown you is the cash book of John H. Fowler?

A. Yes, sir; I think it is.

221 Q. State what connection Orville had with the books when you first went there and what change occurred with reference to the nature of his employment during the time you were there?

A. When I first went there he was the general bookkeeper, made change, balanced cash. After a time he got unsteady. Mr. Fowler accused him of different things, and did not allow him to balance cash or make change. After that he did not do anything particularly; wrote letters for Mr. Fowler and put bills into the invoice book which is now in court.

Q. About what time did that change occur, with reference to the closing of the store?

A. Some time before; don't remember how many months; it was some little time.

Q. The defendant shows the witness the cash book to which his attention was called by the counsel for the plaintiff, and calls his attention to an entry therein under the date of March 29th, 1875, and asks, in whose handwriting is that portion of the entry which is in ink?

A. Orville Fowler's handwriting.

Q. Won't you read the entry as made in ink?

(Plaintiff objects, immaterial and incompetent; no evidence against the plaintiff.)

Witness reads: March 29, 1875, G. A. S., jr., on draft, $500.00.

122 Q. Against that entry, and on the margin, is there an entry in pencil?

A. There is.

Q. In whose handwriting?

A. Orville Fowler's.

Q. Read it.

A. Witness reads: "Error J. H. F., jr."

Q. Are those the initials of John Henry Fowler, jr.?

A. Yes, sir.

Q. Can you state who the initials G. A. S, jr., refers to?

(Plaintiff's counsel objects.)

Defendant's counsel then remarked, it is Gardner A. Sage, jr., your client, in the presence of the witness.

(Plaintiff's counsel then finished his objection to the evidence, stating that it was immaterial and incompetent.)

A. I do not know.

Q. Will you look upon the book and tell me whether the entry is an entry of money received or disbursed?

A. It is of money disbursed. Afterwards changed by witness to "received." I do not know much about books.

123 Q. When were the goods mentioned by you as contained in the invoice of Studwell Bros. received in reference to the closing of the store?

(Objection same as to similar question before.)

A. Not very long; two or three weeks before.

Re-recross-examination:

Q. Were Studwell Bros. manufacturers?

A. They were.

F. O. FULMER.

Sworn to before me Dec. 11, 1876.

C. W. SMITH,
Special Examiner.

JAMES B. BROOKS, a witness produced, sworn, and examined on part of the defendant, testified as follows:

What is your name, age, residence, and occupation?

A. James A. Brooks; 37; attorney at law; Syracuse, New York. In the months of May and June, 1875, I was connected in business with Ruger & Jenny. They were the attorneys of record for John H. Fowler in his bankruptcy matter. I first heard of their being retained by him was the last of May, 1875, or the 1st of June. I think I drew the petition and schedules. My recollection is that they were sworn to as soon as prepared. It usually took two days or so to draw similar
124 papers. I think I was more than one day about it. I can't tell; I think I forwarded them to the clerk of the district court at Buffalo; that is my best recollection. My recollection is that the filing of the papers was delayed. The clerk was asked to delay the filing. That is my recollection. To delay the filing until he was instructed to file them. I do not know what the time for giving instruction to the clerk to file them depend upon. I don't recollect whether I gave the clerk afterwards notice to file the papers or not. I have no recollection now about it.

Q. Was the instructions in regard to the delay in filing occasioned by the fact of a levy which was expected to be made upon the stock of goods of the bankrupt in Syracuse?

(Plaintiff objects as calling for a conclusion; immaterial.)

A. Not that I know of.

Q. Did you know when the last execution in favor of Gardner A. Sage, jr., was levied upon the stock of goods of the bankrupt?

A. No, sir.

Q. Were you informed that such a levy had been made about the time it was made?

(Plaintiff objects; immaterial.)

A. Not that I recollect of.

Q. Can you assign any reason which occasioned the instruc-
125 tions to the clerk of the district court in bankruptcy to delay the filing of the bankruptcy papers as you have stated?

(Plaintiffs objects; immaterial.)

A. No, sir; I cannot.

Q. Do you know of any member of the firm or employee in the office of Ruger & Jenney that gave any instructions to the clerk in regard to the filing of the papers, other than yourself?

A. No, I do not; if I ever knew of any, I do not now recollect.

Q. With whom of your firm did Mr. Fowler advise with *with* reference to the bankruptcy proceedings?

A. With Mr. Ruger sometimes, but I think principally with Mr. Jenney.

Q. Did you have any communication with Mr. Vann, acting as counsel for Gardner A. Sage, jr., or with Ambrose Monell, of New York, in

regard to when the bankruptcy papers should be filed, and if either, with whom?

A. No, sir; I never did with either of them.

Q. Do you know of any member of your firm, or employee of your firm, that did?

A. No, sir.

Cross-examined by Mr. VANN:

Q. Was the clerk of the district court in Syracuse about the time this petition was filed?

126 A. No, sir; I have no recollection that he was.

Q. Do you know of any one, either as employee or otherwise, connected with your office, who had any personal communication with the clerk in relation to filing the petition?

A. I do not; I don't think there was any personal communication with him on the subject.

Q. Whatever communication with him was, as you understand it, by telegraph or by letter?

A. Yes, sir.

Q. You do not know that either communication reached the clerk?

A. I do not know of any communication reaching him in relation to this matter.

Q. When he was requested to delay filing the papers it was by either a letter or telegram, was it not?

A. Yes, sir; it was not in any other way.

JAMES B. BROOKS.

Sworn to before me Dec. 11th, 1876.

C. W. SMITH,
Special Examiner.

Notice is here given by the plaintiff's counsel that upon the final hearing of this action he will move to strike out all of the testimony of
127 Mr. James B. Brooks relating to the fact that the clerk was asked to delay the filing of the petition in question.

2 p. m. Parties all present.

It was here admitted that Messrs. Ruger & Jenney, of Syracuse, were the attorneys of record for Mr. John H. Fowler in filing his petition in bankruptcy.

JAMES BENNETT GOULD, a witness produced, sworn, and examined on the part of the defendant, testified as follows:

Q. What is your name, age, residence, and occupation?

A. J. Bennett Gould; twenty-one years of age; Syracuse; am clerk in the office of the sheriff of Onondaga County, and have been for four years. Davis Cossitt was sheriff of Onondaga County in 1875, and Wm. Evans was under-sheriff; Mr. Evans is dead; died Oct. 15, 1876. I have in my possession an execution issued on a judgment for $4,052, in favor of Gardner A. Sage, jr., against John H. Fowler; that execution was in the office at the time of Evans' death. I know his handwriting.

128 (Here admitted that by reason of the execution produced, a copy of which is hereto annexed, marked Exhibit 6, which was received by the sheriff of Onondaga County on the 31st day of May, 1875, at 9 a. m., said sheriff levied on the stock of goods of John H. Fowler, the defendant, named in the execution, in store No. 3 South Salina street, in the city of Syracuse, on said 31st day of May, 1875.)

Cross-examined by Mr. VANN:

Q. What is the amount of the sheriff's fees on that execution?

A. Eighty-five dollars and seventy-seven cents; that does not include the expense of taking the inventory, which was $31.00.

J. BENNETT GOULD.

EDWIN HURD, a witness produced, sworn, and examined on the part of the defendant, testified as follows:

Q. What is your name, age, residence, and occupation?

A. Name, Edwin Hurd; age, 49 years; residence, Syracuse; occupation, deputy sheriff.

Q. And were you deputy sheriff in 1875?

A. Yes, sir; I was. I received an execution upon a judgment
129 in favor of Gardner A. Sage, jr., against John H. Fowler, June 3, 1875, at ten o'clock fifty-five minutes a. m., for the sum of $1,023.28. I have that execution with me. There is an endorsement upon this execution, made by me on the 3d day of June, 1875. Witness reads endorsement: "Levied on by virtue of an execution, this 3d day of June, 1875, at 11 o'clock a. m., on a stock of goods in a store on Salina street, with boots and shoes, and fixtures, &c.; Davis Cossitt, sheriff; by E. Hurd, deputy." I remember the occasion when I made the levy, as I have certified here.

Q. What did you do?

A. I went over there, told Mr. Fowler I had an execution against him, and asked him if he could pay it. He said he could not pay it, and then I said that I would have to make a levy upon his stock of goods, which I did.

Q. Was anybody with you at the time?

A. No; I went over myself.

Q. Was the store open or not?

A. The store was open.

Q. Did you observe whether or not the business of selling goods was going on?

A. I supposed it was the same as in any store. I did not close it up at that time.

Q. Whom did you see in the store?

A. I saw Mr. Fowler and Mr. Fowler's sons, and several clerks.
130 Q. The door was not fastened or locked or shut when you went there?

A. No, sir; I did not notice whether the shades were up or down to the windows.

Q. Did you know anything at the time you made this levy—know of any other levy having been made upon this stock?

A. No, sir.

Q. Did you close up the store afterwards?

A. Yes, sir.

Q. When?

A. I think it was that night.

Q. Was there anybody with you that night?

A. Yes, sir; Under-Sheriff Evans.

Q. And the store remained closed after that?

A. Yes, sir.

Cross-examined by Mr. VANN:

Q. After making this levy, and upon the same day, did you learn from

Under-Sheriff Evans that he had made a previous levy upon the same stock by virtue of a prior execution against John H. Fowler?

A. Yes, sir.

Q. What is the amount of your fees on this execution?

A. $26.31.

131 Q. After learning that Evans had another execution, did you conclude to close the store?

A. Yes, sir.

Q. Did you know that the other execution was for a large sum?

A. Yes, sir.

Q. Did you at that time know of any other execution except these two?

A. No, sir.

Redirect examination:

Q. How did you come to conclude to close the store?

A. When I went back and saw the under sheriff, and told him I had an execution against Mr. Fowler, he said he had a bigger one, and he guessed that we had better close it up at evening.

Q. Did you have any directions from Mr. Vann in regard to closing the store?

A. No, sir; Mr. Evans and I did it of our own accord.

Q. Did you afterwards advertise the sale of this stock?

A. Mr. Evans advertised the stock for sale; he had the prior execution.

Q. Were you there occasionally between the time of the levy and the time the sale was advertised for?

132 A. Yes, sir, with Mr. Evans.

Q. Did you see any notice of the sale posted at the store?

A. It seems as if I did, but I can't say certain; I have no definite recollection.

ED. HURD.

Sworn to before me, Dec. 12, 1876.

C. W. SMITH,
Special Examiner.

EDWIN S. JENNEY, a witness called, produced, sworn, and examined on part of the defendant, testified as follows:

Q. What is your name, age, residence, and occupation?

A. Edwin S. Jenney; 35 years; Syracuse, N. Y.; lawyer.

Q. You are, and were in 1875, a member of the firm of Ruger & Jenney, attorneys at Syracuse?

A. I was and am.

Q. State what, if any, relations your firm or yourself had with John H. Fowler in connection with his bankruptcy proceedings.

A. We were his attorneys in that proceding; he consulted mainly with myself. Mr. Brooks, my partner, under my general direction, prepared his petition and schedules.

133 Q. When did Mr. Fowler first consult you in that business?

A. I cannot tell you.

Q. How long before the petition in bankruptcy was filed did he consult you in reference to his business embar'assments?

(Plaintiff objects on the ground that the answer involves a privileged communication.

Witness states that as far as he is concerned he is willing to answer the question.)

A. I cannot tell; he first consulted me during the month of May 1875, I believe.

Q. Did you receive, during the latter part of May, any money for your services?

A. I received a retainer during the last week in May, of the sum of $100. This sum of money was paid for past, or to apply upon future services.

Q. With reference to the date when that money was received, were you consulted by Mr. Fowler in regard to his embarrassments?

A. I was advising him at that time; I think I had advised him somewhat prior thereto; but am not certain.

Q. A book in my hand purporting to be the cash book of John H. Fowler, which is in the possession of the assignee of said Fowler, contains an entry under date of May 25th, "paid Ruger & Jenney
134 $100." What is your recollection as to whether that was or was not the day on which you received that sum?

(Plaintiff objects to the reading from a book which is not shown to be what he says it is, or to contain what he says it does, and is not in evidence.)

A. I presume that is the date; it accords with my recollection.

Q. How long after that did you commence to prepare the petition and schedules in bankruptcy?

A. I cannot tell further than that it was between that day and the first day of June.

Q. Do you know when the petition was sworn to?

A. Only from recollection; my recollection would be that it was the first day of June.

Q. What directions, if any, did you give, if any, to sending the petition to the clerk for filing?

A. I have my letter book here, which contains a copy of the letter of transmission.

Q. In whose hand-writing is the letter?

A. In that of my partner, Mr. Brooks.

Q. Did you give him any directions in regard to sending it?

A. I did.

Q. On what date does the letter appear to have been written?

A. June 1, 1875.

135 Q. Have you any other letter in your book with reference to the filing of the petition?

A. No, sir.

Q. Do you know of any directions given to the clerk in reference to the filing, other than the letter shown here?

A. Yes, sir.

Q. What directions?

A. They were by telegram, of which I have no copy, and can give only the substance.

Q. State the substance of those telegrams.

(Objection, immaterial and not best evidence.)

A. The first was directed to the clerk, and directed him to hold the petition and not to file it until further orders; the second directed him to file the petition at once.

Q. Give the dates of the two telegrams.

(Same objection.)

A. My best recollection is that they were dated respectively the 2d and 3d of June.

Q. Were you consulted by Mr. Fowler with reference to sending these telegrams?

A. No, sir.

Q. How came you to send them?

(Objection immaterial.)

A. I sent the first one because Mr. Fowler had not paid me my charges, and I was unwilling that the petition should go on file
136 until he had paid me, knowing that he had no power to take the money out of his estate after it had gone on file; he paid me in person, and then I sent the second telegram.

Q. Did he say anything to you about sending the second telegram?

A. Yes, sir.

Q. What?

(Same objection.)

A. He asked me if I would now telegraph to the clerk to file the petition.

Q. Was the money paid the day the last telegram was sent?

A. My recollection is that he gave me a check on the evening of the second, which was paid on the morning of the 3d.

Q. Did you see Mr. Fowler on the 3d day of June, 1875, before 2 P. M.?

A. Yes, sir; Mr. Fowler was in my office almost constantly, but I have no specific recollection of so seeing him.

Q. Did you at that time know or hear from Mr. Fowler of a suit against him in favor of Gardner A. Sage, jr.?

A. I did.

Q. Of more than one?

A. Of two.

Q. I speak of the time just prior to the petition. What do you now say?

137 (Objection, the answer involves a privileged communication.)

A. I did.

Q. Did you know on the 3d day of June, before 2 o'clock p. m., of a levy being made on that day on an examination in favor of Gardner A. Sage, jr., against John H. Fowler?

(Objection, immaterial.)

A. I can't tell when I knew of that levy; I knew of it shortly after it was made, but whether the same day or not, I can't say.

Q. Did Mr. Fowler tell you anything about it?

A. We had a conversation; I am in doubt whether he told me or I told him.

Q. Before the last telegram was sent?

A. My recollection is quite positive that that telegram was sent before the levy; I am very positive that the last telegram was sent before I knew of the levy; I always supposed the petition was filed before the levy was made.

Q. Do you know at what hour of June 3d the levy was made?

A. I do not know at what hour the levy was made; my recollection is that it was made on the same day that the petition was filed, and subsequent thereto.

Q. Do you know the hour of the day at which the levy was made, or the hour of the day the petition was filed?

138 A. I know neither.

Q. You have no knowledge, then, of the relative time at which the petition was filed and the levy was made?

A. I have not, of either.

Cross-examined by Mr. VANN:

Q. You supposed that the petition was filed before the levy was made?

A. Yes, sir.

Q. Was there any other reason for delaying the filing of the petition other than that you have stated, so far as you know?

A. No, sir; I can say very positively no. That was the only reason that influenced me, and the only one I know of.

Q. Did you receive any instructions or requests from Mr. John H. Fowler, to delay the filing of that petition?

A. No, sir; quite the contrary.

Q. Did you from any one acting for him, or in his behalf?

A. No, sir.

Q. Was there anything said or done by Mr. John H. Fowler,
139 which induced you to believe that he desired that there should be a levy made before the petition was filed?

A. No, sir.

Q. Did you, of your own volition, do any act by which you intended to give time for a levy before the petition was filed?

A. No, sir; I intended to have sent the last telegram on the 2d day of June, the day before it was sent, and it was purely inadvertence on my part that that dispatch was not sent on the evening of the 2d of June.

(Witness explains.)

It may be that I actually had the money on that check on the 2d day of June; that Mr. Fowler got the money on it, or the check may have gone through my bank. I regarded myself paid on the 2d day of June, when the check was delivered or the money paid to me.

Q. Did you intend to allow that levy to be made before the petition was filed?

(Objection; immaterial.)

A. No, sir; I was very anxious to have the petition filed before the levy was made.

Redirect examination:

Q. Was Mr. Fowler correspondingly anxious?

140 A. I believe he was; he so expressed himself. I believe we were in perfect accord on that subject.

(Plaintiff offers in evidence the copy of the letter taken from Ruger & Jenny's letter-press book and referred to by Mr. Jenny in his evidence. Marked Plaintiff's Exhibit No. 2, of December 12, 1876.)

EDWIN S. JENNY.

Sworn to before me, Dec. 12, 1876.

C. W. SMITH,
Special Examiner.

DECEMBER 11*th*, 1876.

JONATHAN G. WYNKOOP, the above-named defendant, being by me duly sworn and examined, testified as follows:

I reside in Syracuse, and am the assignee in bankruptcy of John H. Fowler, a bankrupt. I was appointed about the 7th day of July, 1875.

Q. Did the stock of goods of the bankrupt at No. 3 South Salina street, Syracuse, come into your possession?

A. It did; I subsequently sold them. The sale was approved by Judge Wallace, district judge.

Q. What was the amount realized by you for the sale of the entire

undisputed stock of goods of the bankrupt, in store No. 3 South Salina street?

141 (Complainant objects; immaterial, incompetent; no evidence of value of stock in question.)

A. $8,462.30, and $130 to be added for retail sales, making in all $8,592.30.

Q. There were some goods in the store, in reference to which question was made by the sellers, were there not?

(Objection, immaterial.)

A. There were several cases of goods which were at one side at the back of the store, which were received of H. G. Foss & Co., of Haverhill, Mass.

Q. What was there in regard to those goods?

(Complainant objects; immaterial and incompetent.)

A. As I understood, they were claimed by the sellers. They were demanded by parties who claimed them.

Q. At the time the goods were claimed by the vendors, state whether they had been opened, or were they in the original packages?

(Complainant objects; immaterial and incompetent.)

A. They were in the original packages, unopened.

Q. Have you an invoice of the goods?

A. I have

Q. What was the amount and value of the goods?

(Objection, immaterial and incompetent, and witness not shown to be competent.)

A. The amount the invoice calls for is $523.20, but that is not
142 correct. There were 12 pairs Misses' kid Newport ties not in the box, amounting to $20.40. They were short.

Q. Did you find the invoice of this bill of goods among the papers of the bankrupt when you took possession of them?

(Objection; immaterial and incompetent.)

A. The papers were handed me by the bankrupt.

(Complainant objects to answer as not responsive.)

Q. Where did you get the invoice of the goods?

(Same objection.)

A. From Mr. Fowler, the bankrupt. I received it from him while the stock of goods was in the store. I hold the invoice now in my hand. I compared the goods in the boxes with the invoice. I found it correct with the exception I have stated.

(Defendant offers invoice in evidence.

Complainant objects; immaterial, incompetent, and no evidence against the complainant.

Marked Defendant's Ex. No. 8, of Dec. 11, 1876.)

Q. State whether you found any other goods in the store that were in the original packages.

(Objection, immaterial.)

A. I did.

Q. Among them were there any claimed by H. S. Bacon & Co.?

(Objection, leading, immaterial, and incompetent.)

A. I did.

Q. Where did you find them?

143 A. I found them in the back part of the store, near Foss & Co.'s goods.

Q. Was there a claim made to these goods, and, if so, by whom?

(Objection, immaterial and incompetent.)

A. Yes, sir; by the vendors. I hold the invoice of these goods; I re-

ceived it from Mr. Fowler, the bankrupt; I examined them, and compared them with the invoice, and found them all right. The invoice now produced by me is the invoice of those goods, furnished me by Mr. Fowler, the bankrupt.

(Defendant offers invoice in evidence.

Objection, immaterial and incompetent, and no evidence against the plaintiff.

Marked defendant's exhibit No. 9, of December 11, 1876.

The goods included in these two invoices were not included in the sale made by me.)

Q. Did you find other goods there in the store other than those in the two invoices produced which were in the original package?

(Objection, immaterial and incompetent.)

A. I found more stock which was unmarked and in original packages. Some we found in the basement, and some in paper boxes, on shelves in the back part of the store.

144 Q. Can you state the amount or proportion of the stock which you found in this condition? If yea, do so.

(Same objection.)

A. No, sir; I cannot.

Q. Did you find any goods there that came from Ellison & Stoddard in the store?

(Complainant objects; immaterial and incompetent.

Witness not shown to know whether any goods came from Ellison & Stoddard or not.)

A. Yes, sir; I did. I found goods from Ellison & Stoddard there.

Q. In what condition, with reference to the original packages?

(Objection, immaterial and incompetent.)

A. Several were unbroken, and some were broken.

Q. State whether, among the books of the bankrupt, was an invoice book of bills of goods purchased by the bankrupt.

A. Yes, sir; this invoice book came into my possession.

Q. How is the book made up?

A. The originals are pasted in upon blank sheets with mucilage. I found this book in the safe of Mr. Fowler at the time I took possession.

Q. Did you hear the testimony of the witness, Mr. Fulmer, examined in this case this afternoon?

A. I did so.

145 Q. State whether or not the several invoices that were shown to him, and which he testified to, were invoices contained in that book.

A. The invoices he testified to were part of the invoices contained in this book.

Q. State what goods appear from the invoices contained in this book to have been purchased by Mr. Fowler on and after April 27, 1875.

(Objection, immaterial, incompetent, and, if competent at all, the book the best evidence.

Question waived.)

Q. Are the invoices now in that book the same that were found in that book when you took possession of the bankrupt's books and papers?

A. Yes, sir; they are.

Defendant offers in evidence from the invoice book, an invoice of goods purchased by John H. Fowler, of Studwell Bros. & Co., April 27th, 1875.

(Objection, immaterial and incompetent; no evidence that Mr. Fowler

ever bought the goods; no evidence that any such goods as those described in the invoice were ever received, and no evidence that the invoice is correct.)

Marked Defendant's Exhibit No. 10, of December 11, 1876.

Defendant offers in evidence, from the invoice book, an invoice of goods purchased by John H. Fowler, of B. Lippman & Lesser, April 27, 1875.

146 (Same objection.)

Marked Defendant's Exhibit No. 11, of December 11, 1876.

Defendant offers in evidence, from the invoice book, an invoice of goods purchased by John H. Fowler, of J. Lagowitz & Co., April 27, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 12, of December 11, 1876.

Defendant offers in evidence from the invoice book, an invoice of goods purchased by John H. Fowler, of Studwell Bros. & Co., April 28, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 13, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of J. Lagowitz & Co., April 28, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 14, of December 11, 1876.

Defendant offers in evidence, from the invoice book, invoice of goods bought by John H. Fowler, of Culver Bros. & Co., April 30th, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 15, of December 11, 1876.

147 Defendant offers in evidence, from the invoice book, invoice of goods bought by John H. Fowler, of Ellison & Stoddard, May 3, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 16, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of Noyes & Holmes, May 4th, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 17, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of G. H. Williams & Chase, May 5, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 18, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of B. Lippman & Lesser, May 5, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 19, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of G. Corning & Co., May 6, 1875.

(Same objection.)

148 Marked Defendant's Exhibit No. 20, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of John Freeman, May 7, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 21, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of T. P. & S. S. Smith, April 7, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 22, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of Ellison & Stoddard, May 8, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 23, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of Whitelam Bros. & Co., May 8, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 24, of December 11, 1876.

Defendant offers in evidence from the invoice-book, invoice of goods bought by John H. Fowler of John Freeman, May 10, 1875.

149 (Same objection.)

Marked Defendant's Exhibit No. 25, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of William J. Headley & Son, May 10, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 26, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Ellison & Stoddard, May 11, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 27, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of J. Lagowitz & Co., May 12, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 28, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of B. Lippman & Lesser, May 12, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 29, of December 11, 1876.

150 Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler of Studwell Brothers & Co., May 13, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 30, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Ellison & Stoddard, May 13, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 31, of December 11, 1876.

Defendant offers in evidence from the invoice-book, invoice of goods bought by John H. Fowler, of Ellison & Stoddard, May 14, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 32, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Ellison & Stoddard, May 15, 1875.

(Same objection.)

Marked Defendant's Exhibit No. 33, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Studwell Brothers & Co., May 15, 1875.

(Same objection.)

151 Marked defendant's exhibit No. 34, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of B. Lippman & Lesser, May 15, 1875.

(Same objection.)

Marked defendant's exhibit No. 35, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Mallon & Houghton, May 17, 1875.

(Same objection.)

Marked defendant's exhibit No. 36, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of G. Corning & Co., May 21, 1875.

(Same objection.)

Marked defendant's exhibit No. 37, of December 11, 1876.

Defendant offers in evidence from the invoice book, invoice of goods bought by John H. Fowler, of Wm. O. Headley & Son, May 20, 1875.

(Same objection.)

Marked defendant's exhibit No. 38, of December 11, 1876.

Q. Among the books that came into your possession as assignee was there any book containing a statement of the amount of the goods shipped by Mr. Fowler to Auburn?

A. No, sir.

Q. Was you informed of the existence of a such a book?

(Objection, immaterial and incompetent.)

A. I was so informed.

Q. What, if any, effort did you make to discover it?

(Same objection.)

A. I searched the store with others for it, and made diligent efforts to find it.

Q. What did you do with reference to it with Mr. Fowler, the bankrupt?

(Same objection.)

A. I made a demand upon Mr. Fowler for the book, and it was not delivered to me. I have never been able to find it.

Examination adjourned to December 12th, 1876, at the same place, and at 10 1-2 o'clock a. m.

153 DECEMBER 12, 1876, 10 1-2 a. m.

Parties appeared as before, and the examination of JONATHAN G. WYNKOOP was resumed.

Cross-examined by Mr. VANN:

Q. What is your business?

A. I am in the lumber business; that is my principal business. I make collections for the New York Life Insurance Company. I have several estates in my hands.

Q. Estates of bankrupts?

A. Yes, sir; partially so. I have several bankrupt estates of which I have charge, and also other estates.

Q. Where is your lumber business carried on?

A. It is manufactured at Constantia, Oswego Co. Our office is here.

(Pl'tff's counsel offers in evidence a certified copy of the order of the district court of the United States for the northern district of New York, in bankruptcy, dated August 18th, 1875, in the matter of John H. Fowler, a bankrupt, marked complainant's Exhibit No. 1, of December 12, 1876.

154 Said order shown witness by complainant's counsel.)

Q. Was it in pursuance of that order that you sold the stock of John H. Fowler?

A. Yes, sir; that was it; yes.

Q. You had made an inventory of the stock which you sold to Thing & Norris under this order?

A. Yes, sir.

Q. Was the amount of that inventory as it is stated in the recital of this order at $16,556.97?

A. The inventory was about $36 more than that sum.

Q. Was the inventory made upon the basis of cost?

A. Yes, sir.

Q. And upon this sale you realized what per cent. of the inventory price?

A. Fifty-one per cent.

Q. And that was the highest sum you were offered?

A. Up to that time it was.

Q. Up to what time?

A. Up to the day of the day of this order.

Q. Were you afterwards offered more?

A. I had another higher offer; yes, sir.

Q. How much were you offered then?

A. Fifty three cents.

Q. When was that?

155 A. During the day upon which this order was granted.

Q. Was it before you had actually transferred the title to the stock in question to Thing & Norris?

A. Yes, sir.

Q. Upon receiving that offer did you make any application to the district court for instructions?

A. Yes, sir; I did.

Q. Was that application in writing?

A. No, sir.

Q. The application was a talk with Judge Wallace at his chambers?

A. An advisory talk; I had previously seen the register.

Q. How long had you been negotiating with Thing & Norris before you closed the sale with them?

A. I can't say.

Q. Was it two or three weeks?

A. No, sir.

Q. Was it a week?

A. An agent had been here off and on for a week or ten days, and been in communication with me, but I did not know then who he represented.

Q. Were you at this time negotiating with other parties for this sale?

A. Yes, sir.

156 Q. How long after this order marked complainant's Exhibit No. 1, of December 12, 1876, was granted, was it before you closed the sale with Thing & Norris?

A. At five o'clock in that afternoon.

Q. What time in the day was the order granted?

A. I think about the middle of the afternoon.

(Witness states: I desire to correct my previous answer. The sale was made and the order granted about the same time.)

(Defendant's Exhibits Nos. 8 and 6, of December 11, 1876, shown witness.)

Q. Did you ever see any member of either of those firms?

A. Not that I know of.

Q. Did either of them commence any legal proceedings against you to recover any part of the goods described in either of those invoices?

A. Not that I know of.

Q. Did more than one person, claiming to represent either of these firms, call upon you in relation to those goods?

A. No, sir.
Q. Who was that?
A. Mr. Irving G. Vann.
Q. How many times did he call upon you in relation to that?
A. Once or twice; I think twice.
157 Q. When you finally sold them, did you inform Mr. Vann of your intention to do so?
A. No, sir.
Q. Had he previously notified you that he represented those two firms?
(Defendant objected, immaterial and incompetent.)
A. Yes, sir.
Q. What did you finally realize for the goods contained in these two invoices?
(Defendant objected as before, and to all evidence of this character.)
A. Eighty cents on the dollar, with the error before mentioned excepted.
Q. Did you, as assignee in bankruptcy of John H. Fowler, commence an action in one of the courts of the United States against some parties residing in Utica, to recover for certain goods which they reclaimed after Mr. Fowler's failure?
(Same objection.)
A. I did.
Q. Was that suit ever tried?
A. No, sir.
Q. Did you abandon it and pay the costs?
(Defendant objects same as before, and that witness is not shown to know precisely what was the termination of the suit.)
A. Not all the costs; we paid our part.
158 Q. Will you swear that you did not pay all the taxed costs of that suit?
(Defendant objects. It is not shown that he knows what was taxed.)
A. I cannot swear to that.
Q. What do you mean by the term original packages, as used by you on your direct examination?
A. I mean the unbroken boxes that held the goods.
Q. Can you swear that those goods had never been opened and counted?
A. No, sir; I think some of them were counted, particularly those that were put upon the shelves.
Q. Did you consider packages unbroken that were on the shelves?
A. Yes, sir; full packages.
Q. Were there any boxes upon the shelves except paper boxes?
A. No, sir. Those upon the shelves were paper boxes, that I have in mind.
Q. Can you swear that those that were contained in the wooden boxes had not been opened and counted?
A. No, sir; I cannot.
Q. Did you find any other boxes containing goods in the back part of the store, where you say you found the Foss and Bacon lots?
A. Yes, sir.
Q. And were they in a similar condition?
159 A. No, sir.
Q. In what respect did they differ from the Foss and Bacon lots?
A. Several of the boxes appeared to have been opened and marks were upon them.

Q. Were any of those goods besides the Foss and Bacon lots reclaimed or attempted to be?

A. Yes, sir.

Q. By whom?

A. Ellison & Stoddard.

Q. Any one else?

A. I think not.

Q. Were any of the goods claimed by Ellison & Stoddard surrendered to them?

A. No, sir.

Q. So far as reclaiming goods was concerned there, did it amount to anything more than the simple assertion of the respective claims?

A. Yes, sir, it did.

Q. Mention in what respect.

A. Ellison & Stoddard commenced a replevin suit.

Q. Against whom?

A. Against me, as assignee.

Q. In what court, and what became of it?

A. I think it was supreme court; the suit was settled; they withdrew it and paid costs.

Q. Did anybody succeed in reclaiming any of their goods?

160 A. No, sir, not after I came in as assignee.

Q. Do you know Ellison & Stoddard's goods when you see them?

A. I would not now.

Q. Did you ever know them?

A. Yes, sir.

Q. How?

A. By examining the goods with Mr. Ellison, by the report of the marshal, and by the report of Sheriff Evans; he showed me the goods—pointed them out to me.

Q. Did you know them in any way except as you were told by other parties?

A. Yes, sir.

Q. How?

A. We took those invoices of Ellison & Stoddard and compared with the goods; Mr. Ellison was with me.

Adjourned to 2 1-2 p. m.

2 1-2 p. m.

Parties appeared and cross-examination of Mr. WYNKOOP resumed by Mr. Vann.

Q. Do you know anything about the make of Ellison & Stoddard's goods?

161 A. No, sir, I do not.

Q. Is there any way you can recognize them except what you are told by third parties, and from what you suppose to be the invoices of the goods?

A. No, sir.

Q. You remember these various invoices that have been introduced in evidence from the bill book of the bankrupt?

A. Yes, sir.

Q. Do you know that those invoices are correct?

A. I do not.

Q. Did you know that Ellison & Stoddard's goods had not been opened of your own knowledge?

A. Some of them were opened; those that were open and some not open were all together.

Q. How did you know they were Ellison & Stoddard's goods?

A. From information received from Mr. Ellison, and from comparisons with the invoices, as I stated before.

Q. Did you know, know of your own knowledge, that any of Ellison & Stoddard's goods had not been opened and counted?

A. No, sir, I did not.

Q. Were some of their goods marked and put upon the shelves?

162 A. It was so stated to me; Mr. Ellison pointed them out to me.

Redirect by Mr. NORTHRUP:

Q. Upon your cross-examination you stated that the goods sold under the order referred to, amounting to about $8,000, when sold amounted to $36 more than the sum named in the recitals of the order. Explain how that occurred.

A. We found a little excess of stock and some damaged goods that were mice eaten, &c., and were put one side for future reference when the first inventory was taken, and those amounted to about $36.

Q. Thing & Norris consented to take those?

A. Yes, sir.

Q. Did you use any means to procure purchasers of this stock, and if so, what?

A. I advertised the stock to be sold at auction, and also that I would receive bids for the same in bulk.

Q. For how long a time did you readvertise before the goods were finally sold to Thing & Norris?

A. Somewhere from four to six weeks.

Q. What firms other than Thing & Norris made offers for the goods in question in bulk, and what prices did they respectively offer,

163 and what was the result of your negotiations with these parties, if you had any?

(Plaintiff objects as immaterial.)

A. I had an offer from Rosenbloom & Sons, of 50 cents on the dollar; I had a subsequent offer from them of 40 cents on the dollar; they withdrew the first. I had an offer from Tripp & Son of about 50 cents—I think 50 cents; this offer was withdrawn. They subsequently offered 35 cents on the dollar; I afterwards received an offer from Thing & Norris of 51 cents, they not knowing the other offers were withdrawn. After that I had an offer of 53 cents, which was in suspense, from R. C. Combs, or a party using his name.

Q. How long had that offer from Combs been pending when the sale to Thing & Norris was completed and the goods delivered?

A. I think from about 11 o'clock in the morning, when the offer was made, and kept open by me until about 5 in the afternoon.

Q. For what purpose?

A. To give the parties opportunity to have Mr. Combs ratify it.

Q Did he ratify it?

A. Not to my knowledge; I never got a response from him.

Q. And then you consulted with your counsel and Judge Wallace, and completed the sale?

164 A. Yes, sir; I completed the sale at 5 p. m.

Q. This stock comprised the bulk of the goods, new and old, in the store?

A. Yes, sir.

Q. On your cross examination you said that the order was granted and the sale made at about the same time?

A. Yes, sir.

Q. Was the contract entered into with Thing & Norris subject to the approval of the court or not?

A. Yes, sir.

Q. And when approved by this order the sale was completed?

A. Yes, sir.

Q. The goods sold for 80 cents on the dollar, were they new or old?

A. They were new goods.

Q. What was the nature of the suit brought by you against Utica parties?

A. I brought suit against The Journeyman's Co operative Union of Utica to recover the value of goods taken away from the store by them just before I took possession as assignee.

Q. They retained the goods?

A. They did.

Q. What induced you to abandon the suit?

A. Under the advice of counsel I withdrew the suit.

165 Q. After the sale to Thing & Norris was completed, and subsequent to the order referred to by you, was another order made by the court confirming that sale?

A. Yes, sir.

Recross-examination:

Q. Where did Mr. R. C. Combs live at the time this offer for the purchase of this stock was made to you?

A. I understood he lived at Carmansville, near New York City.

Q. Did you understand him to be a man of means?

A. Well, yes; I think so; generally understood so.

Q. Did you adjourn the sale of the stock which you had advertised to take place?

A. Yes, sir; I had several adjournments.

Q. You sold none of the goods at auction?

A. No, sir.

Q. When you took possession of Mr. Fowler's assets, did you find nearly $300 in cash on deposit to his credit in his bank?

A. I found about $269, I think.

166 Re-redirect:

Q. Who made the offer of fifty-three cents on the dollar in Mr. Combs' name?

A. Mr. John H. Fowler, and also Col. Jenney afterwards.

Q. Did they produce any evidence of their authority to make such an offer?

A. They did not; that is just what we were waiting for all day.

Q. What induced you to decline that offer?

A. We did not hear from Mr. Combs, and we feared the other offer would fall through, and indeed I had heard that it would fall through unless it was closed up that night.

JONATHAN G. WYNKOOP.

The above deposition of the witness, Jonathan G. Wynkoop, was read over to him, and subscribed by him, and sworn to before me this 21st day of December, 1876.

C. W. SMITH,
Special Examiner.

ALONZO S. FOWLER, a witness produced, sworn, and examined on part of the defendant, testified as follows:

Q. What is your name, age, residence, and occupation?

167 A. Alonzo Fowler; 25 years; 65 James street: salesman and floor-walker for G. W. Ingalls & Co.; John H. Fowler is my father; I do not know where he is now; I have not seen him in over a year, nor heard from him since he left Syracuse, in over a year; he left Syracuse in the summer of 1875; couldn't tell the month; don't remember; that is as near as I can state the time of his leaving Syracuse; he started to go to New York City; he subsequently took a sea voyage, as I am informed, to the West Indies; I do not know what particular place was his destination; I do not know whether any one went with him; don't know that any of his family went with him; no member of his family has heard from him since then, that I know of personally; I have not seen any letter or letters written by him since he left.

Q. Do you say that to your knowledge your mother, the wife of John H. Fowler, has not heard from him since he left Syracuse?

(Objected to as immaterial.)

A. Not that I know of.

Cross-examined by Mr. VANN:

Q. Did you know the plaintiff, Gardner A. Sage, jr., to be a man of wealth?

A. Yes, sir; I did.

Q. Did John H. Fowler do a large business?

168 A. Yes, sir.

Q. In the back part of your father's store was there a large and prominent sign of "wholesale department?"

(Objection, immaterial.)

A. Yes, sir.

Q. Did your father do some jobbing business?

A. Yes, sir; at the time of the failure I had been employed in the store about seven years; the stock on hand at the time of his failure was not larger than it usually was at that time of the year; it was smaller; I should judge it was several thousand dollars smaller than at that time of the year previous, to the best of my knowledge; he had at the time of his failure, including his two sons, five clerks beside myself and brother; they were all in the habit of selling goods; I know of remittances received by John H. Fowler from Gardner A. Sage, jr., or his agent.

(Objected to as immaterial.)

In the aggregate amounting to I should think $7,000 to $8,000; I was in the habit of seeing the checks and drafts as they came, and occasionally taking them to the bank; they were usually sent by J. Henry Fowler.

Attention of the witness called to the item dated March 29, 1875, on purported cash book of John H. Fowler, being the same to which the attention of the witness Fulmer was yesterday called, and asked,

169 do you know from whom that sum of $500 came, and, if so, state?

(Objection, immaterial.)

A. Yes, sir; from J. Henry Fowler, jr.

Q. Was that a personal loan he made to his father?

(Objection, immaterial.)

A. It was so understood.

Q. Did you see the check for that when it came?

A. Yes, sir; I believe I took it to the bank to deposit.

Q. By whom was that check signed?
A. By J. Henry Fowler, jr.
Q. In his own name?
A. Yes, sir.
Q. That entry on the cash-book is an error?
A. Yes, sir, it is.
Q. Had it long been a custom in your father's store to examine goods and report them at the desk soon after they reached the store and to compare them with the invoice?
A. It was, sir.
Q. How was your father's health before he last left Syracuse?
A. It was very poor.
Q. Was he advised by his physician to take a sea voyage?
170 A. Yes, sir.
Q. And as you understand, did he take a trip to Bermuda?
A. Yes, sir.
Q. About how much did the annual sales of your father's store amount to during the last two or three years before his failure?
A. About $100,000 per year.

Redirect:

Q. When were the inventories in the store usually taken?
A. About July or January.
Q. When in 1875?
A. That I couldn't state.
Q. Were there any taken in that year?
A. That I couldn't state.
Q. Were any taken in May or June of 1874, 1873, or 1872?
A. I don't know; I know that for quite a while no inventory was taken; it was overlooked.
Q. Overlooked for how long a time?
A. I think for one or two years.
Q. When was the last inventory taken that you remember?
171 A. I could not give time or amount; I did not have charge of taking inventory; my brother had charge of it.
Q. What means, if any, have you of knowing how much smaller the stock was in summer of 1875 than in the summer of former years?
A. From the general appearance of the stock.
Q. No other means?
A. No, sir.
Q. The shelves of the store were full as usual, were they not, at the time of the failure?
A. No, sir.
Q. What shelves were empty?
A. The shelves in the men's department of boots and shoes, also the drawers, were partially so, compared with what they were years before?
Q. You had stock in the rear of the store to fill them, did you not?
A. We had a portion of the stock in the rear of the store.
Q. State the times and sums remitted from Sage for the year prior to June 1, 1875?
A. I don't know as I can state the dates; I know it was in different amounts, from $1,000 to $2,000 at a time.
Q. Can you tell anything about the amounts accurately?
A. I remember several of $1,000 each.
Q. How many?
172 A. I remember four or five that I saw myself.

(Witness shown a book purporting to be invoice book of John H. Fowler, and is asked)—

Q. Is this the invoice book used in John H. Fowler's store at the time of and prior to his failure?

A. It looks like the book.

Q. Question repeated.

A. I think it is the book.

Q. Do you recognize these invoices as invoices in that book before the time of the failure?

A. I think they are, sir.

Q. Placed there by whom?

A. By my brother Orville.

Q. Have you heard that your father is engaged in business, or has been so engaged, in Bermuda?

A. No, sir.

ALONZO S. FOWLER.

Evidence closed, except that plaintiff's counsel may call the witness, Jenney, at a subsequent date, within a week, with the same effect as if called at this date.

And the evidence of the witness Wynkoop is to be read to him at that time.

LAW OFFICE OF NORTHRUP & WICKS,
Syracuse, Dec. 21, 1876.

Parties appeared as before.

173 Mr. Irving G. Vann, counsel for complainant.

Mr. A. J. Northrup and Geo. N. Kennedy, esq., counsel for defendant.

The evidence of the witness, Jonathan G. Wynkoop, was read over to and signed by him.

The complainant the' called as a witness EDWIN S. JENNEY, who testified as follows, as a witness on behalf of the complainant:

Q. Did Mr. John H. Fowler give you any instructions in relation to filing his petition in bankruptcy in time to cut off the first and large Sage judgment?

A. No, sir?

Q. What, if anything, was said between Mr. Fowler and yourself upon that subject prior to the filing of his petition?

(Defendant objects upon the ground that conversation between Mr. Fowler and his attorney is not competent, and hearsay.)

A. Well, there was no definite talk; I don't recollect any conversation with him upon the subject.

Q. State what induced you to advise Mr. Fowler to file this petition in bankruptcy?

(Defendant objects, immaterial and incompetent.)

A. Well, it was the recovery of the first Sage judgment and his professed inability to meet that and pay his other debts as they matured.

174 Q. Had he taken any measures or requested you to take any to get time in that action or prevent the entry of that judgment?

(Defendant objects generally.)

A. He had; his first consultation with me was with reference solely to prevent this judgment being entered against him; he said he didn't think the suit would be pressed to a judgment, and if it was, whether an answer could be put in or an injunction obtained to give him more time.

(Defendant moves to strike out the preceding answer upon the ground, first, that it is not responsive; second, it is incompetent—it is the declarations of Mr. Fowler.)

A. Did he request you to write to Mr. Sage's attorney to get time in that action?

A. It is my impression he did; there was some conversation upon that subject.

Q. How long after the entry of this judgment before you learned of it?

A. I think right away.

Q. Prior to learning of that fact was there any talk between you and Mr. Fowler about his going into bankruptcy?

A. Yes, sir.

Q. Was it decided upon as a plan of action before you learned of the entry of this judgment?

(Defendant objects; incompetent.)

175 A. No, sir.

Q. How soon afterwards was it?

A. My recollection is that that decision was reached the day the judgment was docketed in this county, about that time.

Q. How long after the judgment was docketed in this county was it before you learned of it and of the levy?

A. I think I was informed of these transactions as fast as they occurred.

Q. How did Mr. Fowler seem to be affected by the fact that a levy was made upon that judgment?

(Defendant objects; immaterial and incompetent, and a matter of opinion upon which the witness is not a professional expert.)

A. I don't think that I can give a very satisfactory answer to that question.

Q. Did he seem to be surprised or indignant, or both?

(Defendant objects; same as to last preceding question, and asks for a conclusion of the witness.)

A. He claimed that Mr. Monell had not done as he agreed in sending the judgment up to this county, and seemed distressed and discouraged as to his affairs?

(Defendant objects to this answer as not responsive.)

Q. Was there anything said or done by Mr. John H. Fowler
176 which induced you to believe that he desired that there should be a levy made upon that first judgment before the petition in bankruptcy was filed?

(Defendant objects; immaterial and incompetent.)

A. No, sir.

Q. Did you, of your own volition, do any act by which you intended to give time for a levy under that judgment before the petition was filed?

(Defendant objects; incompetent.)

A. No, sir.

Cross examined by Mr. KENNEDY:

Q. You have said that you were a member of the firm of Ruger & Jenney during the months of April, May, and June, 1875?

A. Yes, sir.

Q. Who composed that firm at that time?

A. The general partners were Mr. Ruger and myself; Mr. Brooks and Mr. French were special partners.

Q. And where was the office of the firm during those months?

A. It was in the Granger Block during those months.

Q. And how far from the store and place of business of Mr. Fowler?

A. The distance of one block.

177 Q. Were you informed by Fowler, the bankrupt, about the time that the suit was commenced, in which the $4,000 judgment was recovered, that it had been commenced against him?

A. I think I was.

Q. And that it was brought to recover the amount of several promissory notes alleged to have been given by Mr. Fowler for borrowed money?

A. I think I saw the complaint, although I have no recollection of it.

Q. Do I understand you to say that Mr. Fowler consulted with you, as his attorney, with a view to a defence of that action, or a delay of the entry of judgment in that case?

A. He did, but he did not claim that he had any defense on the merits to the action.

Q. And did you give him advice, as his counsel, upon that subject; namely, the taking of steps to delay the entry of that judgment?

A. I advised with him upon that subject upon more than one occasion.

Q. Did you desire, as his counsel, to carry out his wish upon that subject?

A. I have no doubt I did.

Q. How long have you practiced law?

A. Since the fall of 1865.

Q. The witness is shown the Defendant's Exhibit No. 1, of December 11, 1876, the same being a certified copy of the judgment roll in

178 the first action commenced by Gardner A. Sage, jr., against the bankrupt, and asked if, in his opinion as a lawyer, there is any legal cause of action in that complaint?

(Complainant objects; incompetent.)

A. I do not think it does.

Q. Would a demurrer, had it been interposed to that complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, in your judgment, have been sustained?

(Same objection.)

A. I think it would.

Q. Did you have a young man in your office named J. H. Leyboult as clerk at the time you were speaking of?

A. I think he was there at that time; I am not certain.

Q. Did you receive, as one of the firm of Ruger & Jenney, the summons and complaint from Mr. Monell, the plaintiff's attorney, in the second action against the bankrupt, accompanied with the request that you cause it to be served upon the defendant?

A. I have no recollection of it.

Q. Who, as a general thing, at that time, first saw and read the correspondence in your office?

A Mr. French.

Q. Was it then passed to you?

A. No, sir; unless it was something I had charge of, or about which it was proper to consult me.

179 Q. Did you know, or was you informed about the time it was done, that your clerk, Mr. Leyboult, served the summons and complaint in the second action?

A. I don't think I ever heard of it before to-day.

Q. Mr. Fowler was, at that time, nevertheless, on the 12th day of May, 1875, your client?

A. He was in relation to this matter; he was never my general client.

Q. Did he consult with you in regard to the second action?

A. Yes, sir.

Q. And did he express a desire in reference to that to delay the entry of the judgment?

A. No, sir.

Q. Did he consult you upon the subject of a defense to that action?

A. I don't think he did.

Q. Witness is shown judgment roll, Defendant's Exhibit No. 3, of December 11, 1876, and asked if, in his judgment as a lawyer, any cause of action is set forth in that complaint?

A. No, sir.

Q. Were you conversant with the several steps in the two actions, which terminated in the judgments against the bankrupt, as they progressed from time to time?

180 A. With all of the legal proceedings, I think I was; what the transactions were between the parties, I do not know.

Q. You say upon your previous examination that the bankruptcy papers of John H. Fowler were prepared under your general direction; by whom were they so prepared?

A. By Mr. Brooks.

Q. Did he prepare the schedule of assets and liabilities?

A. I think he did.

Q. Under like instructions from you?

A. Under simple general directions from me to prepare and file Mr. Fowler's schedule.

Q. Did you examine the papers in the case before they left your office for filing?

A. No, sir; not until some little time afterwards.

Q. About how long after?

A. Well, sir, I can't tell; my attention was called to some supposed errors in the papers.

Q. Can you assign any reason why these five $1,000 notes upon which the two judgments were recovered were included as notes in the liabilities of John H. Fowler, and sworn to as such?

(Complainant objects; that it does not appear that the notes were so put into the schedule, and immaterial.)

181 A. No; I know of no reason. I don't think there could be any reason for it.

Witness explains—

I desire to say in regard to the delay which Mr. Fowler desired with reference to these Sage claims that I advised him that very likely temporary delay could be obtained, but the delay which he sought was until his son then in Europe should return, because if such a delay could be had, he was confident that his son could control the Sage claims and accommodate him with such time as he desired.

Redirect by Mr. VANN:

Q. You say that Mr. Fowler did not consult with you upon the subject of a defense to that action. Did he consult you with reference to filing a petition in time to head off the judgment in the second action?

A. In answer to that question I will say that we determined to file a petition in bankruptcy, and having so determined, intended to file it in time to head of' the last judgment.

(Defendant objects to answer, and moves to strike out that answer, as not responsive, and immaterial and incompetent.)

Q. After looking at the complaints in the two Sage judgments, is you

memory refreshed so that you can say that you ever saw them to examine them before to-day or not?

182 A. I may have seen them; it is quite impossible that I could have examined them.

Witness adds: The first time Mr. Fowler consulted me with reference to the case, I recollect that he did not bring any papers with him; my advice to him was upon a supposed case in which he did not inform me he was a party.

Q. Were you conversant with any legal steps in the Sage actions until after it had occurred?

A. I don't think I was.

Q. In the spring of 1875, did the firm of Ruger & Jenney have correspondents in all sections of the State, who occasionally sent papers them with the request for them to have them served?

A. We are frequently called upon by lawyers in other parts of the State to serve papers for them, and that business is attended to by Mr. French.

EDWIN S. JENNEY.

Sworn to before me December 21st, 1876.

C. W. SMITH,
Special Examiner.

Evidence here closed.

183 I, Cornelius W. Smith, special examiner in the above entitled action, hereby certify that the foregoing are the testimony and proceeding, and all of the same, taken and had before me as such examiner on behalf of the defendant in said action; and I further certify that the within and foregoing witnesses examined as hereinbefore stated, on part of defendant, to-wit: Edwin A. Bennett, Frank O. Fulmer, James B. Brooks, James Bennett Gould, Edwin Hurd, Edwin S. Jenney, Alonzo S. Fowler, and Jonathan G. Wynkoop, and Edwin S. Jenney, called as a witness for complainant, were each and all duly sworn, and were duly examined, and their examination reduced to writing by me, and they severally subscribed their names to their respective testimony, after the same had been read over to them at the respective dates set forth in connection with the examinations of said witnesses respectively.

C. W. SMITH,
Special Examiner.

Dated Syracuse, N. Y., Dec. 21st, 1876.

184 *Defendant's Exhibit No.* 1.

New York supreme court.

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Affidavit of service of summons and complaint.

CITY AND COUNTY OF NEW YORK, *ss:*

George W. Lange, being duly sworn, says: That he is 16 years of age and upwards, and that on the 28th day of April, 1875, at Delmonico's, No. 273 and 275 Broadway, in the city of New York, he served the an-

nexed summons, together with complaint therein mentioned, which is also hereunto annexed, on John H. Fowler, the defendant in this action, by delivering a copy of the same to him, such defendant, personally, and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

GEORGE W. LANGE.

Sworn to before me this 29th day of April, 1875.

HENRY HOYT,
Notary Public, (26) *New York City and County.*

185 CITY AND COUNTY OF NEW YORK:

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Summons for a money demand on contract.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint, on the subscriber at his office, No. 261 Broadway, New York, within twenty days after the service hereof, exclusive of the day of such serve; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of four thousand dollars, with interest on one thousand dollars, part thereof, from the 18th day of March, 1875; on one thousand dollars, part thereof, from the 31st day of March, 1875; on one thousand dollars, part thereof, from the 13th day of April, 1875; and one thousand dollars, remainder, from the 21st day of April, one thousand eight hundred and seventy-five, besides the costs of this action.

AMBROSE MONELL,
Plaintiff's Attorney.

Dated April 28th, 1875.

186 Supreme court, city and county of New York.

GARDNER A. SAGE, JR.,
against
JOHN H. FOWLER.

The complaint of the plaintiff, by Ambrose Monell, his attorney, shows to the court:

First. That on or about the 18th day of March, 1875, at Syracuse, N. Y., the defendant made his certain promissory note in writing, dated on that day, whereby he promised to pay to the order of the plaintiff, on demand, the sum of one thousand dollars, with interest, for value received, but that no part of said note has been paid.

Second. That on or about the 31st day of March, 1875, at Syracuse, N. Y., the defendant made his certain promissory note in writing, dated on that day, whereby he promised to pay to the order of the plaintiff, on demand, the sum of one thousand dollars, with interest, for value received, but that no part of said note has been paid.

Third. That on or about the 13th day of April, 1875, at Syracuse, N. Y., the defendant made his certain promissory note in writing,
187 dated on that day, whereby he promised to pay to the order of the plaintiff, on demand, the sum of one thousand dollars with interest, for value received, but that no part of said note has been paid.

Fourth. That on or about the 21st day of April, 1875, at Syracuse, N. Y., the defendant made his certain promissory note in writing, dated on that day, whereby he promised to pay to the order of the plaintiff, on demand, the sum of one thousand dollars, with interest, for value received, but that no part of said note has been paid.

Wherefore, plaintiff demands judgment against the defendant in the sum of four thousand dollars, with interest on one thousand dollars, part thereof, from the 18th day of March, 1875; on one thousand dollars, part thereof, from the 31st day of March, 1875; on one thousand dollars, part thereof, from the 13th day of April, 1875; and on one thousand dollars, remainder thereof, from the 21st day of April, 1875, besides his costs and disbursements of action.

AMBROSE MONELL,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Ambrose Monell, of said city and county, being duly sworn, says that he is the attorney for the above-named plaintiff, and that the foregoing complaint is true of his own knowledge, except as to the matter therein stated on information and belief, and as to those matters he believes it to be true.

188 Deponent further says that the reason why the verification is not made by the plaintiff is that the action is founded upon written instruments, for the payment of money only, and such instruments are in the possession of deponent, and that his knowledge is derived from said instruments, and also from the admissions of defendant to this deponent, and his grounds of belief are admissions so made to him by the defendant.

AMBROSE MONELL.

Sworn to before me this 28th day of April, 1875.

HENRY HOYT,
Notary Public, New York City and County.

189 Supreme court of city and county of New York.

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Statement of judgment.

Amount claimed in summons		$4,000 00
Interest		33 63
Notary's fee		
		$4,033 63
Costs by statute	$15 00	
Clerk entering judgment	1 00	
Affidavits	50	
Transcript and docketing	11	
Postage		
Serving summons and complaint	0 00	
Sheriff's fees on execution	1 38	
Satisfaction piece	38	
		18 37
		$4,052 00

CITY AND COUNTY OF NEW YORK, *ss:*

Ambrose Monell, plaintiff's attorney in the above action, being duly sworn, says that no answer or demurrer or notice of appearance has been received or served, in pursuance of the requirements of the
190 summons in said action, and that the disbursements mentioned have been made in said action, or may be necessarily made or incurred therein.

AMBROSE MONELL.

Sworn to before me this 19th of May, 1875.

HENRY HOYT,
Notary Public, New York City and County.

Judgment May 19, 1875.

The summons and complaint in this action, having been personally served on John H. Fowler, the defendant, on the twenty-eighth day of April, 1875, and no answer or demurrer to the complaint having been received by the plaintiff's attorney as required by the summons:

Now, on motion of Ambrose Monell, plaintiff's attorney, it is hereby adjudged that Gardner A. Sage, jr., the plaintiff, recover of John H. Fowler, the defendant, the sum of four thousand and thirty-three and sixty-three one-hundredths dollars, the amount claimed and interest, with eighteen and thirty-seven one-hundredths dollars costs and disbursements, amounting in the whole to four thousand and fifty-two dollars.

W. A. B.

Filed May 19, 1875, at 10 o'clock .24 m.

191 STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with original judgment-roll on file in my office, and that the same is a correct transcript therefrom and of the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this twenty-second day of November, 1876.

[L. S.] WM. WALSH, *Clerk.*

Defendant's Exhibit 1, of Dec. 11th, 1876.

C. W. S., *Sp'l Ex'm'r.*

Defendant's Exhibit No. 2.

Supreme court, Onondaga County.

Persons against whom judgment is rendered, John H. Fowler. Damages and costs, $4,052.00.

Persons in whose favor judgment is rendered, Gardner A. Sage, jr. Name of attorney, Ambrose Monell.

Time of docketing judgment, May 29, 1875, 6 p. m.; in New York County. May 19, 1875.

192 STATE OF NEW YORK,
Onondaga County, clerk's office, ss:

I certify that the above is a correct transcript, from the docket of judgment left in this office.

[L. S.] CHAS. E. HUBBELL, *Clerk.*

Dated city of Syracuse, Dec. 9, 1876.

Defendant's Exhibit No. 2, of Dec. 11, 1876.

C. W. S., *Sp'l Ex'm'r*

Defendant's Exhibit No. 3.

Supreme court.

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Affidavit of service of summons and complaint.

CITY OF SYRACUSE,
County of Onondaga, ss:

J. H. Lyboult, being duly sworn, says, that on the 12th day of May, 1875, at the city of Syracuse, N. Y., he served the annexed summons, together with the complaint therein mentioned, which is also 193 hereunto annexed, on John H. Fowler, the defendant in this action, by delivering a copy of the same to John H. Fowler, such defendant, personally, and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

J. H. LYBOULT.

Sworn to before me this 12th day of May, 1875.

E. F. ROUSE,
Commissioner of Deeds, Syracuse, N. Y.

Supreme court, city and county of New York.

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Summons for a money demand on contract.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint, on the subscriber, at 194 his office, No. 261 Broadway, New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of one thousand dollars, with interest from the 8th day of May, one thousand eight hundred and seventy-five, besides the costs of this action.

AMBROSE MONELL,
Plaintiff's Attorney.

Dated May 10th, 1875.

Supreme court, city and county of New York

GARDNER A. SAGE, JR.,
against
JOHN H. FOWLER.

The complaint of the plaintiff, by Ambrose Monell, his attorney, shows to the court:

First. That on or about the 8th day of May, 1875, at Syracuse, N. Y., the defendant made his certain promissory note in writing, dated on that day, whereby he promised to pay to the order of the plain-
195 tiff, on demand, the sum of one thousand dollars, with interest, for value received, but that no part of said note has been paid.

Wherefore plaintiff demands judgment against the defendant in the sum of one thousand dollars, with interest from the 8th day of May, 1875, besides his costs and disbursements of this action.

AMBROSE MONELL,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Ambrose Monell, of said city and county, being duly sworn, says that he is the attorney for the above-named plaintiff, and that the foregoing complaint is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why the verification is not made by the plaintiff is that the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of deponent, and that his knowledge is derived from said instrument, and also from the admissions of defendant to this deponent, and his grounds of belief are admissions so made to him by the defendant.

AMBROSE MONELL.

Sworn to before me this 11th day of May, 1875.

HENRY HOYT,
Notary Public, New York City and County.

196 Supreme court of the State of New York—city and county of New York.

GARDNER A. SAGE, JR., PLAINTIFF,
against
JOHN H. FOWLER, DEFENDANT.

Statement of judgment.

Amount claimed in summons	$1,000 00	
Interest	4 86	
Notary's fee		
		$1,004 86
Costs by statute	$15 00	
Defendants served with process	2 00	each.
Clerk entering judgment	1 00	
Affidavits	38	
Transcript and docketing	16	
Postage	12	

Serving summons and complaint.....		
Sheriff's fees on execution.....	1 38	
Satisfaction piece.....	38	18 42
		$1,023 28

CITY AND COUNTY OF NEW YORK, *ss:*

Ambrose Monell, plaintiff's attorney in the above action, being duly sworn, says that no answer or demurrer or notice of appearance
197 has been received or served in pursuance of the requirements of the summons in said action, and that the disbursements mentioned have been made in said action, or may be necessarily made or incurred therein.

AMBROSE MONELL.

Sworn to before me this 2d of June, 1875.

FRED. C. STIFFEN,
Notary Public, New York County.

Judgment, June 2, 1875.

The summons and complaint in this action having been personally served on John H. Fowler, the defendant, on the twelfth day of May, 1875, and no answer or demurrer to the complaint having been received by the plaintiff's attorney as required by the summons.

Now, on motion of Ambrose Monell, plaintiff's attorney, it is hereby adjudged that Gardner A. Sage, jr., the plaintiff, recover of John H. Fowler, the defendant, the sum of one thousand and four and eighty-six one-hundredths dollars, the amount claimed, and interest, with eighteen and forty-two one-hundredths dollars costs and disbursements, amounting in the whole to one thousand and twenty-three and one-hundredths dollars.

Filed June 2, 1875, at 8 o'clock .52 m.

J.

198 STATE OF NEW,
City and County of New York, ss:

I, William Walsh, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with original judgment roll on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

In witness whereof I have hereunto subscribed my name, and affixed my official seal this twenty-second day of November, 1876.

[L. S.] WM. WALSH, *Clerk.*

Defendant's Exhibit No. 3, of Dec. 11th, 1876.

C. W. S., *Sp'l Ex'm'r.*

Defendant's Exhibit No. 4.

Supreme court, Onondaga County.

Persons against whom judgment is rendered, John H. Fowler. Damages and costs, $1,023.28.

Persons in whose favor judgment is rendered, Gardner A. Sage, jr. Name of attorney, Ambrose Monell.

Time of docketing judgment, June 3, 1875, 11 a. m. In New York County, June 19, 1875.

199 STATE OF NEW YORK,
Onondaga County, clerk's office, ss:

I certify that the above is a correct transcript from the docket of judgments kept in this office.

[L. S.] CHAS. E. HUBBELL, *Clerk.*

Dated city of Syracuse, Dec. 9, 1876.

Defendant's Exhibit No. 4, of Dec. 11, 1876.

C. W. S., *Sp'l Ex'm'r.*

DEFENDANT'S EXHIBIT NO. 5.]

The people of the State of New York to the sheriff of the county of Onondaga, greeting:

Whereas judgment was rendered on the nineteenth day of May, one thousand eight hundred and seventy-five, in an action in the supreme court of the State of New York, city and county of New York, between Gardner A. Sage, jr., plaintiff, and John H. Fowler, defendant, in favor of the said plaintiff and against the said defendant, for the sum of four thousand and fifty-two dollars, as appears to us by the judgment-roll filed in the office of the clerk of the city and county of New York; and whereas the said judgment was docketed in your county on the
200 twenty-ninth day of May, in the year one thousand eight hundred and seventy-five, and the sum of four thousand and fifty-two dollars is now actually due thereon. Therefore, we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor, on the day when the said transcript was docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you, to the clerk of the city and county of New York.

Witness Hon. Noah Davis, presiding justice of said court, at the city hall, in the city of New York, the 28th day of May, one thousand eight hundred and seventy-five.

AMBROSE MONELL.
Plaintiff's Attorney, 261 *Broadway, N. Y.*

(Endorsed:)

201 Supreme court.

GARDNER A. SAGE, JR.,
against
JOHN H. FOWLER.

Execution against property.

Sheriff of county of Onondaga:

Levy and collect $4,052, with interest from and on 19th day of May, 1875, besides your fees, &c.

AMBROSE MONELL,
Plaintiff's Attorney, 261 *Broadway, N. Y.*

Received May 31st, 1875, 9 a. m.

DAVIS COSSITT, *Sheriff.*

Defendant's Exhibit No. 5 of December 11, 1876.

C. W. S, *Sp'l Ex'm'r.*

Defendant's Exhibit No. 6.

The people of the State of New York to the sheriff of the county of Onondaga, greeting:

202 Whereas judgment was rendered on the second day of June, one thousand eight hundred and seventy-five, in an action in the supreme court of the State of New York, city and county of New York, between Gardner A. Sage, jr., plaintiff, and John H. Fowler, defendant, in favor of the said plaintiff, and against the said defendant, for the sum of one thousand and twenty-three 28 one-hundredths dollars, as appears to us by the judgment-roll filed in the office of the clerk of the city and county of New York; and whereas the said judgment was docketed in your county on the third day of June, in the year one thousand eight hundred and seventy-five, and the sum of one thousand and twenty-three and twenty-eight one hundredths dollars is now actually due thereon: Therefore we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor on the day when the said transcript was docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you to the clerk of the city and county of New York.

Witness Hon. Noah Davis, presiding justice of said court, at
203 the city hall, in the city of New York, the 2d day of June, one thousand eight hundred and seventy-five.

AMBROSE MONELL,
Plaintiff's Attorney, 261 *Broadway, N. Y.*

(Endorsed:)

Supreme court.

GARDNER A. SAGE, JR.
against
JOHN H. FOWLER.

Execution against the property.

Sheriff of County of Onodaga:

Levy and collect $1,023.28, with interest from the 22d day of June 1875, besides your fees, &c.

AMBROSE MONELL,
Pl'ff's Att'y.

Rec'd June 3, 1875, 10.55 a. m.

DAVIS COSSITT, *Sheriff.*

Defendant's Ex. No. 6, of Dec. 11th, 1876.—C. W. S., Spl. Exm'r.

204 *Defendant's Exhibitt No.* 8.

HAVERHILL, *May* 19, 1875.

Mr. John H. Fowler, bought of H. G. Foss & Co., manufactures of and dealers in fine boots and shoes, No 75 Merrimac street. Terms—30 days, 10. off.

	Check—	24	prs. la Fr. kid button bt.	M., 2 1-6,	$3 75		$90 00
Case 1.	"	24	" " " "	F. M., 2 1-6,	3 75		90 00
	"	12	" " " "	F., 2 1-6,	3 75		45 00
	"	12	" " serge kid fox do	S. 2 1-6,	2 60		31 20
Case 2.	"	24	" " " " "	M. 2 1-6,	2 60		62 40
	"	12	" " " " "	S. 2 1-6,	2 60		31 20
Case 3.	"	24	" " " " "	F. 2 1.6,	2 60		62 40
	"	12	" " car kid Newport ties	S., 2 1-6,	1 95		23 40
	"	12	" " " " "	M., 2 1-6,	1 95		23 40
	"	12	" " " " "	F., 2 1-6,	1 95		23 40
	*	12	" Miss " " "	M., 2 1-6,	1 70		20 40
	Check—	12	" " " " "	F M., 2 1-6,	1 70		20 40
							$523 20
			Error				20 40
							$502 80

*Short, not received (in pencil).

Merchant's dispatch—will send balance in a few days.

Defendant's Exhibit No. 8, of Dec. 11th, 1876.—C. W. S. sp'l exm'r.

205 *Defendant's Exhibit No.* 9.

MILFORD, MASS., *May* 21, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of H. S. Bacon & Co., manufactures of boots and shoes, men's Scotch and plain congress boots, balmorals, Oxford ties, in calf and buff, women's, misses', and children's Polish boots in grain, calf, and buff. Factory, Central street. H. S. Bacon, Jesse Howard, Lambert Pierce.

Check—5 cases 60 pr. calf boots at $3 00 ..... $180 00

Defendant's Exhibit No. 9, of Dec. 11, 1876.—C. W. S., sp'l exm'r.

Defendant's Exhibit No. 10, *of Dec.* 11, 1876.

NEW YORK, *April* 27, 1875.

Mr. Fowler, J. H., Syracuse, N. Y., bought of Studwell Brothers & Co., manufacturers and jobbers of boots and shoes, No. 17 Murray
206 street, between Broadway and Church sts. Leander M. Studwell, Dwight Studwell. Terms cash. Interest from date if not paid within 30 days.

Check	18—36	woms. kid blue inld. hld. ties,	c2-6,	$1 75		$63 00
"	19—36	" " red " "	c2-6,	1 75		63 00
"	20—60	" goat m. w. cong. burh,	⅜,	90		54 00
"	21—60	" carpet hld. slips,	⅜,	45		27 00
"	22—60	" castg. goat for cong.,	⅜,	1 40		84 00
"	23—60	" peb. grain half ds pol.,	3-7,	1 35		81 00
"	24—60	miss a. clf. half ds. pol.,	1 3-2,	1 20		72 00
"	25—36	men's buff Creole cong.,	6-10,	1 65		59 40
"	26—36	boys' kip plow shoes,	1-5,	1 10		39 60
"	27—30	" buff imp. cong.,	1-5,	1 40		42 00
"	28—30	" " hib. top cong.,	1-5,	1 37½		41 25

Check 29—60 woms. peb. grain half ds. butt.,	3-7,	1 85.....	111 00
" 30—11 " " " "	3-7,	1 85.....	20 55
" 38 " " " "	2-6,	1 51.....	57 38
" 13 " " " "	2-6,	1 51.....	19 63
" 31—24 " " " "	2-6,	1 51.....	36 24
" 6 " last goat fox cong.,	3-8,	1 40.....	8 40
" 27 " a clf. half ds. bals,	6-9,	1 30.....	35 10
" 12 chs. cuir. pat. fox butt. s. s.,	2-5,	1 05.....	12 60
Ctge.....			1 50
			$928 45

H. R. R. & N. Y. C. R. R.

Defendant's exhibit No. 11, of Dec. 11, 1876.—C. W. S., sp'l exm'r.

207 *Defendant's Exhibit No.* 11.

NEW YORK, *April* 27, 1875.

Mr. John H. Fowler bought of B. Lippman & Lesser, manufacturers of hand and machine sewed boots and shoes.

Check—24 S. S. Cong. gait.....	$3 75	$90 00
" 12 S. S. Bu'mge hand slaid.....	6 00	72 00
" 12 S. S. C. & T. buckle low Alexis.....	6 00	72 00
		$234 00

Marked Defendant's Exhibit No. 11 of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 12.

NEW YORK, *April 27th*, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of J. Lagowits & Co., manufacturers of all styles of trunks, valises, patent frame traveling bags and satchels, 390 Broadway, between White and Walker sts.; factory East New Newark, N. J. All orders promptly attended to.

208 Terms—All bills upon which a credit is given must be settled within 30 days by note. J. Lagowits, L. Hass, J. Fraukle.

		1¼	1½	2	2½	
Check—3 West U. Ild., (4)		28	32	36	40	$21 75
		4⅜	5⅛	5½	5⅞	
" —1 Ea. No. 1 ladies,		28	30	32	34	21 25
		3⅝	4⅛	4½	4⅞	
" —1 " 2 "		28	30	32	24	17 25
	4⅛	4½	4⅞	5¼	5⅝	
" —4 " x 2 "	28	30	32	34	36	97 50
	3¼	3½	3¾	4	4¼	
" —1 " 3 "	28	30	32	34	36	18 75
	2.50	2.65	2.80	2.95	3.10	
" —1 " 6 "	28	30	32	34	36	14 09
		3½	3¾	4	4¼	
" —1 " x 6, gent. lin.,		26	28	30	32	15 50
				1⅜	1½	
" —4 " U. russet val.,				22	24	11 50
			4¼	4¾	5½	
" —2 " X C. T. R. R.			18	20	22	29 00
			4¾	5¼	5¾	
" — " X B. F. R. R. red			16	18	20	15 75
" —2 24 X C. R. R.					6½	13 00
" —1 doz. 1¼ Th. straps					5	5 00
			12¾	13¼	13¾	
" —½ " Ea. R. R. bags,			6	7	8	19 87
45 Mtlg.,					15	6 75
						$306 87

2½ doz. slates.
1½ " keys.

H. R. R. R. Shipped from factory.
Defendant's Exhibit No. 12 of Dec. 11, 1876.—Sp'l ex'm r.

209 *Defendant's Exhibit No.* 13.

NEW YORK, *April* 28, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of Studwell Brothers & Co., manufacturers and jobbers of boots and shoes, No. 17 Murray street, between Broadway and Church st. Leander M. Studwell, Dwight Studwell. Terms Cash. Interest from date if not paid within 30 days.

Check 32—36 men's Granite State bal's,	6-11	$1 45	$52 20	
" 33—60 woms. kid ms. aut.,	2-6	85	51 00	
" 34—60 miss " "	1½	82½	49 50	
			$152 70	
C'v'ge			50	
			$153 20	

H. R. R. & N. Y. C. R. R.
Defendant's Exhibit No. 13 of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 14.

NEW YORK, *April 29th*, 1875.

210 Mr. J. H. Fowler, Syracuse, N. Y., bought of J. Lagowitz & Co., manufacturers of all styles of trunks, valises, patent frame traveling bags and satchels, 390 Broadway, between White and Walker streets. Factory, East Newark, N. J. All orders punctually attended to. Terms—4 months note. All bills upon which a credit is given must be settled within 30 days by note. J. Lagowitz, L. Hass, J. Frankle.

			17	20	
Check—½ doz. E. No. 1 P. R. R.			18	22	$12 33
Job—Check—1 Doz. No. 16 Satchels,			13	10½	10 50
Check—5-12 Doz. No. 18 Satchels,			13	12	5 00
" —7-12 " No. 18 "			12	11	6 34
" —1 " No. 5 Shovel Straps,				3	3 00
" —1 " H. 3 " "				6	6 00
" —1 24 Sole Leather Valise,				6½	6 50
" —2 26 " " "				7¼	14 50
" —3 22 F. R. R. Job.				2¼	8 25
" —1 22 C. R. R.,				5	5 00
" —1 24 A. R. R.,				7	7 00
	4¼	4¾	5¼	5¾	
" —2 Ea. X.A T. R. R.,	14	16	18	20	40 00
" --1 22 X A T. R. R.,				6½	6 50
			3½	4½	
" —2 Ea. No. 71 Satchels,			11	13	16 00
		16	17	18	
" —1 Ea. No. 4 Sole Leather and Cover,		28	30	32	51 00
" —6 40 Union Iron Ld. Tk.,				2½	15 00
9 Mtlgs.,				15	1 35
					$218 27

211 H. R. R. R.

Defendant's Exhibit No. 14.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 15.

Messrs. Syracuse Boot and Shoe Store, bought of Culvers Bro. & Co., manufacturers and dealers in paper and paper stock. No. 35 West Fayette street. E. B. Culver, B. H. Culver, J. L. Collin.

Check—1 bdl. 24x36 manilla.
" —1 " 28x30 "
" —2 " 18x24 " 95. 9. $8 55

Defendant's Exhibit No. 15, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 16.

N. B. Ellison, Goodwin Stoddord.

212 ROCHESTER, N. Y., *May 3d*, 1875.

Mr. J. H. Fowler, bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77, North Water street. Terms—90 days.

Check—12 pr. men's cf. boots M $56 00
" —12 " " " F 56 00

$112 00

Am. Express.

Defendant's Exhibit No. 16, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 17.

ABINGTON, MASS., *May* 19, 1875.

Mr. John H. Fowler, Syracuse, N. Y., bought of Noyes & Holmes, successors to B. E. Faxon & Co., manufacturers of machine-sewed and hand-pegged fine calf and buff boots, congress and brogans, French kid excelsiors, balmorals, &c. H. Noyes, I. H. Holmes. Terms
213 —4 mo's note, or 5 p. c. off, 30 days.

Check—No. 245. 23 half D. S. nailed calf Alexis, 6 10, $2.85... $65 55
" —No. 246. 24 " " " " 1 5, 2.25... 54 00

$119 55

Sold by B. F. Seymore.

Defendant's Exhibit No. 17, of Dec. 11th, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 18.

LYNN, MASS., *May* 5, 1875.

Mr. John H. Fowler, bought of G. H. Williams & Chase, manufacturers of women's boots and shoes; also men's serge, tweed, and canvas boots, Nos. 8 and 12 Munroe street. Terms—4 mo's note, or 5 off 30 days; 6 off 8 days; bills to be settled at expiration of 30 days.

Check—No. 320. 24 Jupour kid Pol., $2.00 ..... $48 00
" 36 " pl. butt., 1.85 ..... 66 60

$114 60

Defendant's Exhibit No. 18, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

214 *Defendant's Exhibit No.* 19.

NEW YORK, *May* 6, 1875.

Mr. John H. Fowler, bought of B. Lippman & Lesser, manufacturers of hand and machine-sewed boots and shoes.

Check—24 S. S., Scotch cg. b. T. buff pat, $3.75 ..... $90 00

Defendant's Exhibit No. 19, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

Defendant's Exhibit No. 20.

BOSTON, *May* 6, 1875.

J. H. Fowler, bought of G. Corning & Co., manufacturers of boots, shoes, and brogans, No. 91 Pearl street. Factories—Farmington, N. H.; Chester, N. H.; East Abington, Mass.; Holliston, Mass.; Danvers, Mass.

Check—36 wo's kid Crough slips, 2-6, $1.15 ..... $41 40
Cartage 38

$41 78

Defendant's Exhibit No. 20, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

215 *Defendant's Exhibit No.* 21.

ORANGE, N. J., *May* 7, 1875.

Mr. J. H. Fowler, bought of John Freeman, boot and shoe manufacturer, Willow Hall Building, Main Street. Terms—net cash.

Check—24 Men's Calf Strap Shoes, W. Vamp Case Toe, $5.25 $126 00
Via. exps., will send a case of Square Toes on Monday.
(In pencil:) Error 6 00

$120 00

Defendant's exhibit No. 21, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

Defendant's Exhibit No. 22.

PHILADELPHIA, 4 *mo.* 7, 1875.

Mr. John H. Fowler, to T. P. & S. S. Smith, Dr. No. 334 North Third street. Terms—4 mos. note, or 4 p. c. off on 30 days.

Check—990.	To 72 prs.	Children's	Peb. Pol.	7-10	$ 97½	$70 20
" —657.	" 72 "	"	Last Auk.	7-10	95	68 40
" —108.	" 72 "	Miss. Peb.	Pal.	1½	1.37½	99 00

$137 60

(In pencil:) 7 Pair Misses Short.

Defendant's exhibit No. 22, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

216 *Defendant's Exhibit No.* 23.

N. B. Ellison, Goodwin Stoddard.

ROCHESTER, N. Y., *May* 8, 1875.

Mr. John H. Fowler, Syracuse, N. Y., bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77 North Water street. Terms—90 days.

Check—24 prs. cf. cgs. leg boots, half C. S. M $4.75 $114 00
" —24 " " " " F 4.75 114 00

$228 00

DEAR SIR:—You will find a p. of these boots marked E F; those are made in the full last. The p. marked F is on medium boot. E. & S.
Ship via. Am. Express.

Defendant's exhibit No. 23, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

Defendant's Exhibit No. 24.

SYRACUSE, N. Y., *May 8th*, 1875.

C. S. Whitelam, Geo. Whitelam, J. DeGan.

217 Mr. J. H. Fowler, city, bought of Whitelam Bros. & Co., wholesale manufacturers of men's hand sewed and pegged fine boots and shoes, No. 4 Keeler Block, West Fayette street. Terms—60 days.

Check—12 prs. men's button gaiters, half D. S.....$6.50 $78 00

Defendant's ex. No. 24, of Dec. 11th, 1876.—C. W. S., Sp'l Ex'm'r.

Defendant's Exhibit No. 25.

ORANGE, N. J., *May* 10, 1875.

Mr. J. H. Fowler, bought of John Freeman & Co., boot and shoe manufacturer, Willow Hall Building, Main street. Terms—net cash.

Check—12 men's calf strap shoes, square toe.....$5.00 $60 00
" —12 " " " " 5.00 60 00

$120 00

Defendant's exhibit No. 25, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

218 *Defendant's Exhibit No. 26.*

NEW YORK, *May* 10, 1875.

Mr. J. H. Fowler, bought of Wm. O. Headley & Son, No. 8 Warren street, manufacturers of trunks, traveling bags, ladies' satchels, &c.

			5.75	6.25		
No.	1, 6.	Check—3	28	30 No. 6 Lad. Zinc.		$36 00
"	7, 8.	" —2		32 No. 6 "	$6.75	13 50
			5.37½		2.50	
"	9,	" —1	34	No. 2 Gents' Zinc with trays 1 16 S.		7 88
"	10, 12.	" —3	34	No. 6 Lad. Zinc.	7.25	21 75
"	13, 14.	" —2	36	No. 6 Lad. Zinc.	7.75	15 50
			7.25	5.75		
"	15, 16.	" —2	38	No. 11 Lad. Lea. 2 22 H.		26 00
				5		
		"		half doz. 1¼ in trunk straps.		2 50
			7.75	3.37		
"	17.	" —1	30	No. 11 Lad. Lea. 1 16 H.		11 22
		"		2 18 H.	3.75	7 50
			7.75	2.50		
"	18.	" —1	30	No. 11 Lad. Lea. 1. 16 S.		10 25
		"		2. 18 S.	2.75	5 50
			8.25	3.37	4.25	
"	19.	" —1	32	No. 11 Lad. Lea. 1. 16 H. 2	20 H.	20 13
			8.75	2.25 3.00		
"	20.	" —1	34	No. 11 Lad. Lea. 2. 14 20 S.		19 25
			9.25	14.00 15.00 per doz.		
"	21.	" —1	26	No. 11 Lad. Lea. 6. 11 12 No. 30 in.		23 75
			9.25	16.00 per doz.		
"	22.	" —1	36	No. 11 Led. Lea. with trays 2.13 No 30 in.		11 92
				5.00		
				half doz 1¼ in. trunk straps		2 50
			3.37	3.75		

No. 23, 24.	Check—2	26	30	No. 2 Gent's Zinc.		14 25
		3.50	4.00		5.75	
" 25, 26.	" —2	28	32	No. 3 " "	2.24 H.	26 25
219		4.25	4.62	16.00 pr. doz.		
" 27, 29.	" —1	28	No. 2 Gent's Zinc. 2.30, No. 2 Gent's Lea.		4.13	
			No. 30 Sat.			18 84
		4.62	4.25			
" 30, 33.	" —1	30	No. 2 Gent's Lea. 3.28, No. 2 Gent's Lea.			17 38
				33 wraps 15		4 95
						$316 97

Defendant's exhibit No. 26, of Dec. 11, 1876.—C. W. S., Sp'l Ex'm'r.

Defendant's Exhibit No. 27.

ROCHESTER, N. Y., *May* 11, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77 North Water street. Terms—90 days.

Check—24 prs. men cf. Newport ties	$3 25	$78 00
" —12 ", " Cong.	4 25	51 00
		$129 00

Am. Express.

Defendant's exhibit No. 27, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

220 *Defendant's Exhibit No. 28.*

NEW YORK, *May* 12, 1875.

Mr. J. H. Fowler bought of J. Lagowitz & Co., manufacturers of all styles of trunks, valises, patent frame traveling bags and satchels, 390 Broadway, between White and Walker streets. All bills upon which a credit is given must be settled within 30 days by note. J. Lagowitz, L. Hass, J. Frankle.

	15¼	16¼	17¾	19	
Check—½ doz. ea. No. 1 P. R. R.,	16	18	20	22	$34 25
" —6 36 Union Ild. Tk.				2	12 00
6 Mtlgs.			15		90
					$47 15

H. R. R. R.

Complete.

Defendant's exhibit No. 28, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

221 *Defendant's Exhibit No. 29.*

21 WARREN STREET,
New York, May 12, 1875.

Mr. John H. Fowler bought of Lippman & Lesser, manufacturers of hand and machine sewed boots and shoes.

Check—1 D. S. box t. lots	$8 00
" —1 S. S. " "	7 00
	$15 00

For Sage, ex'r.

Defendant's exhibit No. 29, of Dec. 11th, 1876.—C. W. S. sp'l ex'm'r.

Defendant's Exhibit No. 30.

NEW YORK, *May* 13, 1875.

Mr. John H. Fowler, Syracuse, N. Y., bought of Studwell Brothers & Co., manufacturers and jobbers of boots and shoes, No. 17 Murray street, between Broadway and Church sts. Leander M. Studwell, Dwight Studwell. Terms—cash. Interest from date if not paid within 30 days.

222

Check—35 60 woms. A clf. half D. S. Pol. 3-7	.....	$1 30	$78 00
" —36 100 woms. Webb slips	.....	28	28 00
Ctge.	.....		50
			$106 50

H. R. R. & N. Y. C. R. R.
(Endorsed in pencil:) Paid by note.
Defendant's exhibit No. 30, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 31.

ROCHESTER, N. Y., *May 13th*, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77 North Water street. Terms, 90 days.

Check—12 prs. men's cf. Scotch gaiters	.....	$4 25	$51 00
" —12 " " gr. leg boots	.....	4 75	57 00
			$108 00

Am. Express.
Defendant's exhibit No. 31, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

223 *Defendant's Exhibit No. 32.*

ROCHESTER, *May* 14, 1875.

Bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77 North Water street; terms, 90 days.

Check—24 p'rs men's c'f Duke Alexis ..... $4.25—$102 80
Am. Express.
Defendant's exhibit No. 32, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 33.

ROCHESTER, N. Y., *May* 15, 1875.

Mr. John H. Fowler, Syracuse, N. Y., bought of Ellison & Stoddard, wholesale boot and shoe manufacturers, No. 77 North Water street; terms, 90 days.

Check—24 p'rs men's c'f Duke Alexis, outside tap..... $4.75—$114 00
American Express.
Defendant's exhibit No. 33, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

224 *Defendant's Exhibit No.* 34.

NEW YORK, *May* 18, 1875.

Mr. J. H. Fowler, Syracuse, N. Y., bought of Studwell Brothers & Co., manufacturers and jobbers of boots and shoes, No. 17 Murray street, between Broadway and Church st. Leander M. Studwell, Dwight Studwell. Terms, cash; interest from date if not paid within 30 days.

Check—37 60 ch's A cl'f half D. S. C. T. Pol. 11-12....$ .95—$57 00

H. R. R. & N. Y. C. R. R.
(Endorsed in pencil:) Paid by notes.
Defendant's exhibit No. 34, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 35.

21 WARREN STREET,
New York, May 22, 1875.

225 Mr. John H. Fowler bought of B. Lippman & Lesser, manufacturers of hand and machine sewed boots and shoes.

Check—1 best morocco leg boots $10 00

Defendant's exhibit No. 35, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 36.

BOSTON, *May 17th*, 1875.

Mr. John H. Fowler bought of Mallon & Houghton, manufacturers and wholesale dealers in boots and shoes, 180 Congress street. Terms, 4 mos. Factory at East Abington. A. J. Mallon, G. C. Houghton.

Check—60 p'rs wo's sge. kid g't crog. buskins.....$ .75 $45 00
Carting..... 38

$45 38

Defendant's exhibit No. 36, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

226 *Defendant's Exhibit No.* 37.

BOSTON, *May* 21, 1875.

John H. Fowler, bought of G. Corning & Co., manufacturers of boots, shoes, and brogans, No. 91 Pearl street. Factories: Farmington, N. H., Chester, N. H., East Abington, Mass., Holliston, Mass., Danvers, Mass.

Check—24 p'rs kid crogt. slips, D wide, $1.15.....$27 60
C't'ge..... 38

$27 98

Defendant's Exhibit No. 37, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

Defendant's Exhibit No. 38.

236. Factory, Newark, N. J.

NEW YORK, *May* 20, 1876.

Mr. J. H. Fowler, Syracuse, N. Y., bought of Wm. O. Headley & Son, No. 8 Warren street, manufacturers of trunks, traveling-bags, ladies' satchels, &c.

6.75 7.75.

No. 1, 2. Check—1 32 36 No. 6 lad. zinc..... $14 50
" 3. " —1 34 No. 11 lad. lea..... 8 75

					5.00 5.37½.		
No. 4,	9.	Check—	3	32	34	No. 2 gent's lea.....	31 13
					4.62½ 5.00.		
" 10,	11.	"	—1	30	32	No. 2 gent's zinc.....	9 62
" 12,	13.	"	—2	34		No. 3 gent's zinc, $4.25.....	8 50
14.		"	—1	32		No. 11 lad. lea.....	8 25
						14 wraps, .15	2 10
							$82 85

This completes order.

Defendant's Exhibit No. 38, of Dec. 11, 1876.—C. W. S., sp'l ex'm'r.

227 At a term of the district court of the United States, in bankruptcy, held in and for the northern district of New York, at the city of Syracuse, on the 17th day of August, A. D. 1875.

Present, Hon. William J. Wallace, district judge.

In the matter of John H. Fowler, a bankrupt.—No. 4749.

On reading the petition of Jonathan G. Wynkoop, assignee of said bankrupt, dated and verified this day, setting forth that he has received an offer for the stock of goods late of said bankrupt, in store No. 3, Salina street, Syracuse, from the firm of Thing & Norris, of Boston, Mass., for fifty-one cents upon the dollar of the inventory price, subject to correction of errors, which inventory amounts to $16,556.97, and said sum to be paid to $8,444.05; and that said assignee has entered into a contract with said Thing & Norris for the sale to them of said goods at said price, errors excepted, in cash, subject to the approval of this court, and further setting forth that the sheriff of Onondaga County has
228 or claims a lien upon said goods, by virtue of levies made under two certain executions in favor of Gardner A. Sage, jr., plaintiff, and said John H. Fowler, as defendant, but which executions and the judgments on which they are issued said assignee claims are fraudulent, and he desires to contest the same; and further setting forth that said assignee has, at private sale, sold goods at and above the inventory price to the amount of $130.00.

And Irving G. Vann, esq., appearing for said sheriff, and said Gardner A. Sage, jr., and opposing the motion herein. On motion of A. J. Northrup, attorney for said assignee and petitioner, ordered, that said assignee be and he is authorised and empowered to sell said stock of goods on the terms and conditions in his contract set forth to Thing & Norris, and said agreement is hereby approved and affirmed, and said sale is in all things ratified, and that the said claim or *lein* of said sheriff and said Sage be released from said goods upon such sale, and transferred to so much of said monies as shall be sufficient to pay the same, if finally held good, and that the assignee deposit with the clerk of this court the sum of five thousand and two hundred dollars to cover the amount of said executions and sheriff's fees thereon, to which said sheriff's and Sage's *lein* shall attach until the further order and judgment of the court in respect thereto, with the same force and effect as before this order they attached to said goods, and that the said
229 sales of goods made by said assignee be and they are approved, confirmed and ratified in all respects.

WM. J. WALLACE.

(Endorsed:)
Original filed August 17th, 1875.

UNITED STATES OF AMERICA,
District Court Clerk's Office,
Northern District of New York, ss:

I, Winfield Robbins, clerk of said court, do hereby certify that I have compared the annexed copy of an order with the original order entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have caused the seal of the said court to be affixed at the city of Buffalo, in said district, this 20th day of August, A. D. 1875.

[L. S.] WINFIELD ROBBINS, *Clerk.*

Defendant's Exhibit No. 7.

UNITED STATES OF AMERICA,
230 *District Court Clerk's Office,*
Northern District of New York, ss:

I, Winfield Robbins, clerk of said court, do hereby certify that I have compared the annexed copy of a debtor's petition, schedules thereto annexed and endorsement of filing with the original debtor's petition, schedules and endorsement entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have caused the seal of the said court to be affixed at the city of Buffalo, in said district, this 22d day of December, A. D. 1876.

[L. S.] WINFIELD ROBBINS, *Clerk.*

Petition by debtor.

To the Hon. William J. Wallace, judge of the district court of the United States for the northern district of New York:

The petition of John H. Fowler, of the city of Syracuse, in the county of Onondaga and State of New York, and district aforesaid, respectfully represents:

231 That he has resided and carried on business for six months next immediately preceding the filing of this petition at Syracuse, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said act; and that he may

be decreed to have a certificate of discharge from all his debts provable under the same.

JOHN H. FOWLER.

RUGER & JENNEY,
Attorneys for Petitioner.

232 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, John H. Fowler, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my *my* knowledge, information, and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

JOHN H. FOWLER.

Subscribed and sworn to before me this first day of June, A. D. 1875.

D. F. GOTT,
Register in Bankruptcy.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured, according to the provisions of the 28th section of said act.

Order of payment: Preferred claims.	Refr'nce to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount	Where and when contracted.	Nature and consideration of the debt, and whether contracted as copartners or joint contractor; and if so, with whom.
1.				*Dolls. Cts.*		
Debts due the United States, and taxes and assessments under the laws thereof.	Fol. 1.	None.				
2.						
Debts due to the State of ..... and taxes and assessments under the laws of said State.	.....	None.				
3.						
Wages due clerk, servant, &c., to an amount not exceeding $50, for labor performed within six months.	.....	Orville S. Fowler	Syracuse, N. Y., clerk in store.	$75.00	Syracuse, N. Y., June 1, 1873	For services as clerk in store.
	.....	Richard Welch	Syracuse, N. Y., servant	25.00	Syracuse, N. Y., June 1, 1875	For services as a servant.
	.....	Alonzo S. Fowler	Syracuse, N. Y., clerk in store.	125.00	Syracuse, N. Y., June 1, 1875	For services as clerk.
4.						
Other debts preferred by said act.	.....	None.				
	" 2					

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the 11th section of the act, and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences and description. [Including nature and cause, and consideration of indebtedness.]	When and where contracted.	Value of securities.	Amount of debts.
" 3	.....	None.		*Dollars. Cts.*	*Dollars. Cts.*
" 4					

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and if so, with whom.
			Dolls. Cts.		
" 5	J. O. Whitehouse	27 Warren street, New York City, merchant.	$353 64	Syracuse, N. Y., 4 months, Dec. 18, 1874.	For goods purchased for which petitioner gave his note.
	J. O. Whitehouse	Same	528 54	Jan. 9, 1875, 4 months, Syracuse, N. Y.	Same as above.
	J. O. Whitehouse	Same	670 61	Syracuse, N. Y., 4 months, Feb'y 5, 1875.	Same as above.
	Wallace & Elliott	25 Warren street, New York City, merchant.	508 94	Syracuse, N. Y., 4 months, Dec. 21, 1874.	For goods purchased for which petitioner gave his note.
	Wallace & Elliott	Same	496 04	Syracuse, N. Y., 4 months, Dec. 24, 1874.	Same as above.
	Wallace & Elliott	Same	276 18	Syracuse, N. Y., 4 months, Jan'y 11, 1875.	Same as above; said amount is balance due on note.
" 6	Wallace & Elliott	Same	376 87	Syracuse, N. Y., 4 months, Jan'y 21, 1875.	For goods purchased for which petitioner gave his note.
	Wallace & Elliott	Same	260 90	Syracuse, N. Y., 4 months, Jan'y 20, 1875.	For goods purchased for which petitioner gave his note.
	Wallace & Elliott	Same	663 10	Syracuse, N. Y., 4 months, Feb'y 1, 1875.	For goods purchased for which petitioner gave his note.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any person; and if so, with whom.
			Dolls. Cts.		
	Wallace & Elliott	25 Warren street, New York City, merchants.	$249 98	Syracuse, N. Y., between Feb. and April 14, 1875.	For goods purchased.
	B. Lippman & Lessor	21 Warren street, New York City, merchants.	575 56	Syracuse, N. Y., 3 months, Feb. 23, 1875; 4 months, Feb. 1, 1875.	For goods purchased for which petitioner gave his two promissory notes.
" 7	B. Lippmann & Lessor	21 Warren street, New York City, merchants.	358 50	Syracuse, N. Y., from April 20 to May 22, 1875.	For goods purchased.
	J. Wooster & Sons	Kingsboro', N. Y., merchants	291 36	Syracuse, N. Y., 4 months, Jan. 1, 1875.	For goods purchased for which petitioner gave his note.
	G. H. Williams & Chase	Lynn, Mass., merchants	835 43	Syracuse, N. Y. (4 months, Jan. 14, 1875; Feb. 11, 1875).	For goods purchased for which petitioner gave his three promissory notes.
	G. H. Williams & Chase	Lynn, Mass	704 30	Syracuse, N. Y., from M'ch 22 to May 5, 1875.	For goods purchased.
" 8	Williamsport Rubber Company.	Williamsport, Pa., manufacturers.	317 26	Syracuse, N. Y., 4 months, Jan. 25, 1875.	For goods purchased for which petitioner gave his note.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.
			Dolls. Cts.		
	Cowles, Curtiss & Brady....	Rochester, N. Y., merchants.	$174 74	Syracuse, N.Y., 4 months, Jan'y 7, 1875.	For goods purchased, for which petitioner gave his note.
	A. & W. McElwain.....	Amsterdam, N. Y., merchants.	176 94	Syracuse, N. Y., 3 months, Feb. 27, 1875, 1 month, April 21, 1875.	For goods purchased, for which petitioner gave his two notes.
" 9	E. Simon & Brothers	65 Reade street, New York, merchants.	348 61 350 62	Syracuse, N. Y., 3 and 2 months, March 11, 1875.	For goods purchased, for which petitioner gave his two notes.
	A. S. Kelly.....	Haverhill, Mass., merchants.	112 70	Syracuse, N. Y., 2 months, March 25, 1875.	For goods purchased, for which petitioner gave his note.
	J. Lagowitz & Co.....	390 Broadway, New York City, merchants.	1,038 16	Syracuse, N. Y., 4 months, Feb'y 11, 1875, 4 months, April 27, 1875.	For goods purchased, for which petitioner gave his two notes.
	Wilson & Davison.....	Bath, N. Y., manufacturers.	228 93	Syracuse, N. Y., 2 months, April 9, 1875.	For goods purchased, for which petitioner gave his note.
	L. Boyden & Co.....	Newark, N. J., manufacturers.	142 21	Syracuse, N. Y., 2 months, April 22, 1875.	For goods purchased, for which petitioner gave his note.
" 10	Thacher White.....	South Braintree, Mass., manufacturers.	178 68	Syracuse, N. Y., 4 months, Feb'y 22, 1875.	For goods purchased, for which petitioner gave his note.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.
			Dolls. Cts.		
	Holbrook & Fisk	Milford, Mass., manufacturers.	$372 29	Syracuse, N. Y., 4 months, Feb. 8, 1875.	For goods purchased, for which petitioner gave his note.
	Nathan Price	Boston, Mass., 91 Pearl street, merchant.	305 25	Syracuse, N. Y., 3 months, April 1, 1875.	For goods purchased, for which petitioner gave his note.
	Studwell Bro's & Co	17 Murray street, New York City, merchants.	2,425 85	Syracuse, N. Y., 4 mo., Mar. 20, 1875, 4 mo., April 1, 1875, 4 mo., April 27, 1875, 4 mo., May 3, 1875.	For goods purchased, for which petitioner gave his four notes.
" 11	Chas. W. Lincoln & Co	106 Pearl street, Boston, Mass., merchants.	216 00	Syracuse, N. Y., 4 months, March 5, 1875.	For goods purchased, for which petitioner gave his note,
	William Owens	Utica, N. Y., manufacturer	253 55	Syracuse, N. Y., 4 months, March 19, 1875.	For goods purchased, for which petitioner gave his note.
	Willard Keith	Campbell, Mass., merchant	668 60	Syracuse, N. Y., 4 months, March 27, 1875.	For goods purchased, for which petitioner gave his note.
	John Ferguson	Gloversville, N. Y., glovemaker.	126 44	Syracuse, N. Y., 2 months, May 1, 1875.	For goods purchased, for which petitioner gave his note.
" 12	Busley, Leonan & Co	Albany, N. Y., merchants	389 07	Syracuse, N. Y., 2 months, May 6, 1875, 2 mos., May 8, 1875, 2 mos., May 8, 1875.	For goods purchased, for which petitioner gave his three notes.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured. (3)

[N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property; the nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint-contractor with any other person; and if so, with whom.
			Dolls. Cts.		
	J. Freeman & Co	Orange, N. J., manufacturers	$180 00	Syracuse, 4 months, Apl. 24, 1875	For goods purchased for which petitioner gave his note.
	J. Freeman & Co	Same	245 00	Syracuse, N. Y., May 16, 1875	For goods purchased.
" 13	Ellison & Stoddard	Rochester, N. Y, merchants	793 00	Syracuse, N. Y., from May 3 to May 15, 1875.	For goods purchased.
	T. P. & S. S. Smith	Philadelphia, Pa., merchants	237 60	Syracuse, N. Y., May 7, 1875	For goods purchased.
	G. Corning & Co	91 Pearl street, Boston, Mass., merchants.	41 78	Syracuse, N. Y., May 6, 1875	For goods purchased.
	Noyes & Holmes	Abington, Mass., merchants	119 55	Syracuse, N. Y., May 4, 1875	For goods purchased.
	Wm. O. Headley & Son	8 Warren street, N. Y. City, merchants.	258 43 316 97	Syracuse, N. Y., from M'ch 31 to April 21, 1875, and May 10, 1875.	For goods purchased.
" 14	S. Shaw, jr	Elmwood, Mass., merchant	129 00	Syracuse, N. Y., April 2, 1875	For goods purchased.
	Whitelam Bros	Syracuse, N. Y., manufacturers	308 00	Syracuse, N. Y., from Ap'l 3 to May 8, 1875.	For goods purchased.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured. (3)

[N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property; the nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint-contractor with any other person; and if so, with whom.
			Dolls. Cts.		
	H. S. Bacon & Co	Millford, Mass., merchants	$127 50	Syracuse, N. Y., Feb'y 5, 1875	For goods purchased of White & Sinnell for which petitioner gave his promissory note.
" 15	J. Wooster & Sons	Kingsboro', N. Y., manufacturers.	6 50	Syracuse, N. Y., April 15, 1875	For goods purchased.
	Mallon & Houghton	180 Congress street, Boston, Mass., merchants.	45 38	Syracuse, N. Y., May 17, 1875	For goods purchased.
	William Butterfield	6 Murray street, N. Y. City, merchant.	23 77	New York City, March 24, 1875	For goods purchased.
	Phillips, Bentley & Co	Syracuse, N. Y., merchants	22 79	Syracuse, N. Y., April 21, 1875	For goods purchased.
" 16	Max L. Ran	360 Broadway, N. Y. City, merchant.	43 75	Syracuse, N. Y., November 13, 1874	For goods purchased.
	R. B. Morse	Lynn, Mass., merchant	707 64	Syracuse, N. Y., March 19, 1875, April 15, 1875.	For goods purchased.
	James Cunningham	Syracuse, N. Y., laborer	60 00	Syracuse, N. Y., June 1, 1875	For labor and services performed for petitioner.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and if so, with whom.
			Dolls. Cts.		
"17	G. A. Sage, jr	New York City, has no business.	$5,000 00	New York City, March 18, 1875; March 31, 1875; April 13, 1875; April 21, 1875; May 8, 1875.	For money borrowed for which petitioner gave his five several promissory notes, dated as in the first preceding column, all on demand.
	Ellen A. Fowler	Syracuse, N. Y., housekeeper.	5,000 00	Syracuse, N. Y	For money borrowed.
	John M. Wieting	Syracuse, N. Y., no business	1,850 00	Syracuse, N. Y., May 1, 1875	For rent of store occupied by petitioner.
"18	Thomas Rice	Syracuse, N. Y., grocer	50 00	Syracuse, N. Y., May 27, 1875	For groceries purchased.
	J. Henry Fowler, jr	New York City, 5 Warren street, lawyer.	About 500 00	Syracuse, N. Y., April 2, 1875	For money borrowed for which petitioner gave his promissory note endorsed by Ellen A. Fowler.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, &c., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.]

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and if so, with whom.
			Dolls. Cts.		
	Wm. O. Headley & Son	8 Warren st., New York City, merchants.	$82 85	Syracuse, N. Y., May 15, 1875	For goods purchased.
	G. Corning & Co	91 Pearl street, Boston, Mass., merchants.	27 98	Syracuse, N. Y., May 17, 1875	For goods purchased.
"19	M. S. Price	Syracuse, N. Y., merchchant	75 00	Syracuse, N. Y., Jan'y 1, 1875	For goods purchased.
	Thomas Rice	Syracuse, N. Y., grocer	75 00	Syracuse, N. Y., July 1, 1874	For goods purchased.
	W. H. Stewart & Co	Syracuse, N. Y., merch'ts	125 00	Syracuse, N. Y., 1874	For goods purchased.
	S. P. Pierce & Co	Syracuse, N. Y., merch'ts	75 00	Syracuse, N. Y., Jan'y, 1874	For goods purchased.
	W. S. Carpenter	Syracuse, N. Y., merch't	10 20	Syracuse, N. Y., July, 1874	For goods purchased.
20	Brown & Elder	Syracuse, N. Y., merch'ts	22 52	Syracuse, July, 1874	For goods purchased.

JOHN H. FOWLER, *Petitioner.*

21. None.

22.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

(*Accommodation paper.*) (5.)

[N. B.—The dates of the notes or bills, and when due, with the names, residence, and business or occupation of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or endorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the petitioner should be stated, with his business and place of residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences of holders and particulars of notes or bills.	Place where contracted.	Amount.	Whether liability was contracted as copartner or joint contractor, or with any other person; and if so, with whom. Nature of each debt or demand, and cause and consideration of each indebtedness.
				Dolls. Cts.	
	Alexander McKinstry.....	Syracuse, N. Y.....	Syracuse, N. Y., March 12, 1875, due June 15, 1875.	$700 00	One promissory note made by R. C. Coombs, of New York City, for the accommodation of petitioner, endorsed by petitioner's wife and petitioner; one promissory note made by petitioner.
" 23	Van Arden estate, John Peck executor.	New York City.....	New York City, March 22, 1875, one June 27, 1875.	1,000 00	One promissory note made by petitioner, endorsed by R. C. Coombs, for accommodation of petitioner.
	New York State Banking Company.	Syracuse, N. Y.....	Syracuse, N. Y., 4 months, Feb. 25, 1875. Jan. 5, 1875, five months.	2,000 00	Two promissory notes made by R. C. Coombs for petitioner's accommodation, endorsed by petitioner and his wife, Ellen A. Fowler, and discounted at said bank.

JOHN H. FOWLER, *Petitioner.*

SCHEDULE A.

(*Accommodation paper.*) (5.)

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and business or occupation of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or endorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the petitioner should be stated, with his business and place of residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residence of holders and particulars of notes or bills.	Place where contracted.	Amount.	Whether liability was contracted as copartner or joint contractor, or with any other person; and if so, with whom. Nature of each debt or demand, and cause and consideration of each indebtedness.
				Dolls. Cts.	
	Alexander McKinstry.....	Syracuse, N. Y.....	Syracuse, N. Y., April 15, 1875, 2 months.	$600 00	One note, made by R. C. Coombs, of New York City, and endorsed by petitioner and his wife, for petitioner's accommodation.
"24					

JOHN H. FOWLER, *Petitioner.*

246 UNITED STATES OF AMERICA,
Northern District of New York, ss:

On this first day of June, 1875, before me personally came John H. Fowler, the person mentioned in and who subscribed to the foregoing petition and schedule marked A, and who, being by me first duly sworn, did declare the said schedule to be a full and true statement of all his debts, &c., in accordance with the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

D. F. GOTT,
Register in Bankruptcy.

SCHEDULE B.

Statement of all real and personal estate and effects whatever, which are now in the possession, enjoyment, or under the control of the petitioner, or which are held by any other person, in trust, for his use, or to the possession or enjoyment of which he is entitled at the date of filing petition.

INTEREST IN LANDS.

	Particular Description of all Real Estate owned by Petitioner, or held by him, and whether under contract or lease.	Encumberances thereon, if any, and date thereof.	Statement of all particulars relating thereto.	Estimated value.
" 25	The store No. 3 South Selina Street, Syracuse, N. Y., now occupied by petitioner, and for which he has a verbal lease for one year from May 1, 1875.	None.	Rental value per year.	$3,000 00
" 26				

JOHN H. FOWLER, *Petitioner.*

Dec. 5.—T. J. Burrows	goods	.....	42 00
36			
Nov. " —J. W. Burrows	"	.....	15 00
Dec. 2, '75.—J. A. Burrows	"	.....	2 00
April 1, '74.—Col. Bennett	"	.....	13 25
Dec. 26.—J. M. Baker	"	.....	6 00
Dec. 31.—Mr. Broadhead	"	.....	2 00
75			
Jan. 9.—Mr. Busher, on account rendered		.....	2 00
May 20.—Curtis & Sanwald	"	.....	6 50
" 26.—J. Henry Clark, jr.	"	.....	1 50
Sept. 12, '74.—Dr. Duyan	"	.....	5 75
—V. G. Edwards	"	.....	43 75
37			
—Edwards & Robinson	"	.....	31 75
75 —E. L. Robinson	"	.....	83 05
Feb. 24, '72.—B. A. Eastman	"	.....	12 00
253 June 4, '72.—Mrs. Farrell	"	.....	2 50
Sept. 4.—S. Fritcher	"	.....	8 00
Dec. 19, '74.—Wm. Foster	"	.....	15 55
Dec. 3, '75.—Thomas Fredericks	"	.....	11 00
Jan'y 9.—J. S. Fredericks	"	.....	1 75
38			
May 24, '69.—H. Finn & Sons	"	.....	3 00
Dec. 25, '72.—			
Aug. 30, '71.—J. Grodevant	"	.....	4 50
July 20, '72.—G. F. Jewett	"	.....	5 00
May 8.—Mrs. Ganz	"	.....	3 15
April 19, '74.—John A. Greer	"	.....	16 90
Oct. 21, '75.—George Greenway,	"	.....	1 25
May 8.—A. H. Gillett	"	.....	20 10
May 14.—C. M. Gibbs	"	.....	20 00
39			
May 22.—D. A. Gillespie	"	.....	7 00
4.—J. R. Gesler	"	.....	20 50
1069, Feb., '74.—Capt. Hinsdale	"	.....	10 75
Dec. 11.—H. J. Holmes	"	.....	4 00
March 9, '75.—Geo. Hier	"	.....	4 50
March 12.—H. House	"	.....	6 50
75			
April 3.—Dr. Higgins	"	.....	2 50
40			
May 29.—R. B. Harmon	"	.....	3 90
Idiot Asylum	"	.....	35 60
April 30, '73.—B. A. Isaacs	"	.....	4 50
Jan. 10, '71.—J. M. Jaycox	"	.....	75
Aug. 26, '74.—H. A. Jacobs	"	.....	10 00
254 Jan. 25, '75.—James Smith	"	.....	2 50
April.—E. H. Lewis	"	.....	11 50
April 9.—Thomas Lewis	"	.....	3 75
May 21.—S. G. Lapman	"	.....	3 00
May 26.—Hamson Thomas	"	.....	29 50
41			
Feb. 11, '70.—Geo. Wilsey	"	.....	4 00
Dec. 2.—W. H. Wright	"	.....	2 00
Dec. 9.—Park Wheeler	"	.....	8 40

Jun. '74.—H. A. Wright	goods	.....	42 00
Dyer Williams	"	.....	8 50
Sept. 26, '75.—Oliver W. Teal	"	.....	10 00
Jan. 9, '74.—W. H. Waite	"	.....	1 50
Jan. and July, '74.—Horace Williams	"	.....	6 50
Jan.—M. Walsh	"	.....	2 25
42			
H. K. White	"	.....	75
Dan. Johnson	"	.....	12 00
Jan. 20, '75.—J. C. Williams	"	.....	1 75
May 8.—W. H. Woodhull	"	.....	6 50
Feb. 5.—Sam Comstock, paid June 3	"	.....	1 50
Sept. 11, 72.—Courier office	"	.....	10 00
Sept. 11, '72.—Standard Pub. Co.	"	.....	212 76
Sept.—W. H. Stewart & Co.	"	.....	112 00
43			
Charles Sedgwick	"	.....	11 50
Mar. 29, '75.—J. Reed	"	.....	2 00
May 18, '75.—James Gordon	"	.....	6 00
May 7, '73.—Mrs. Judd	"	.....	3 00
Dec, 14, '72.—Jacob Sumer	"	.....	1 50
255 May 29, '75—J. S. Johnson,	"	.....	1 75
May 29, '74—S. P. Pierce & Co.,	"	.....	18 00
Jan. 16, '74—Charles Kinney,	"	.....	1 00
44			
Mrs. Doyle,	"	.....	1 00
Mrs. McKay,	"	.....	2 00
July 1, '70—Joseph Durston,	"	.....	50 00
July 16, '73—E. H. Stephens,	"	.....	3 65
April 12, '75—Brown & Elder,	"	.....	2 75
Oct. 4, '70—John H. Dorrity, (Skaneateles)	"	.....	99 00
May 15, '75—Thomas Rice,	"	.....	18 50
May 1, '75—W. S. Carpenter,	"	.....	20 00
45			
June—C. S. Ball, Syracuse (balance)		.....	11 00

JOHN H. FOWLER,
Petitioner.

(Petition by debtor.)

SCHEDULE B. (4.)

Property in reversion, remainder, or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of, or to charge.

(N. B.)—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the
256 date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same as far as known to the petitioner.)

General interest.	Particular description including situation and incumbrances.	Supposed value of my interest.
		Dolls. Cts.
Interest in land	None.	
Personal property	None.	
Property in money, stock, shares, bonds, annuities, etc., etc. 46.	None.	
Rights and powers	None.	
		Amount realized from proceeds of property conveyed. *Dolls. Cts.*
Property heretofore conveyed for benefit of the creditors	None.	
What portion of debtor's property has been conveyed by deed or assignment or otherwise for benefit of creditors; date of such deed; name and address of party to whom conveyed; amount realized therefrom and disposal of same, so far as known to petitioner. 47.	None.	

JOHN H. FOWLER, *Petitioner*.

257 (Petition by debtor.)

SCHEDULE B. (5.)

A particular statement of the property claimed as excepted from the operation of said act, by the provisions of the 14th section thereof, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

(N. B.—The property claimed to be exempt under the laws of any State is to be described separately from the rest, and reference given to the statute of said State creating the exception.)

		Valuation.
		Dols. Cts.
Property claimed to be excepted from the operations of said act, and which may be set apart by the assignee under the 14th section. 48.	Petitioner's wearing apparel.	$50 00
Property claimed to be exempt by State laws; its valuation; whether real or personal estate; its description and present use; and under what State law exemption is claimed. 49.	Petitioner's wearing apparel mentioned above exempt under the laws of the State of New York.	

JOHN H. FOWLER, *Petitioner*.

258 Petition by debtor.

SCHEDULE B. (6.)

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part

thereof, which, at the date of this petition, are in my possesion or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore at any time in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same:

Books—Sales book, cash book, bill book, memorandum ledger, invoice book.

50

Deeds—None.

Papers, etc.—None.

51

JOHN H. FOWLER,
Petitioner.

259 UNITED STATES OF AMERICA,
Northern District of New York, ss:

On this first day of May, A. D. 1875, before me personally came John H. Fowler, the person mentioned in and who subscribed to the foregoing petition and schedule, marked B, respectively, and who, being by me first duly sworn, did declare the said schedule to be a full and true statement of all his estate, both real and personal, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

D. F. GOTT,
Register in Bankruptcy.

No. 4749. United States district court, northern district of New York. In bankruptcy. In the matter of John H. Fowler, a bankrupt. Copy, schedule, and inventory. Filed June 3, 1875, 2 p. m.

Defendant's Exhibit No. 7, of Dec. 11. 1876.—C. W. S., sp'l ex'r.

260 United States circuit court, northern district of New York. In equity.

GARDNER A. SAGE, JR.,
vs.
JONATHAN G. WYNCOOP, AS ASSIGNEE IN BANKRUPTCY of John H. Fowler, a bankrupt, impleaded, &c.

It is hereby stipulated and agreed that the foregoing printed copy of the pleadings, proofs, and exhibits may be filed as and for and in lieu of the original exhibits produced before the examiner upon the taking of the proofs herein by him. And we do hereby further agree and certify that the said exhibits as complete transcripts of each and every one of them, and full and true copies thereof.

Dated March 1, 1877.

A. J. NORTHRUP,
Solicitor for Def't, Wyncoop.
IRVING G. VANN,
Counsel for Complainant.

261 Circuit court of the United States, northern district of New York.
In equity. June term, 1877.

GARDNER A. SAGE, JR.,
vs.
JONATHAN G. WYNCOOP.

This cause has been heard on bill, answer, replication, proof, motion of orator to suppress evidence, and argument of counsel.

The evidence sought to be suppressed, although most of it is in the the nature of hearsay, as the motives of those communicating are in question, shows parts of the transaction involved, and for that purpose seems to be admissible. The motion is therefore overruled.

From the pleadings and proofs it satisfactorily appears that the bankrupt of whom the defendant is assignee, was insolvent and known to be so by himself and by the agent and attorney of the orator having entire control of this business for the orator.

That the bankrupt, who was a trader, by giving new notes
262 signed by hinself alone to the attorney of the orator to take up other notes of the same amount, secured by the signature and endorsement of other responsible parties, toward whom they were both friendly, on which to be sued, and by procuring goods on credit of parties to whom his insolvency was unknown in addition to his stock that they might be taken on execution for this debt, procured, or at least suffered his property to be seized on execution, if seizure there was, to give relief to those liable for the debt and interested to have is satisfied by him, or out of his means.

And that the agent and attorney of the orator had good reason to know that the new notes were given, and took them, and caused suit to be commenced upon them, for the like purpose of saving the other parties, or some of them, for whom he was interested, harmless, without detriment to his client and principal or to himself, and caused the proceedings to be carried forward, knowing that if the plan should
263 be successful other creditors would probably suffer.

This was done by the bankrupt being insolvent with a view to give a preference to a person or persons under a liability for him, and done by the agent of the orator having reasonable cause to believe the bankrupt was insolvent and knowing that it was in fraud of the provisions of the bankrupt law, which is the same as if done by the orator himself with the same cause to believe and the same knowledge, and brings the case within both the letter and the spirit of sec. 5128 Rev. Stat. U. S., as amended by §§ 10 and 11 of the act of June 23, 1874, pp. 211 and 212.

The orator having brought this suit to reach the avails of property of the bankrupt levied on by virtue of executions on judgments in these suits so brought, is not, on these findings, entitled to any decree in his favor.

There is another ground, not urged in argument however, on which it would seem that the defendant is entitled to a decree in his favor
264 at least so far as the first and larger judgment and execution are concerned.

It is alleged in the bill, fol. 15, that the sheriff by virtue of that execution levied on the stock of goods of the bankrupt, and, fol's 25 and 26, that he kept and retained possession of it. The levy, whatever it was, is admitted in the answer, fol. 108, and as proved before the master, fols. 635–6; but there is no admission or proof about keeping or retaining

possession under the levy, except the testimony of the deputy sheriff who served the other execution, fol's 639-47, which shows that possession, if taken, was not kept nor resumed under that execution until the night of June 3d, 1875, and that it was vacant so far as the officer serving that execution, or any officer acting under it, was concerned from before 11 o'clock until night of that day, during which time, at 2 o'clock p. m., the petition in bankruptcy of the bankrupt was filed. From the whole it seems most probable that there was a formal levy, as it is
265 called, by going into the store on the 31st of May, but no seizure until the night of the 3d of June. However that was, it is clear that any seizure that had been made had been relinquished, and after relinquishment it was the same as if it had never been made. Bradley vs. Wyndham, 1 Wils., 44; 2 S.&R., 596; Storm vs. Woods, 11 Johns. 110; Fitch vs. Rogers, 7 Vt., 403; Kellogg vs. Griffin, 17 Johns. 274; Heard vs. Fairbanks, 5 Met., 111; 2 Addison on Torts, sec. 907.

In this view neither the sheriff nor the orator had at the time the petition in bankruptcy was filed any greater right to the goods of the bankrupt than so far as they were bound by the common law by the teste of the writ of execution, left in force by the statute after delivery of the writ to the sheriff.

The common law so bound the goods of the debtor that the sheriff might seize them in the hands of a purchaser from the debtor, unless bought in market overt, but vested no property in them in the sheriff, without seizure. (Smallcomb vs. Cross et al., 1 L'd Raym. 251;
266 Payne vs. Drew, 4 East, 523; Edwards vs. Harben, 2 T. R., 596; Boals vs. Guernsey, 8 Johns., 348; Bliss vs. Ball, 9 Johns., 131; Westervelt vs. Pinckney, 14 Wend. 123.)

The whole property in the goods remained in the debtor, and passed by the assignment to the assignee. (Rev. Stat. U. S., sec. 5044.) This is in accordance with the rule under the English Bankrupt Acts. (Bayley vs. Bunning), Lev. 173; Phillips vs. Thompson, 3 Lev. 69, 191; Montagu on Lien., 83; Smallcomb vs. Cross, 1 L'd Raym., 251; Cole vs. Davis, id., 724.)

The right of the sheriff to seize the goods is quite similar to that of a landlord under the statute of Illinois to seize the goods of his tenant for rent, which is held not to vest any right in the goods against an assignee in bankruptcy. (Morgan vs. Campbell, 22 Wall., 381.) And it seems to have been on the ground that there was an actual seizure that the right of a landlord to hold the property of his tenant against the assignee has been upheld. (Marshall vs. Knox, 16 Wall., 551.) It
267 is not at all clear that the sheriff serving the other execution took and maintained any possession of the goods before the night of June 3d, and if showing that he did would maintain the orator's bill, it is quite doubtful on the evidence whether it would be made out. But whether it would be or not, he fails here on the other point.

Let a decree be entered that the bill be dismissed with costs.

HOYT H. WHEELER.

268 (Endorsed:) U. S. circuit court, north. dist. of N. Y. In equity. Gardner A. Sage, jr., vs. Jonathan G. Wyncoop, assignee, &c., &c. Opinion. Wheeler, J. Filed Oct. 24, 1877.

269 Know all men by these presents, that we, Richard Carman Combes, of 172 Broadway, in the city, county and State of New York, and J. Henry Fowler, of No. 10 Wall street, in said city, are held and firmly bound unto Jonathan G. Wyncoop, as assignee in bankruptcy

of John H. Fowler, a bankrupt, in the sum of one thousand dollars lawful money of the United States of America, to be paid to the said Jonathan G. Wyncoop, assignee as aforesaid, his successors or assigns: for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the fifteenth day of February, one thousand eight hundred and seventy-eight.

Whereas Gardner A. Sage, jr., has taken an appeal to the Supreme Court of the United States to reverse a decree of the circuit court of the United States for the northern district of New York, entered on the first day of December, 1877, in a suit in which said Gardner A. Sage, jr., was complainant, and Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, impleaded, &c., was defendant, and against the said complainant:

270 Now, therefore, the condition of this obligation is such that if the said Gardner A. Sage, jr. shall prosecute his appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

R. CARMAN COMBES. [SEAL.]
J. HENRY FOWLER. [SEAL.]

Sealed and delivered in the presence of—
JACOB DUBOIS.

STATE OF NEW YORK,
City and County of New York, ss:

R. Carman Combes, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder, within this State, and is worth the sum of two thousand dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

R. CARMAN COMBES.

Sworn to before me this 15th day of February, 1878.
JACOB DU BOIS,
Notary Public, N. Y. Co.

271 STATE OF NEW YORK,
City & County of New York, ss:

J. Henry Fowler, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within this State, and is worth the sum of two thousand dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

J. HENRY FOWLER.

Sworn to before me this 15th day of February, 1878.
JACOB DU BOIS,
Notary Public, N. Y. Co.

I certify that on this 15th day of February, 1878, before me personally appeared the above-named Richard Carman Combes and J. Henry Fowler, known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same.

JACOB DU BOIS,
Notary Public, N. Y. Co.

272 CITY & COUNTY OF NEW YORK, *ss:*

William H. Wilkinson, being duly sworn, deposes and says that on the 18th day of February, 1878, he served the annexed bond on A. J. Northrup, the attorney for Jonathan G. Wyncoop, assignee, &c.; that such service was made by depositing a copy of said bond enclosed in a post-paid wrapper in the United States general post-office, in the city of New York, directed to said Northrup, at Syracuse, New York.

W. H. WILKINSON.

W. H. WILKINSON.

Sworn to before me this 18th day of February, 1878.

WILLIAM STEARNS,
Notary Public, N. Y. Co.

(Endorsed:) R. Carman Combes and J. Henry Fowler to Jonathan G. Wyncoop, as assignee, &c., dated February 15, 1878. Bond.

Within bond approved as to form and sufficiency of sureties.
Feb'y 16th, 1878.

HOYT H. WHEELER.

Filed Feb. 19, 1878.

273 United States circuit court, northern district of New York.

GARDNER A. SAGE, JR., COMPLAINANT,
vs.
JONATHAN G. WYNKOOP, AS ASSIGNEE IN bankruptcy of John H. Fowler, a bankrupt, impleaded, &c., defendant.

The appeal of Gardner A. Sage, Jr., complainant and appellant above named, respectfully showeth:

That on or about the 13th day of October, 1875, the above named complainant filed his bill in the circuit court of the United States for the northern district of New York, alleging the recovery by him in the supreme court of the State of New York of two judgments against the defendant John H. Fowler, one for $4,052, on the 19th day of May, 1875; and the other for $1,023.35, on the 2nd day of June, 1875, the rolls thereof being filed in the office of the clerk of the city and county of New York; that transcripts of said judgments were shortly after the
274 recovery thereof filed in the office of the clerk of the county of Onondaga, and execution thereupon issued to the said defendant Davis Cossitt, who was then sheriff of said county of Onondaga, where the said John H. Fowler at the time resided; that by virtue of said executions said sheriff levied upon a large stock of goods, in the city of Syracuse, to said John H. Fowler belonging, the date of the levies being May 31st, 1875, under the first and larger of said judgments, and June 3rd, 1875, under the second and smaller of said judgments; that on the 4th day of June, 1875, and while said levies continued in full force, said John H. Fowler filed his petition in voluntary bankruptcy, and was subsequently adjudged a *a* bankrupt thereupon; that on the 9th day of June, 1875, upon the application of some of the creditors of said John H. Fowler, the said sheriff was restrained by the order of the United States district court for said district from all proceedings to enforce the collection of said executions from the property of the said John H. Fowler until the further order of said court; that on the 15th day of July, 1875, the defendant Jonathan G. Wynkoop was appointed
275 assignee of said John H. Fowler in bankruptcy, and that he forthwith qualified and thenceforth acted as such assignee.

That on the 17th day of August, 1875, and while said levies were still in force, upon the application of said assignee, an order was made by said district court authorizing said assignee to sell said stock of goods belonging to said John H. Fowler, which had been levied upon by said sheriff as aforesaid, at private sale, and releasing therefrom the lien of said sheriff by virtue of said executions and levies thereunder, and transferring such lien to so much of the monies realized upon such sale as would be sufficient to pay said judgments, and requiring said assignee to deposit with the clerk of said district court the sum of $5,200, to which, under the provisions of said order, the liens of the sheriff and of this complainant attached with the same force as before the making of the order they had attached to the said stock of goods; that shortly thereafter said assignee sold said goods for the sum of $8,000 and over, and upon the 1st day of September, 1875, he deposited
276 $5,200 thereof with said clerk, as by said order he had been directed; that said judgments have not been paid, except that $320.34 has been collected and credited upon the smaller thereof, under an execution issued thereon to the County of Cayuga; that the fees, poundage, and the like of the sheriff of Onondaga County amounts to the sum of $148.27; that more than twenty days' notice of the action was given to said assignee before the bringing thereof, to enable him to tender amends, but that he refused to pay or to consent to the payment of the liens of the complainant, and praying that the said judgments of the complainant, with interest, sheriff's fees, and costs, be decreed to be paid out of said fund so deposited, and if it be insufficient for the purpose, that the assignee be directed to pay the balance out of any fund in his hand belonging to said estate.

That said defendant Wynkoop appeared and answered said bill of complaint, and complainant filed a general replication thereto,
277 and after testimony had been taken the cause was argued by counsel for the respective parties.

That thereafter, and on the 1st day of December, 1877, a decree was made and entered dismissing the complainant's said bill of complaint, and awarding the defendant three hundred and twenty-two dollars and two cents cost, which said judgment and decree is erroneous, and should be reversed.

Wherefore this appellant appeals from the whole of said decree, and respectfully prays that the decree of said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and that the decree of the said circuit court, and every part thereof, may be in all things reversed, with costs, and such other decree made as to the said Supreme Court may seem just.

AMBROSE MONELL,
Complainant's Solicitor.

IRVING G. VANN,
Of Counsel.

278 The foregoing appeal is allowed.
Dated February 16th, 1878.

HOYT H. WHEELER, *J.*

279

280 CITY AND COUNTY OF NEW YORK, *ss:*

William H. Wilkinson, being duly sworn, deposes and says that on the 18th day of February, 1878, he served the annexed appeal on A. J. Northrup, the attorney for Jonathan G. Wynkoop, assignee, &c.; that such service was made by depositing a copy of said appeal enclosed in a postpaid wrapper in the United States general post-office in the city of New York, directed to said Northrup, at Syracuse, New York.

W. H. WILKINSON.

Sworn to before me this 18th day of February, 1878.

WILLIAM STEARNS,
Notary Public, N. Y.

(Indorsed:) U. S. circuit court, northern district of New York. In equity. Gardner A. Sage, jr., vs. Jonathan G. Wynkoop, as assignee, &c. Appeal. Ambrose Monell, compl't's solicitor. Filed Feb. 19, 1878.

281 United States circuit court, northern district of New York.

GARDNER A. SAGE, JR., COMPLAINANT,
vs.
JONATHAN G. WYNKOOP, AS ASSIGNEE IN BANKRUPTCY OF JOHN H. FOWLER, a bankrupt, impleaded, &c., defendant.

By the Hon. Hoyt H. Wheeler, one of the judges of the circuit court of the United States for the northern district of New York.

To Jonathan G. Wynkoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, impleaded, &c.

Whereas, Gardner A. Sage, jr., has lately appealed to the Supreme Court of the United States from a decree rendered on the 1st day of December, 1877, in the circuit court of the United States for the northern district of New York, made in your favor and against him the said Gardner A. Sage, jr., and has filed the security required by law:

282 You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, D. C., on the second Monday of October, 1878, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Canandaigua, in the northern district of New York, in the second circuit, the 6th day of February, one thousand eight hundred and seventy-eight.

HOYT H. WHEELER, *J.*

283

284 CITY AND COUNTY OF NEW YORK, *ss:*

William H. Wilkinson, being duly sworn, deposes and says that on the 18th day of February, 1878, he served the annexed citation on A. J. Northrup, the attorney for Jonathan G. Wynkoop, assignee, &c.; that such service was made by depositing a copy of said citation enclosed in a postpaid wrapper in the United States general post-office in the city of New York, directed to said Northrup, at Syracuse, New York.

W. H. WILKINSON.

Sworn to before me this 18th day of February, 1878.

WILLIAM STEARNS,
Notary Public, N. Y.

(Endorsed:) U. S. circuit court, northern district of New York. In equity. Gardner A. Sage, jr., vs. Jonathan G. Wynkoop, as assignee, &c. Citation. Ambrose Monell, comp'l't's solicitor. Feb. 19, 1878. Filed.

285 UNITED STATES OF AMERICA.
Northern district of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America, for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, with their respective originals now on file and remaining of record in my office, and they are correct copies of said originals, being a full and complete transcript of the record and proceedings in the suit of Gardner A. Sage, jr., vs. Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, impleaded, &c., in said court.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at the city of Utica in said district, this fourteenth day of September, in the year of our Lord eighteen hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] CHARLES MASON,
Clerk.

(Indorsed:) Supreme Court of the United States. Gardner A. Sage, jr., appellant, vs. Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt, impleaded with Davis Cossitt as sheriff of Onandaga County, and John H. Fowler. Return on appeal.

(Indorsement on cover:) No. 352. Gardner A. Sage, jr., appellant, vs. Jonathan G. Wyncoop as assignee in bankruptcy of John H. Fowler, a bankrupt, impleaded with Davis Cossitt as sheriff of Onandaga County, and John H. Fowler. N. New York, C. C. U. S. Filed 2nd December, 1878.

Supreme Court of the United States,

No. 352.

GARDNER A. SAGE, Jr.,

Plaintiff in Error,

vs.

JONATHAN G. WYNCOOP, as Assignee in Bankruptcy of John H. Fowler, a bankrupt, Impleaded with DAVID COSSITT, as Sheriff of Onondaga County, and JOHN H. FOWLER,

Defendants in Error.

Appeal from the Circuit Court of the United States, for the Northern District of New York.

Brief for Plaintiff in Error.

AMBROSE MONELL,

Solicitor for Plff. in Error.

AARON J. VANDERPOEL,

Of Counsel for Plff. in Error.

NEW YORK:

John Polhemus, Printer, 102 Nassau Street.

1881.

Supreme Court of the United States.

GARDNER A. SAGE, JR., Plaintiff in Error, *vs.* JONATHAN G. WYNCOOP, as Assignee in Bankruptcy of John H. Fowler, impleaded, &c., Defendants in Error.	**No. 352.** *Brief for Plaintiff in Error.*

Appeal from the Circuit Court of the U. S. for the Northern District of New York.

This suit was commenced on the 14th of October, 1875, in the United States Circuit Court for the Northern District of New York, by a bill filed by the complainant in his character as judgment and execution debtor of John H. Fowler (p. 1).

This bill was filed by Gardner A. Sage, Jr., as complainant, against Jonathan G. Wyncoop, as assignee in bankruptcy of John H. Fowler, a bankrupt; Davis Cossitt, as Sheriff of Onondaga County, and John H. Fowler, as defendants, to compel the payment of two judgments recovered by the complainant against the defendant John H. Fowler, out of a certain fund deposited with the Clerk of the United States District Court for the Northern District of New York, in accordance with a special order of said District Court.

Process in this action was served in due time upon the defendants, who have all suffered default except

the defendant Jonathan G. Wyncoop, as assignee in bankruptcy of John A. Fowler, a bankrupt, who appeared and answered.

The bill of the complainant sets forth the recovery by him, in the Supreme Court of the State of New York, of two judgments against the defendant John H. Fowler; one for $4,052, on the 19th day of May, 1875, and the other for $1.023 35, on the 2d day of June, 1875, the rolls thereof being filed in the office of the Clerk of the City and County of New York; that transcripts of said judgments were, shortly after the recovery thereof, filed in the office of the Clerk of the County of Onondaga, and execution thereupon issued to the said defendant Davis Cossitt, who was then Sheriff of said County of Onondaga, where the said John H. Fowler at the time resided; that by virtue of said executions said Sheriff levied upon a large stock of goods in the city of Syracuse, to said John H. Fowler belonging, the date of the levies being May 31, 1875, under the first and larger of said judgments, and June 3, 1875, under the second and smaller of said judgments; that on the 4th day of June, 1875, and while said levies continued in full force, said John H. Fowler filed his petition in voluntary bankruptcy, and was subsequently adjudged a bankrupt thereupon; that on the 9th day of June, 1875, upon the application of some of the creditors of said John H. Fowler, the said Sheriff was restrained by the order of the United States District Court for said District, from all proceedings to enforce the collection of said executions from the property of the said John H. Fowler until the further order of said court; that on the 15th day of July, 1875, the defendant Jonathan G. Wyncoop, was appointed assignee of said John H. Fowler, in bankruptcy, and that he forthwith qualified and thenceforth acted as such assignee. That on the 17th day of August, 1875, and while said levies were still in force, upon the application of said assignee, an order was made by said

District Court authorizing said assignee to sell said stock of goods belonging to said John H. Fowler, which had been levied upon by said Sheriff, as aforesaid, at private sale, and releasing therefrom the lien of said Sheriff by virtue of said executions and levies thereunder, and transferring such lien to so much of the monies realized upon such sale as would be sufficient to pay said judgments, and requiring said assignee to deposit with the Clerk of said District Court the sum of $5,200, to which, under the provisions of said order, the liens of the Sheriff and of this complainant attached with the same force as before the making of the order they had attached to the said stock of goods; that shortly thereafter said assignee sold said goods for the sum of $8,000 and over, and upon the 1st day of September, 1875, he deposited $5,200 thereof with said clerk, as by said order he had been directed; that said judgments have not been paid except that $320.34 has been collected and credited upon the smaller thereof under an execution issued thereon to the County of Cayuga; that the fees, poundage and the like of the Sheriff of Onondaga County, amounts to the sum of $148.27; that more than twenty days' notice of this action was given to said assignee before the bringing thereof, to enable him to tender amends, but that he refused to pay or to consent to the payment of the liens of the complainant.

The prayer for relief asks that the said judgments of the complainant, with interest, Sheriff's fees and costs, be decreed to be paid out of said fund so deposited, and if it be insufficient for the purpose, that the assignee be directed to pay the balance out of any funds in his hands belonging to said estate.

See bill, on pages 1 to 6 of record.

The answer of Jonathan G. Wyncoop, assignee, &c., admits the recovery by the complainant of said judgments, the filing of transcripts thereof. the issuing of executions thereupon, the levies thereunder by the Sheriff of Onondaga County upon the prop-

erty of John H. Fowler, the residence of said Fowler, the filing of a petition in voluntary bankruptcy by him, the adjudication thereupon, the appointment of said Wyncoop as assignee and his acting as such, the order restraining said Sheriff from selling, the order empowering the assignee to sell and transferring the lien of the executions from the goods to the fund, the sale by the assignee, the deposit of the fund with the clerk, the notice to the assignee before suit and his refusal to tender amends, substantially as said facts are set forth in the bill.

No necessary or material allegation of the bill is denied by the answer. Intermingled with the admissions of the answer, however, facts are alleged which amount to a plea of confession and avoidance, and which may be briefly stated as follows :

That for more than four months before he was adjudged a bankrupt, John H. Fowler was insolvent, and that during that period he gave out that he was indebted to the complainant, *for money lent*, in the sum of $5,000, for $4,000 of which said complainant held four notes of $1,000 each, made by one Combes and endorsed by said Fowler and his wife, and which, respectively, matured March 18th and 31st, April 21st, and May 8th, 1875, and for $1,000, of which the complainant held the note of said John H. Fowler, without endorsement, maturing April 13th, 1875 ; that about April 28th, 1875, said John H. Fowler retired said notes by giving five new notes for $1,000 each, payable on demand, signed by himself and unendorsed, dated respectively as of the dates when the notes of said first series became due ; that upon the same day actions were commenced upon four of those notes and subsequently upon the fifth, which resulted in said two judgments of the complainant ; that this was done to cast the burden of paying said notes from responsible parties upon said John H. Fowler in contemplation of his soon being bankrupt ; that said judgments were not recovered in good faith, but by col-

lusion, and with an intent to give the complainant a preference; that even the filing of the petition in bankruptcy was delayed by said John H. Fowler, to enable this conspiracy to ripen and to perfect these preferences.

And, finally, notwithstanding the care taken to replace one series of notes of parties claimed to be responsible, by another series of notes of a party claimed to be irresponsible, the assignee closes his answer with the allegation, upon information and belief, that there never was any debt at all, and that the whole thing was fictitious, and done with the intent to cheat the creditors of said Fowler, and to create a secret trust for his benefit.

See answer, on pages 6 to 13.

There is a general replication to the answer.

See replication, on pages 13 and 14.

Much evidence has been taken, and which is printed in the record, some of which is regarded as pertinent to the issues raised by the pleadings, and much of which is claimed, at least, by the complainant, to be not only immaterial but grossly incompetent.

It is deemed best to examine the questions which arise in the case respecting the competency and admissibility of evidence before proceeding to a discussion of the merits.

The issues in this action, as will appear from an nspection of the pleadings, as well as from what has already been said, are two, viz:

First—Were the judgments in question recovered, executions thereon issued and levies thereunder made in fraud of the Bankrupt Act?

Second—Was the claim of the complainant, upon which said judgements were recovered, genuine or spurious?

The second issue can be speedily disposed of. The real questions in the case are involved in the first of these issues, which for convenience, and in accordance with the provisions of sections 5,021 and 5,128 of the Revised Statutes, is divided into three subordinate issues, to wit:

1. Did John H. Fowler, with a view to give a preference to the complainant, procure or suffer his property to be seized upon said executions or either of them?

2. Did the complainant, at the time of the levies under his executions, have reasonable cause to believe that John H. Fowler was insolvent?

3. Did the complainant, at the time the said levies were made, *know* that such levies were made in fraud of the Bankrupt Act?

In this case no question arose as to the insolvency of the judgment debtor, or as to the fact that the seizure was within four months of the filing of the petition, as the bill sets forth these facts, and tbe answer admits and re-asserts them.

On the 19th of May, 1875, the complainant recovered a judgment in the Supreme Court of New York for about $4,000 damages, upon which an execution was, on the 31st of May thereafter, issued to the sheriff of the County of Onondaga, who, on that day, levied upon a stock of boots, shoes, trunks, etc., then in the possession of the bankrupt. This fact is admitted in the answer at page 10.

On the 2d of June the complainant recovered another judgment against Fowler, in the Supreme Court, for about $1,000, and on the next day an execution was issued to the same sheriff upon that judgment, who levied upon the property belonging to Fowler, which had been previously levied on under and by virtue of the first execution. This fact is also admitted by the answer on page 10. The bill also avers that the sheriff kept and retained the pos-

session of the goods and personal property so levied upon by him, caused it to be separated into parcels for sale at auction, and advertised it (p. 3).

That after the levies by the sheriff, as aforesaid, Fowler, on the 4th of June, caused to be filed in the office of the Clerk of the District Court for the Northern District of New York, a petition in bankruptcy and that he was adjudged a bankrupt. That on the 9th of June an injunction was issued by the District Judge restraining a sale under the executions, and afterwards an order was made by which the property was sold by the assignee (p. 5), and the amount of $5,200 deposited with the Clerk, subject to the final decision of the Court in relation thereto. That proper notice was given to the assignee of the commencement of the suit, and asking that the assignee may be decreed to have no interest in the fund except a surplus after the satisfaction of the liens.

The answer (p. 10) is substantially that the recovery of these judgments and the issuing of these executions was in fraud of the Bankrupt Act. While the answer admits the validity of the original levy under each of the executions, there is no averment that the lien thereby created was lost or had been in anywise prejudiced if it was a valid lien at the time it was created.

In February, 1875, John H. Fowler, a shoe dealer in Syracuse, was indebted to the complainant in the sum of five thousand dollars for moneys theretofore advanced to him part on notes made by R. Carman Combes, endorsed by John H. Fowler and his wife, and part by his own note. (See notes pp. 7 and 8-27).

The notes of Combes, who was a relative of Fowler by marriage, had been loaned to him, and were solely for his accommodation (p. 27, 28.)

These notes were not paid at maturity, and Combes was unwilling to lend any notes in renewal, p. 29. An arrangement was then made between John H. Fowler and his son, J. Henry Fowler, who was the attorney for the plaintiff, by which

notes were given by John H. Fowler for the whole indebtedness. These notes bore date on various days, between March 18, 1875, and May 8, 1875, (p. 74, 78).

These notes were in the possession of J. Henry Fowler.

As early as Dec., 1874, J. Henry Fowler (who from time to time employed Mr. Monell and his associate, Mr. Gerry, to act as counsel), contemplated spending the following summer in Europe, and arranged with Mr. Monell to attend to his business affairs in his absence (p. 27).

When the first note became due, Mr. Fowler excused to his son the non-payment (p. 28), and informed him that he had been disappointed in the receipts from his business, and was unable to pay that note, and offered his own note for the same amount to take up the same, which lawyer Fowler accepted, and as fast as the Combes notes matured he accepted these notes in place of them, he telling him that he had reason to believe that he would shortly obtain the money from his wife and from his business sufficient to take up these notes in suit. Mrs. Fowler, it was known, was then trying to sell her property, and offers had been made for it. Mr. Fowler sailed for Europe April 28th, and a few days before that day delivered the notes of his father to Mr. Monell, telling him he was very much annoyed to think that when his father knew, several months prior, that he had engaged passage to Europe for himself and family, that he had "compelled me to renew the original notes, and after renewing them I had additionally loaned him from my own funds about $500, which latter sum, together with at least the amount of the two first notes, he would surely pay before I went abroad; that I was sorry to hear that he had been disappointed, and would probably be unable to fulfill that promise in whole, and that I should be obliged to leave those evidences of debt against him in his (Mr. Monell's) hands, to collect as he saw best."

I additionally told Mr. Monell, after I had placed the notes in suit in his possession as my representative, that I desired him to protect the interests of the complainant, our client, as against John H. Fowler, notwithstanding that he was the author of my existence. At the same time, stating to Mr. Monell, that from John H. Fowler's representations to me I believe, it was a question of a reasonable time within which he would pay these notes in whole or in part, and that I believed he was responsible, and if he would pay on account of these notes a reasonable sum to be as lenient with him as possible, without jeopardising the interests of the complainant herein.

Assignments of Error Relied Upon.

First.—That the Circuit Court erred in adjudging that the action could not be maintained and in not adjudging that the action could be maintained as to the claim of the complainant under both of his judgments and executions.

Second.—That the said decree is erroneous in this that it does not direct the payment to the complainant of the amount of the judgment in his favor for $4,052.

Third.—That the said decree is erroneous in this that it does not direct the payment to the complainant of the judgment in his favor for $1,023.35.

Fourth.—That the said decree is erroneous in that it does not direct that the full amount due to the complainant on both of the said judgments, including principal and sheriff's fees be paid to the complainant.

Fifth.—That the Circuit Court erred in admitting the contents of the petition and schedules in evidence.

Sixth.—That the Circuit Court erred in admitting in evidence the invoices of goods (pp. 82 to 91).

First Point.

The established rule is, that, except in cases of attachment against the property of the bankrupt within a prescribed time, preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law, or by act of the bankrupt, which existed against the property in the hands of the bankrupt.

Yeatman *v.* Savings Inst. 95 U. S., 766.
Brown *v.* Heathcote, 1 Atk., 160.
Mitchell *v.* Winslow, 2 Story, 630.
Gibson *v.* Warder, 14 Wall., 244.
Donaldson, etc., *v.* Farwell, 93 U. S., 631.
Jerome *v.* McCarter, 94 U. S., 734.
Winsor *v.* McLellan, 2 Story, 492.
Goddard *v.* Weaver, 1 Wood, 260.
Kennedy *v.* Ingalls, 126 Mass., 488.

The assignee takes the property of the bankrupt, subject to all legal and equitable rights thereto existing in favor of third parties at the time of the bankruptcy.

Hamilton *v.* National Loan Bank of St. Louis, 3 Dill., 230.
Webster *v.* Woolbridge, 3 Dill., 74.

When not absolutely prohibited by the bankrupt law, liens and preferences are entitled to the same protection from the bankrupt courts, as other legal rights.

Barron *v.* Morris, 14 Bank. Reg., 371.

In Colorado the delivery of an execution to the sheriff, constitutes such a lien upon the debtor's property as will be valid against proceedings in bankruptcy filed after such delivery, but before evy made.

Bartlett *v.* Russell, 4 Dill., 267.

Proceeding in bankruptcy do not affect the lien of an execution from a State Court, levied before they were commenced. The State Court cannot direct the sheriff to pay over the proceeds collected to the assignee, nor can the United States Court interfere.

State *v.* Taylor, 3 Mo. Appeal, 351.

To authorize the assignee to recover money or property under section 35, as originally enacted, it was necessary that he should establish the act of the bankrupt, not only of which he complains, but also that it was done, with *a view to give a preference over* other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent.

Wilson *v.* City Bank, 17 Wall., 473.
Mays *v.* Fritton, 20 Wall., 420.
Clark *v.* Iselin, 21 Wall., 373, 374, etc.
Watson *v.* Taylor, 21 Wall., 378.
Little *v.* Alexander, 21 Wall., 500.

The expression in the original act "having reasonable cause to believe such a person is insolvent," requires something more than reasonable grounds of suspicion of the debtor's insolvency to give it effect. His creditor should have some reasonable cause to *believe* him insolvent. "He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Grant *v.* National Bank, 97 U. S., 80.
Barbour *v.* Priest, 103 U. S., 293.

In re Bininger (7 Blatch. 273) the court say, "By this, however, I do not mean to say that in every instance of temporary want of money to pay debts coming to maturity, insolvency is to be inferred. This would be tantamount to saying that, whenever a trader suffers a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent. *This would be an extreme view.*"

Where actual intent to give a preference is negatived, mere honest inaction on the part of an insolv-

ent debtor who is sued on a just debt, and who allows judgment to go against him, and his property to be levied on, is not an act of bankruptcy within the 39th section of the Bankrupt Act.

Wright *v.* Filley, 1 Dill., 171, per Miller, *J.*

The mere non-resistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due, and there was no valid defense to it, is not the suffering and giving a preference under the Bankrupt Act.

National Bank *v.* Warren, 96 U. S., 539.

By the act, as amended June 22, 1874, the words, "having reasonable cause to believe," was changed to the word "knowing" which was inserted in lieu thereof.

In other words, where reasonable cause to believe that a fraud on the act was intended was before sufficient, *knowledge of the fact* is now required.

Chap. 390, § 11, Laws of 1874, R. S., § 5128.
Singer *v.* Sloan, 3 Dill, 110.

On the question of what is required where the law demands "actual notice" see

Sprague *v.* Railway Co., 103 U. S., 756.
Stearns *v.* Gage, 79 N. Y., 102.
Smith *v.* Livingston, 111 Mass., 334.

The above are cases in which it was sought to attack the title of a transferee of commercial paper.

Section 5128, as amended by the act of June 22, 1874, would read as follows: "If any person, being insolvent, or in contemplation of insolvency, within two months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by said attachment having reasonable cause to believe such person is insolvent, and *knowing* that such attachment, sequestration, seizure, payment, pledge, assignment or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of

it, from the person so receiving it, or so to be benefited."

In view of the construction given to section 35 by the courts, this amendment is extremely significant. Prior to the amendment it was held that the creditor should have a *knowledge* of some *fact* or *facts* calculated to produce the belief of insolvency in an ordinarily intelligent mind. It now requires, in addition, that the creditors should have actual *knowledge* that a fraud on the act was intended.

The learned judge says in his opinion that it satisfactorily appears that the bankrupt was insolvent, and known to be so by himself and by the agent and attorney of the orator having control of the business for the orator.

1. It may be seriously questioned whether there is evidence to support the above suggestion.

   But if we assume it to be so, it standing alone is immaterial.

2. The next statement in the opinion is wholly immaterial in this action.

   It is wholly immaterial whether the bankrupt did any act which might release a surety for him. It neither increased nor diminished his liability. There is not the slightest evidence of an improper notice in this matter. It may have been imprudent to release an endorser, but it did not in the slightest degree affect the liability of the bankrupt, the principal debtor.

The fact that J. Henry Fowler was the son of the bankrupt, and also the attorney for Mr. Sage, may have furnished ground for suspicion, and have induced the Court to sanction considerable latitude in the evidence ; but favored by this latitude, the as-

only

signee not wholly failed in his proofs but established affirmatively an absence of collusion.

It cannot be said that when J. Henry Fowler sailed for Europe, proceedings in bankruptcy had been thought of, much less suggested.

It cannot on the proof be claimed or pretended that Mr. Monell, the attorney who issued the execution, had any other motive than to discharge his duty to Mr. Sage.

It is proven that the bankrupt sought to prevent seizure under the second execution.

Second Point.

Where an execution against a bankrupt was delivered to a sheriff prior to the filing of the petition in bankruptcy, and the assignee took possession of the bankrupt's property before the return day of the execution, the execution creditor proving his claim in bankruptcy before such return day as a claim secured by a lien by virtue of the delivery of the execution to the sheriff, on the application of such creditor the assignee was ordered to pay out of the proceeds of the property which he had sold the amount of the execution, with interest.

Matter of Stockwell, 9 Benedict, 265.

The learned Judge in making the further suggestion to the effect of what he considers a failure on the part of the sheriff to hold his levy, assumes that the Sheriff left the whole property in the goods in the debtor, and it thereby passed to the assignee, but he thereby leaves out of view the lien acquired by the creditor when he issued his execution to the sheriff. The creditor had not done any act which impaired his lien.

The assignee took the property just as the bankrupt held it, subject to this lien.

In re Weeks, 4 Bank R., 364.
Woodland *v.* Fuller, 11 Adolp. & Ell., 859.

It cannot be a debateable point that a lien was acquired on the property when the execution was delivered to the sheriff.

The rule of law in New York is well stated in the Code, section 1405.

The goods and chattels of a judgment debtor, not exempt by express provision of law from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer to whom an execution against property is delivered, bound by the execution from the time of the delivery thereof to the proper officer to be executed, but not before.

2 N. Y. R. S., 366, sec. 17.
1 Rev. Laws of 1813, p. 501, sec. 6.

Third Point.

There is a broad distinction between knowledge and a reasonable cause to believe.

Singer *v.* Sloan, 11 B R., 433.
Buchanan *v.* Smith, 7 B. R., 513.
Bump's Bankruptcy, 8th ed., p. 820.

And cases there cited.

No longer can a preference be set aside because a creditor is put upon inquiry.

Suspicious circumstances may exist, which once would have brought the creditor within the force of the Statute, but far more is now required. Actual *knowledge* of a collusive, corrupt and settled design to prefer is absolutely essential.

The complainant's case might safely rest upon his point alone.

The complainant himself knew nothing whatever of the various transactions, as already appears. J. Henry Fowler, his agent, is not shown to have known anything of an intent to prefer, or of circumstances from which such an intent can be legally or morally inferred. Mr. Monell knew still less.

The utmost that can be tortured from the evidence is a possible motive on the part of the debtor to prefer; a possible motive on the part of the creditor to accept a preference, and an opportunity for a collusive and corrupt agreement to be made. Does this prove that the creditor *knew* that the debtor intended a preference, especially when the presumption of law is that no such knowledge existed?

Is property held by so feeble a grasp that it can be transferred from one man's pocket to that of anoter upon such evidence?

There are strong circumstances proven by the testimony of Colonel Jenny, a most upright and conscientious witness, called by the assignee, from which the natural inference is, not only that no preference was in fact intended by the bankrupt, but that he intended to prevent a preference.

Pages 69 to 72.

This inference, in the absence of any rebutting testimony, is conclusive so far as the last judgment is concerned.

There was no reasonable cause on the part of the creditor to believe that the debtor was insolvent.

Mr. Sage, the complainant was in Europe and had been for a long time. He had no personal

knowledge or information whatever upon the sobject so far as appears or can be reasonably presumed. His attorney, in fact, Mr. J. Henry Fowler, transacted all of the busines for him, but doubtless whatever knowledge or information either he or Mr Monell had is binding upon the complainant.

It is not probable that Mr. J. Henry Fowler would have sailed for Europe at the time that he did, had he expected or even suspected that his father would fail within the next six weeks. His own interest and that of his client, Mr. Sage, whose business he cared for with commendable fidelity, and that of his mother, to whom the bankrupt owed $5,000, was too great. The interest of the bankrupt himself, even, would have delayed the departure, so that he could have had the advice and assistance of his son.

It cannot be inferred from this that the bankrupt did tell J. Henry Fowler that he was insolvent, or that he told him enough to put him upon inquiry. An opportunity to do the thing, and a possible motive for doing it is shown ; from this it does not follow that the thing was done.

What reasonable cause, then, such as would induce belief in the mind of an intelligent, capable business man, did J. Henry Fowler have to believe that his father was insolvent?

Fourth Point.

The three essential elements of a preference, viz: Intent to prefer on the part of the debtor, reasonable cause to believe that the debtor was insolvent on the part of the creditor, and the actual knowledge of the creditor that a fraud on the Bankrupt Act was intended, are all wanting in this case.

These three things must concur, not only in fact, but in time. If any one precedes or follows the other, the Statute is not satisfied.

Clark v. Iselin, 11 B. R. 237.
S. C., 7 C. L. N. 185.

The burden of proof, as to each one of these three factors of a preference, rested upon the defendant, yet he has failed to satisfactorily establish any one of them.

Section 5021 of the Revised Statutes has the expression "with intent" to give a preference, while section 5128 says "with a view" to give a preference.

The debtor must *do* the thing which works the preference. In this case the preference was not the result of the debtor's own act; it was the result of another person's acts. It cannot be inferred that a man intends the result of other person's acts when he does nothing himself to aid that result.

Henkelman *v.* Witt, 12 B. R. 121.

Hence, if the bankrupt did a positive act, the consequences of which he perceived beforehand, he must be held to have intended those consequences; but unless he *did* a positive act and perceived its consequences at the time, he cannot be held to have intended those consequences.

This position is fully sustained by the authorities.

Wilson *v.* City Bank, 9 B. R. 97.
Rice *v.* Grafton Mills, 13 B. R., 209.
Clark *v.* Iselin, 11 B. R., 237.
Britton *v.* Payen, 9 B. R., 445.
Buckingham *v.* McLean, 3 McLean, 185.
Demy *v.* Dana, 56 Mass., 160, 172.
Judd *v.* Gibbs, 69 Mass., 539, 544.

What act did the bankrupt do to work this preference?

Several things are suspected, nothing is proved.

It is claimed, however, that the substitution by the bankrupt of his own notes for the notes of him-

self, his wife and R. Carman Combes was a step toward a preference.

This claim cannot be sustained.

Mr. Fowler was primarily liable on the first series of notes. They were made for his benefit and he had the money on them. They could have been enforced against him the same as if he had signed them. Then what object was there in retiring them? How did it help the preference? It could have been accomplished just as soon and just as easily without this step as with it.

But the same witness by whom the fact of this substitution of notes was proven, testified that it was done in anticipation of a loan of money from the bankrupt's wife, and because Mr. Combes refused to renew any of the notes. (Fols. 342 to 347.) This refusal on the part of Mr. Combes made some new step necessary. What step could be more natural than to give a demand note until the loan from Mrs. Fowler could be brought around? And why was not the last note so dated that it could have been sued with the rest, if a preference was intended? Furthermore, after the renewal of the notes, or after the renewal of all but the last and after the agreement to renew that, the bankrupt's son, who was also the agent of the complainant, and transacted all of this business for him, loaned $500 from his own funds to Mr. Fowler, which loan has not been paid (fols. 351-2). If any preference was intended by the bankrupt, would he not have first preferred his own son by paying him the $500, or his own wife by paying her debt of $5,000 (fols. 572 and 401)?

It is also claimed that the bankrupt went to the office of Mr. Monell, plaintiff's attorney, in the two judgments, in order to have the papers served upon him.

This is also suspected, but not proved.

The bankrupt has not been sworn. The only testimony upon this point is that of Mr. Monell and Mr. Lange.

It clearly appears from their testimony that the bankrupt went to Mr. Monell's office for an object quite different from the one ascribed to him.

No man is presumed to have violated the law. It must be proved, and facts as consistent with innocence as with guilt must be construed in favor of innocence.

It is submited that there was nothing said or done by the bankrupt, which, in the light of this principle, tends to establish an intent on his part to procure or suffer a preference.

Huckelman *v.* Smith, 12 B. R., 121.

On the other hand, there are several acts from which an intent to prevent a preference can be inferred.

a. The bankrupt wrote a letter to the attorney for the plaintiff, requesting an extension of time of two or three months upon these notes, until his son could return. It is natural that hes hould have expected this lenity under the circumstances.

b. The bankrupt consulted his attorney, Colonel Jenney, in order to prevent the entry of the first judgment. He wanted to have an answer put in or an injunction procured so as to get time until his son's return.

c. The petition was filed for the very purpose of cutting off the last judgment.

d. Bankruptcy was not decided upon as a remedy until after the first judgment had been recovered and levy made.

e. The whole testimony of Colonel Jenney shows that no preference was intended. It certainly could not have been intended at that time. If there was a vague intention on the part of the bankrupt to allow the complainant to have a preference in the future, of which, however, there is no evidence; it is of no consequence. If there was no intention on the part of the bankrupt to give a preference at the time it was obtained, then the preference is valid.

Witt *v.* Hereth, 13 B. B, 106.

Fifth Point.

The contents of the petition and schedules are not competent evidence to establish the facts therein contained.

Phænix *v.* Ingraham, 5 Johns. 41.

A judgment record is not admissible against a person not a party or a privy to the suit, as evidence of any fact determined by it or of any fact alleged in it.

DeGraff *v.* Hovey, 16 Abbott's Pr. Rep., 120.
Clark *v.* Montgomery, 23 Barb., 464.
Mathews *v.* Menedger, 2 McLean, 145.
Hurst *v.* McNeil, 1 Wash. C. Ct., 170.

The witness, Frank O. Fulmer, who was callled by the defendant, was shown several papers purporting to be invoices of goods, and testified that he did not recognize the invoices but that he recognized the goods described in the invoices as having been received at the store of John H. Fowler; that he did not know when they were received, independent of the date of the invoice; that with reference to the time of the closing of the store by the Sheriff, it was "about a month or two" previous; that he had never seen the invoices until the time he was sworn as a

witness, and that he had no knowledge of the amounts or date thereof except as he read it from the writing before him, and that he did not know that John H. Fowler ever bought any goods of the persons named in the various invoices. He was, notwithstanding, allowed to state the date and amount of the different invoices, reading the same from a book before him, which he had never seen before.

The testimony of this witness covered some nine or ten invoices.

All of this evidence was, in due time, objected to upon proper grounds.

See pages 82 to 91.

This point covers numerous objections embraced in the above statement.

Argument is unnecessary to show that this evidence was secondary and incompetent.

The defendant, Wyncoop, was sworn as a witness on his own behalf, and testified that the invoices shown to the witness Fulmer, were, part of them, contained in the Invoice Book of John H. Fowler; that the invoices in said book were the same that the assignee found therein when he took possession of Mr. Fowler's store; that he did not know that they were correct.

The purported invoices were then read in evidence, under the comprehensive objection, page 57.

These invoices cover about ten pages of the record.

See pages 82 to 91.

There was no evidence that the invoices were correct.

There was no evidence that Mr. Fowler ever bought the goods described in the invoice.

There was no evidence that any such goods were ever received by Mr. Fowler.

There was no evidence as to the date of the transaction, if there ever was such a transaction.

What foundation, then, was there for reading the invoices in evidence? What do they prove against this complainant?

Mr. Fowler did not defend. There was no issne between him and the assignee, or between him and the complainant. The invoices might fiave been evidence against Mr. Fowler were he defending against the assignee, but upon what principle can they be made evieence against the complainant?

They are not evidence *per se.*

1 Greenleaf's Ev., § 82.
Stark Ev., 641.

Sixth Point.

If the question was presented by the pleadings, and if it was a material question in the case whether the actual levy had been abandoned, there were no facts or circumstances from which an abandonment of the levy could be inferred. The mere fact that the property was not removed but allowed to remain three days in the debtor's store was no evidence of an abandonment of the levy.

In Butler *v.* Maynard, 11 Wend., 548, Nelson, *J.* says (p. 552): "These cases, however, show that leaving the property in the possession of the defendant for a reasonable time and without any improper motive after the levy, is not *per se* fraudulent, but the rights of the plaintiff and officer remain in full vigor. There is nothing,

then, in this case, in the fact of the flour being temporarily left in the possession of the defendant in the execution which would go to impair the rights of the defendants."

Lampton *v.* Taylor, *Lill.* select cases, 273. It is no breach of trust in a sheriff to leave property levied on in the hands of the defendant or claimant until the day of sale—for he acquires by the levy such an interest in it as will authorize him to appoint whom he pleases his bailer or keeper of it.

Smith *v.* Hughes, 24 Ill., 270, 277. "The cases agree that an officer selecting the defendant in the execution as custodian of the property does not thereby release nor in any wise affect the validity of the levy."

Barber *v.* Benninger, 4 Ker., 270. Doty *v.* Turner, 8 Johns. 20. Herkmier Co. Bank *v.* Brown, 6 Hill, 232.

The cases cited in the opinion of the Judge who presided at the Circuit are not analagous to the present.

Bradley *v.* Wyndham, 1 Wils. 44, suit for false return. The plaintiff's attorney was present and told the special bailiff, to whom the writ was directed, to use the defendant kindly, not to take any of his household goods, for that the defendant's landlord would soon be in the country and pay the debt. The special bailiff announced seizure of all corn and cattle on the farm, and another execution came in at the suit of Earl. Earl had not agreed to pay plaintiff's debt, and the jury found that it was not intended that the first execution should be really executed.

Storm *v.* Woods, 11 Johns., 110; action for false return. Plaintiff in the execution allowed

the goods to remain in defendant's possession, using them as his own for nearly a year. It was held that as the conduct of the sheriff was known and approved of by the owners of the judgment, he was not liable to them for neglect of duty, and that they intending to allow their execution to remain unexecuted until pressed by younger executions their execution must be deemed dormant.

Kellogg *v.* Griffin, 17 Johns., 274, was similar in its features to Storms *v.* Wood.

Heard v. *Fairbank*, 5 *Metc.* 111, turned upon the validity of the original attachment levy, and is not in harmony with the decisions in New York.

See Russell *v.* Gibbs, 5 Cow., 395; Ferguson *v.* Lee, 9 Wend., 258, to the effect, that the neglect of a sheriff to sell, without any act of the plaintiff, does not render the execution dormant, even though the plaintiff for six months after the return day takes no step to compel a return.

To the same effect are Herkemer Co. Bank *v.* Brown, 6 Hill, 232. Thompson *v.* Van Vechten, 5 Abbott Prac. R., 458.

In the Weeks 4 Bank. R. 364, Judge Blodget held that a direction by the creditor to the sheriff to hold the execution but not to levy until further orders "did not impair the lien acquired by the delivery of the execution to the sheriff prior to the bankruptcy proceedings."

We submit that our lien being valid as against the bankrupt and his assignee in bankruptcy, a levy could have been made to execute the lien during the life time of the process which would have been effectual as against the assignee.

Where an execution on final judgment has been

levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff cannot be disturbed by the assignee. The assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands.

Marshall *v.* Knox *et al.* 8 N B. R., 97.

The complaints in the suits on the notes set forth a cause of action, and could not have been objected to on demurrer.

Mr. Jenny erred in his evidence in this behalf.

A complaint identical in form and substance was held to be good in Pentz *v.* Pratt, 6 Barb., 662.

Seventh Point.

The judgment should be reversed, with costs.

AMBROSE MONELL,
Solicitor for Plaintiff in Error.

A. J. VANDERPOEL,
of Counsel.

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Number 106

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. MCKENNEY, Clerk.

UNITED STATES SUPREME COURT.

IN EQUITY.

GARDNER A. SAGE, JR.,

Appellant.

AGAINST

JONATHAN G. WYNKOOP,

as Assignee in Bankruptcy of John H. Fowler, a bankrupt, impleaded, &c.,

Appellee.

APPELLEE'S BRIEF.

STATEMENNT OF PLEADINGS.

The bill in this case is filed for the purpose of compelling the application of $5,200, now in the custody of the District Court for the Northern District of New York, in bankruptcy, upon and in payment of two certain judgments claimed to have been recovered and to be held by the plaintiff against the bankrupt John H. Fowler. And therein it is alleged that on the 19th day of May, 1875, the plaintiff recovered a judgment in the Supreme Court of the State of New York against said bankrupt for $4,052.00, damages and costs. Fol. 8. P 2

That on the 29th of May, 1875, a transcript of said judgment was duly filed in the Onondaga County Clerk's office.

That on the 31st day of May, 1875, an execution against the property of the judgment debtor was issued and delivered to the Sheriff of Onondaga County, endorsed with directions to collect the full amount of said judgnent., &c. Fol. 11. P 4

That execution was levied on the property of the bankrupt by the sheriff, May 31. Fol. 15. P. 4½

That on the second day of June, 1875, the complainant recovered a second judgment against the said bankrupt for $1,023.35. That a transcript thereof was filed in Onondaga County, June 3, 1875. Fol. 19. P. 4½

That on the same day execution for the full amount of said judgment was issued thereon and delivered to the Sheriff of Onondaga County, to be executed by him, and was levied by him upon the property of the debtor on same day. Fol. 20. &c. P. 4½

The bill then avers that said Gardner A. Sage, Jr., at the time of recovering said judgments and issuing said executions and the levy thereon, did not have reasonable cause to believe that said Fowler was insolvent, &c. Fol. 30. P. 7

That after the levy of said executions and on the 4th day of June, (the 3d day of June in fact), 1875, the judgment debtor, Fowler, caused his petition in *voluntary bankruptcy* to be filed in the office of the Clerk of the District Court for Northern District of New York, &c.

That on the 9th day of June, an order was made in the bankruptcy proceedings by His Honor, Judge Wallace, restraining the Sheriff from proceeding on said executions. Fol. 39. P. 8

That on the 15th day of July, 1875, (the 3d day of July in fact), the defendant, Jonathan G. Wynkoop, was appointed said bankrupt's assignee. Fol. 40. P. 9

That on the 17th day of August, 1875, an order was made by the court in said bankruptcy proceedings, directing said assignee to sell said goods levied upon by virtue of said executions, free from the lien thereof, and to bring sufficient of the proceeds thereof into

court to pay said executions, provided they were entitled to preference. Fol. 42. Prim. 10

That under said order the assignee sold the property and brought $5,200, part of proceeds, into court, in pursuance thereof.

That the whole amount realized on said sale was $8,000. Fol. 48. Prim. 10

Upon the above allegations the plaintiff asks for a decree that said two executions be paid out of said sum so deposited, and that if any deficiency exists the assignee pay the balance out of any funds in his hands as such assignee.

The answer of the assignee, Mr. Wynkoop, among other things, avers:—

That on the 3d day of June, 1875, the petition in voluntary bankruptcy was filed, and on the 7th day of June, said petitioner, John H. Fowler, was adjudged a bankrupt. Fol. 75. Prim. 16

That Wynkoop was appointed assignee *July* 3, 1875.

That within the period of four months next preceding the filing of such petition, said bankrupt *gave out and pretended* that he was indebted to Gardner A. Sage, Jr., in about the sum of $5,000, on certain promissory notes, which are set out in said answer at Folios 83 and 86. They being four promissory notes alleged to have been made by *R. Carman Combes* to the order of *Ellen A. Fowler*, and endorsed by her and John H. Fowler, the bankrupt, each for one thousand dollars, and dated and maturing as follows:

One dated December 15, 1874, due in three months and maturing *March* 18, 1875.

One dated December 28, 1874, due in three months and maturing *March* 31, 1875.

One January 18, 1874, due in three months and maturing *April* 21, 1875.

One February 5, 1875, due in three months and maturing *May* 8, 1875.

That R. Carman Combes, the maker of said notes, had for several years previous to, and did up to August, 1874, ostensibly as principal, carry on the boot and shoe business in the city of Syracuse, but that said business was conducted by said John H. Fowler, as pretended agent for said Combes; and that Ellen A. Fowler, the first endorser on said notes was wife of the bankrupt. Fol. 93. P-mk: 19

It will be observed, and the fact becomes significant in the light of the evidence given in the case, that neither of *said notes was protested at maturity*, but that as *claimed*, demand and protest *were waived*.

The answer further alleges that on the 28th day of April, 1875, the bankrupt, John H. Fowler, was in the city of New York, and that J. Henry Fowler, who was the attorney in fact of the complainant, was also there; and that then and there said John H. Fowler made his five promissory notes payable respectively to Gardner A. Sage, Jr., or order, &c And that said J. Henry Fowler then and there cancelled the five noties copied above, thereby attempting to release the said R. Carman Combes and Ellen A. Fowler, who were each, and especially the former, perfectly responsible from their liability on said notes. Fol. 102. P 20

That on the same day said notes were given (to-wit, April 28, 1875,) an action was commenced to recover the amount of four of them through the agency of said J. Henry Fowler, the attorney in fact of said complainant, which said action culminated in the judgment of $4,052, mentioned and set forth in the complaint herein. Folio 107. P-mk-22

That the second judgment was obtained on the 5th note.

The answer then alleges the issuing of the executions on said judgments, levy by the sheriff, order for sale of property by assignee, its sale, &c., substantially as stated in the complaint.

It then denies the allegations in said complaint, that at the time of the recovery of said judgment and the issuing of said executions or either of them, the plaintiff did not have reasonable cause to believe that the said John H. Fowler was insolvent, and that he was acting in contemplation of insolvency, or that he did not know a fraud was intended upon the bankrupt act Folio 116. Print 2-24

The answer then avers the converse of said propositions, and avers knowledge and reasonable ground for belief of the insolvency, &c., of the said John H. Fowler. See averments at folio 119–124. Print 2-25

And that said judgments and executions were and are fraudulent under said act.

That for several days prior to the 3d day of June, 1875, the said John H. Fowler had been preparing his petition in bankruptcy, and that the same was completed as early as May 31, 1875, but that the filing thereof was delayed until the 3d day of June, 1875, at 2 o'clock P. M., to enable said plaintiff to obtain said judgments, and levy executions thereon upon the property of the bankrupt before such filing, and that the same was done in pursuance of a plot, plan and scheme, by which said Sage was to procure, and said Fowler was to permit and aid in procuring for said Sage an unlawful preference, and to cheat and defraud the other creditors of said bankrupt. Folio 131. A similar averment is found at folio 143. Print 2-26

The said answer also contains the averment that said pretended indebtedness for which said judgments were obtained was wholly fictitious, that in truth and

fact said bankrupt did not owe and was not indebted to said Sage in any sum whatever, and that said notes were given by said John H. Fowler, and received by said plaintiff with intent to cheat and defraud the creditors of said John H. Fowler, and to create a secret trust for his benefit. Folio 146. Prim 6-30

The case was heard at a Circuit Court held at Canandaigua, N. Y. on the day of by Hon. Wheeler, Circuit Judge, upon the pleadings and evidence, and a decree was entered adjudging the judgments fraudulent and void, and that the defendant as assignee in bankruptcy of John H. Fowler was entitled to said fund, proceeds of the sale of the property of the bankrupt.

The evidence in the case bearing upon the issues in pleadings can be better and more intelligibly presented to the court by grouping it under the several propositions which it tends to establish.

POINTS.

I.

The alleged indebtedness for which said judgments were obtained was fictitious and fraudulent as against the creditors of said John H. Fowler, and the same was acknowledged by the bankrupt and the judgments were permitted by him to be obtained with a view to his own benefit and with intent to cheat and defraud his creditors.

The plaintiff calls as a witness, J. Henry Fowler, at page 63 B 36 of case.

He is the son of John H. Fowler, the bankrupt, and an attorney-at-law practicing in the city of New York.

John H. Fowler, the bankrupt, resides in the city of Syracuse.

The witness has acted as legal adviser and *the attorney in fact* of the complainant, for five years prior to his examination as a witness. Fol. 318, 328, 332.

In attempting to explain the consideration for giving the notes in question, on his direct examination he says:

"The notes of R. Carman Combes, which were accommodation notes and which I discounted as the attorney in fact of Gardner A. Sage, Jr., by virtue of his power of attorney to me, which money I paid over directly or through John H. Fowler's bank, to him in Syracuse, or the bank at which he [illegible] *John H. Fowler, as agent*, or other[illegible]

Turning to folio 359, it appears tha[illegible] ler failed in business in New York in 1861, and that from that time down to the summer of 1874, he conducted business at Syracuse *as agent for R. Carman Combes.*

R. Carman Combes was the principal debtor in fact as he appeared upon the paper, upon the notes or pretended notes which are sought to be used as a consideration to support the notes upon which the judgments are founded, and the bankrupt was not liable upon the same except as the last accomodation endorser, Combes, the maker of said notes, was a relative of Fowler the bankrupt, and was a man of wealth and perfectly responsible. Fol. 358.

The five $1,000 notes were all made by R. Carman Combes. Fol. 383.

Question. *You held those notes* past due down to the time that the notes you gave to Monell for collection *were given?*

Answer. I did not.

Q. What had you done with them?

A. My impression is *I had returned* them to *John H. Fowler*. Fol. 390. P. 179

The notes we are given to understand were made by R. Carman Combes for the accommodation of John H. Fowler, and discounted by J. Henry Fowler, his son, as attorney in fact for Gardner A. Sage, Jr. the plaintiff, and yet are returned by this astute attorney and agent to the principal debtor whom he knew to be insolvent; and after such surrender as he alleges, the notes in question are given for them. This statement is scarcely credible.

Again, turning to the judgment roll on the first four notes of $1,000 each, and it is found that the first note bears date on the 18th day of March, 1875; the second one March 31, 1875; the third one April 13th, 1875; and the fourth one April 21st, 1875. Fol. 928. P. 196

Returning to the witness J. Henry Fowler, at fol. 392, the following evidence is found:

Q. Were not those notes which you left with Mr. Monell for collection, given by your father on the 27th or 28th of April, 1875?

A. No, sir.

Q. Were they not given at one time?

A. No, sir.

Q. Where were they given?

A. Some in Syracuse and others in New York.

Q. When those were given in Syracuse were you there?

A. Yes, sir.

Q. And when the notes were given in New York was your father here?

A. Of course he was; on two occasions to my positive knowledge.

Q. When you were in Syracuse, did you make it your home with your father and mother?

A. I did.

Q. And when in New York did he stop at your house?

A. Sometimes.

Q. You knew your mother owned the dwelling house in which the family lived in Syracuse?

A. I did; she has owned it for ten or more years.

Q. What time did your father come to New York on the occasion of your departure for Europe in 1875?

A. Two or three days prior, he made my house his stopping place partially.

Q. When was he in New York next previous to that?

A. I can not remember.

Q. Was he here in the spring of 1875, or winter of 1875, and before the first of January?

A. My impression is that it was, I am not positive.

Q. Were you in Syracuse during the winter or spring of 1875?

A. I was within three months of my going to Europe, I think within six weeks, I staid there only a day or so; my visit there was to visit my father's family and bid them good bye.

Q. Did you transact any business with your father there?

A. I did.

Q. What, sir?

A. I looked about hie store, inquired in reference to his stock, as to his general business; I can not state now definitely any other business, at that time, or prior thereto, *I arranged that my father should secure my mother for his indebtedness to her of $5,000*, and obtained his note therefor payable to my mother. This is all that I have a present recollection of.

Q. When was you in Syracuse next before the time you have mentioned?

A. I think in the fall of 1874; I think in the early part.

It will be seen from the above that there was no opportunity at the date of the notes to give or receive them.

At folio 327. P. 112-66

Q. From whom did you obtain the notes which you say were signed by John H. Fowler, and by you delivered to Mr. Monell?

A. From John H. Fowler, the maker.

At folio 342:— P. 69 "He (John H. Fowler,) informed me that he had been disappointed in his receipts from his business, and was unable to pay that note (one first claimed as falling due,) and offered me his note for the same amount to take up the same, which I accepted, *and as fast as those notes matured I accepted these notes in the place of them.*"

At folio 185, P. 40 Monell, the attorney for the complainant in the two judgments in question, testifies:—

"He, J. Henry Fowler, referred to these notes on several occasions, and finally, shortly before his departure for Europe, he put the notes into my hands telling me he was going to leave them *with me for collection.*"

At folio 217, P. 44 is the following testimony:—

Q. Who was the maker of the notes that were left with you, the first notes received by you?

A. John H. Fowler.

Q. How many were there?

A. My impression is five of $1000 each.

Q. Did you hear from any source previous to the time the notes were left with you of certain other five notes of $1000 each, given by R. Carman Combes to

Mrs. Ellen A. Fowler, the wife of John H. Fowler the bankrupt?

A. I had.

Q. Were you informed at the time or previous to, or at the time the notes were left with you, that they were given to retire said notes of R. Carman Combes?

A. I had heard something to that effect before or at the time the notes in suit were given.

Again at folio 263:— Print - 23

"As before stated, I have no recollection of seeing these notes but twice, once when they were delivered to me, when I put them in my safe, and again when I delivered them to my clerk to prepare the complaints."

By a reference to the judgment roll in the second action, at folio 970, 195 it will be seen that the note on which that action is brought was given or bears date May 8th, 1875, or some ten days after J. Henry Fowler sailed for Europe, he having left on the 28th of April previous.

If we now refer to the testimony of J. Henry Fowler, given as was the foregoing by Mr. Monell before the fact of the date of the note was discovered, we find at folio 334: Print - 68

Q. Shortly before your departure for Europe did you have in your possession promissory notes which you had discounted for said Fowler with complainant's money and for his benefit, and which were unpaid?

A. I had.

Q. To what amount?

A. $5,000 or more.

Q. Had any of these notes matured prior to your departure for Europe?

A. Several of them had matured.

Q. Have you these notes in your possession or under your control, or do you know where they are?

A. The original notes of R. Carman Combes were returned to John H. Fowler upon their maturity *and retired by his delivering to me his notes in extension therefor.*

At folio 349: Print 7.

Q. What instructions did you give Mr. Monell with reference to this indebtednes?

A. I told him I was very much annoyed to think that when my father knew for several months prior that I had engaged passage to Europe for myself and family, that he had compelled me to renew the original notes, and after renewing them I had additionally loaned him $500 from my own funds. * * * I additionally told Mr. Monell after I had placed *the notes in suit in his possession as my representative,* that I desired him to protect the interest of our client, the complainant, as against John H Fowler, notwithstanding he was the author of my existence.

At a subsequent stage of the examination and when the absurdity of the testimony in regard to the last note was made apparent to the witness, he attempts to change position upon the question, and this effort is quite as awkward as the original

At fol. 305:—Print 82

Q. Did your father give you the five notes that are included in these judgment rolls?

A. He gave me four of the notes at least.

Q. Whom did he give the other to?

A. I cannot remember.

Q. Were they all given before you went to Europe?

A. He gave me four.

Q. Was any one authorized to take the fifth note?

A. Mr. Monell was authorized by me in the event

of the fifth note not being paid, to take John F. Fowler's note in lieu thereof.

Q. Did anybody else have any authority of that nature?

A. I don't remember unless it might have been Mr. Combes.

Q. Do you wish to be understood as testifying that you authorized Mr. Monell to take your father's note for R. Carman Combes' note maturing after you went to Europe?

A. I so did to the best of my recollection.

Q. Did you authorize R. Carman Combes to exchange his note for your father's note after you went to Europe?

A. I don't remember.

Q. Have you any recollection or idea that you authorized any one besides Mr. Monell to exchange that note?

A. I think not.

Q. Where was your office when you left for Europe?

A. No. 5 Wall street. Mr. Lester Newell was in my office; he transacted business for me; he looked after some minor suits and attended to general business for me.

Q. Did you leave any of Mr. Sage's notes with him?

A. I did not.

Q. Assuming that note to bear date on the 8th day of May, 1875, and to be written payable on demand, can you account for the giving of it in any other way than that it was taken by you before your departure for Europe?

A. I can, sir.

Q. How?

A. That Mr. Fowler sent it to New York to take up the other note which I saw; I would not deliver the

Combes note to him due May 8, 1875, unless he paid it before I departed for Europe. Otherwise, I now recollect of having placed it in my safe and left it there during my absence in Europe, and desired John H. Fowler to send Mr. Monell a new note after it had matured, or else send him the money wherewith to take up the same.

If this explanation is not found to be entirely lucid and wholly satisfactory, it is not because the witness has not studiously attempted to make it so; and the failure must be ascribed to the want of ability on his part.

Having thus presented the evidence bearing upon the existence of the demands in question, it is suggested to be conflicting, contradictory and wholly insufficient to establish with any degree of satisfaction the existence of a consideration to support the judgments

The judgment being fictitious, is a transfer or an attempted transfer with intent to hinder, delay and defraud creditors.

In re Schick, 1 B. R., 177.
In re Schick, 2 Benedict, 5.
Bump's Bankruptcy, 8 ed, 294.

II.

The judgments are void and the liens by execution and levy in operation as a preference under section 5021, 5128 and 5129 of the Bankrupt law, because John H. Fowler, being insolvent, with a view to give a preference to the complainant, suffered and procured his property to be seized on said execution, and the said complainant had reasonable grounds to believe said John H. Fowler insolvent, and knew that the same was in fraud of said act.

(a) John H. Fowler, the alleged debtor, was insolvent. He was a merchant and trader and as

applied to him the definition of the term *insolvent* and the sense in which it is used by Congress in the act, is a person who is unable to pay his debts as they become due in the ordinary course of business.

Harrison vs. McLaren, 10 B. R., 247.
Smith vs. McLean, 10 id. 269.
Bump Bankruptcy, 10 ed., 412, and cases cited.

In addition to the notes past due on the 28th of April, 1875, hereinbefore alluded to, and which he had frequently when dunned promised to pay and as often violated his promise, (Fol. 351—353), he owed J. O. Whitehouse a past due note of $363.64, maturing April 21, 1875; Wallace & Elliott one maturing April 24, $508.94; another to same parties maturing April 27, for $325.00. He owed his wife a $5,000 note past due, which he frequently promised to pay—and many other debts.

The amount of his indebtedness was $35,000, and his assets $8.592. Fol.

He was therefore insolvent within the interpretation above given and hopelessly insolvent in fact and in the broadest acceptation of the term.

A merchant having no property but his stock in trade who, when pressed for a debt admitted to be just, gives as a reason that he is unable to pay it and suffers a judgment to be entered against him is insolvent within any accepted or sound definition of the term as used in the bankrupt act, although his stock in trade at cost prices or cash value could it be sold for what it is worth equals or excels the trader's liability.

Nelson vs. The City Bank, 5 B. R., 270.
9 id. 97.
1 Dillow, 475.
17 Wall, 473.

(b) The bankrupt Fowler both suffered and procured the jndgments to be obtained with a view to give complainant an illegal preference.

J. Henry Fowler was a relative of Sage, the complainant, and was his attorney in fact and had been so for five years previous to the petition in bankruptcy of John H. Fowler. Fol. 317. Print 21-64

J. Henry Fowler was the son of the bankrupt, was intimate with him and entirely familiar with the bankrupt's business and means.

J. Henry Fowler knew when his father went into business in the summer or fall of 1874 that he had no capital or means, and that he borrowed $7,000 to enter into business. Fol. 370. Print 75

J. Henry Fowler, as he testifies, was pressing the bankrupt for the payment of the notes afterwards put in judgments and the bankrupt had repeatedly promised to pay them.

On the 28th day of April, 1875, the bankrupt was in the city of New York, where both the Attorney Monell and J. Henry Fowler resided and done business. The bankrupt at this time stopped with his son and was with him several days, and J. Henry Fowler employed Monell as *his representative* to commence action upon the notes. Fol. 182. Print 40 c

(c) The parties on the day last named, all met on board the steamer in which J. Henry was to sail. Fols. 188, 193, 228. Print 40

On the steamer the bankrupt, who had but little previous acquaintance with Monell, kindly informs him "that he will call at his office in the afternoon and bid him good-bye." Fol. 194. And Monell thereupon proceeds to his office and directs summons and complaint to be made out and served on him when he comes.

True to his promise the bankrupt called at the attorney's office and the complaint in the first action was served by a clerk in his office. He knew no one in the office. Fol. 230. Prim. 47

To make this call upon those with whom he had no acquaintance as the attorney had said he had travelled from the place where he was staying, two miles, to reach the office, and directly away from the Union Depot, the place of his departure. Fol. 231. Prim. 47

The attorney often met the bankrupt afterwards and consulted with him. Fol. 233. Prim. 48

As bearing upon the question of collusion and fraud the testimony of George N. Lange, becomes significant. He as well as Monell and J. H. Fowler, are witnesses called by the plaintiff.

The witness having stated on his direct examination that the bankrupt came to the attorney's office and that he followed him into Delmonico's and there served the papers, on his cross-examination testifies: Fol. 298. Prim. 60-61

Q Had you ever seen Mr. John H. Fowler before that time?

A. I had seen him once or twice in Mr. Monell's office; I think once when Mr. Monell was not there, and once when he was. I saw him in the same week when Monell was not there, or the week before; he came there and inquired for Mr. Monell; he came alone; I don't know if Mr. Monell was in the office or not; the first time Fowler called he did not see Mr. Monell; when he did see him it was after that, one or two days after, *and that was two or three days before I served the papers*, and perhaps longer--and on that occasion he came alone. *He saw Mr. Monell in his own private office.* (Monell says the notes were left

with him for collection within the week before the 28th. Folio 216,) They remained in the private room together *for half an hour or three-quarters of an hour; they were there alone.*

Q. At that interview did you hear any conversation between them ?

A. No ; Mr. Fowler never remained long ; I don't think the door was closed ; I was in the office alone. The next time I saw him was the day I made the service ; *I have seen him at the office since the service ;* I don't know how long after; I think it was two months after ; I think Monell was not in ; I think he called again the same day and did not see Mr. Monell. The next day he called, went into the private office and came right out again--he was not *in more than fifteen minutes.* * * Two or three days after that I saw him in the office ; he was *in Mr. Monell's private office ;* I had to go down to the post office, and when I came back he was gone ; I do not remember seeing him after that. * * * Mr. Fowler was talking with Mr. Morell at Delmonico's when I made the service. *He did not express any surprise at being sued.*

Q. In the office did he say this to Mr. Fowler upon whom the papers are to be served ?

A. No ; he came out and said, that is Mr. Fowler in there.

On this suit the judgment was entered on the 19th day of May, 1875, for $4052.

Turning to the complaint in this action and it will be found that it sets forth no cause of action against the bankrupt.

It does not aver the delivery of either note by the bankrupt to the plaintiff, or any body else, or that the

plaintiff was at the commencement of the action, or had been at any time the owner of either.

In the light of the fact that the complaint is verified by the attorney, the omission to state a cause of action is very significant upon the question we first present, that none in fact existed. It can not be regarded as an accident, since such conclusion would do great injustice to the attorney; it rather seems a studied omission rendered necessary by the peculiar circumstances of the case.

The action to recover the second judgment was commenced by the service of a summons and complaint sent to Messrs. Ruger & Jenney at Syracuse for service; they were the attorneys for the bankrupt in the bankruptcy proceedings, and the papers were served by the clerk in their office. This summons was served on the 12th day of May, 1875, and the judgment entered June 2, 1875.

The complaint in this action, like the other, sets forth no cause of action against the defendant. Folio 970.

On the 29th day of May a transcript of the first judgment is filed in the Onondaga county clerk's office and an execution issued to the sheriff of that county thereon. *On the 3d day of June, 1875, at 10:55* A. M., an execution was received by the sheriff of Onondaga county on the second judgment, and levied by the sheriff on the bankrupt's stock *of goods at 11 o'clock* on that day, and the store closed by him that afternoon, until which time the store had remained open and business continued by the bankrupt as usual. Folio 129. Folio 130

Previous to the first day of June, 1875, Ruger & Jenney had been retained by the bankrupt to prepare his papers in proceedings in voluntary bankruptcy;

they were prepared by Mr. Brooks in their office; it took two days or more to prepare them; they were sworn to as soon as prepared and sent to the clerk *with instructions to delay the filing until he should be instructed to file them.* Page 123-4.

The petition of the bankrupt is sworn to June 1st, 1875, (Folio 1158.) and schedules same day. Folio 1227.

They were filed in the District clerk's office at *Buffalo, June 3d, 1875, at 2 P. M.*, or three hours after the levy of the last execution upon the bankrupt's property in Syracuse.

That the judgments and all the proceedings were collusive, is, it seems to us, too manifest for argument.

The testimony of Edwin S. Jenney seems to illustrate more fully the accuracy of this position. He is one of the attorneys for the bankrupt in the bankruptcy proceedings.

At folio 663, he says:—"The bankrupt consulted me during the month of May, 1875." On the 25th day of May, he was paid by the bankrupt $100 for services rendered and to be rendered, and witness had advised him prior to that date. Folio 664.

At folio 862 he is called by the complainant and further testifies at folio 866.

Q. Had he, the bankrupt, taken any measures or requested you to take any, to get time in that action, or to prevent the entry of that judgment?

A. He had; his first consultation with me was with reference solely to prevent this judgment being entered against him; he said he did not think the suit would be pressed to judgment, and if it was, whether an answer could be put in or an injunction obtained to give him more time. It is my impression he requested me to write Mr. Sage's attorney to get time in that action.

On his cross examination he further testifies on this subject. Fol. 881. Drum-177

Q. Were you informed by Fowler, the bankrupt, about the time the suit was commenced in which the $4,000 judgment was recovered, that it had been commenced against him?

A. I think I was.

Q. And that it was brought to recover the amount of several promissory notes alleged to have been given by Fowler for borrowed money?

A. I think I saw the complaint, although I have no recollection of it.

Q. Do I understand you to say that Mr. Fowler counselled with you as his attorney with a view to a defense to that action, or a delay of the entry of judgment in that case?

A. He did, but he did not claim he had any defense on the merits to the action.

Q. And did you give him advice as his counsel upon that subject, viz:—The taking of steps to delay the entry of that judgment?

A. I advised with him upon that subject on more than one occasion.

Q. Did you desire, as his counsel, to carry out his wishes upon that subject?

A. I have no doubt I did.

Q. How long have you practiced law?

A. Since the fall of 1865.

[Here the witness is shown a certified copy of the judgment roll in the first action (the $4,052 one), and is asked if, in his opinion as a lawyer, there is any legal cause of action in that complaint?]

A. I do not think it does.

Q. Would a demurrer, had it been interposed to that complaint upon the ground that it did not state

facts sufficient to constitute a cause of action in your judgment have been sustained?

A. I think it would.

The same testimony is given by the witness in regard to the complaint in the second action. Fol. 894. P 178

In the schedule accompanying the petition on page 241, P 102 it will be seen that the five $1,000 notes are included as a debt owing the petitioners. Upon this subject the witness is asked. Fol. 889. P 181

Q. Can you assign any reason why those five notes upon which the two judgments were recovered were included as notes in the liabilities of John H. Fowler and sworn to as such?

A. No; I know of none.

(c) The complainant obtaining this preference, if preference was obtained, had reasonable grounds to believe that the bankrupt was insolvent at that time.

J. Henry Fowler is the son of the bankrupt and was then and had been the attorney in fact of the complainant for five years previous, was entirely familiar with his father's business and means, and in all the transactions had done this business, and his knowledge is the complainant's knowledge.

He knew his father was insolvent, he knew he had past due commercial paper which he could not meet.

He knew his father's circumstances were precarious to such an extent that in the winter of 1875 he came to Syracuse and tried to get security for a debt of $5,000 the bankrupt owed his mother.

He had frequently, if he is to be believed, pressed the bankrupt to pay these notes, had been promised payment and the promise violated.

Reasonable ground to believe may be defined to mean a state of facts or circumstances which would

lead any prudent man to make inquiry. It will not do to ask protection on account of ignorance when a reasonable amount of inquiry would give the necessary information.

In re J. B. Wright, 2 B. R., 490.
In re Arnold id 160.
White vs. Rafferty, 3 id 221.
Scammon vs. Cole, 5 id 257.
Smith, assignee vs. Buchanan, 8 Blatchford, 153.
Buchanan vs. Smith, 16 Wallace, 217.

(d) The complainant through his attorney in fact, J. Henry Fowler, *knew* that the judgments were in fraud of the bankrupt act.

This knowledge is evident by the testimony hereinbefore referred to. Upon this proposition especial attention is called to the manner the suits were commenced, the privity of act in the commencement of the first one between Monell, the attorney for Sage, and Fowler, the bankrupt. The fact that by the laws of New York in relation to pleading no cause of action was stated in either complaint.

That the judgment in the first action was docketed in the city of New York on the 19th day of May, 1875, but no transcript was filed in Onondaga County, where the judgment debtor resided, until May 29th, 1875. Execution was issued thereon May 31, and a levy, in form at least, on the bankrupt's stock in trade made; the bankrupt was permitted to conduct his business undisturbed after the levy until the afternoon of June 3, and until after the second judgment had been obtained and an execution thereon levied and until after the petition was filed. Fol. 647. Brief - 130

The object of this is developed pretty satisfactorily by the testimony of Monell, the plaintiff's attorney in obtaining the judgments. He says, "I delayed issu

ing the execution in the first suit partly because the second suit was not then in judgment." Fol. 239. P 45 Again he says, "I delayed issuing execution on the first judgment because judgment had not been perfected in the second action, and *I was fearful that if I should issue execution on one judgment it might predjudice the collection of the second.* Fol. 247. P 50

The second judgment is obtained and docketed in the office of the Clerk of the County of New York on the 2d day of June, 1875, and a transcript of the same filed in the Onondaga County Clerk's office. On the 3d day of June an execution is issued thereon and levied in form on the bankrupt's stock of goods at 11 o'clock A. M., same day, June 3. There was no actual seizure on either execution until after the petition in bankruptcy had been filed.

The petition in bankruptcy is prepared and sworn to together with the schedules on the first day of June, 1875, and forwarded to the Clerk of the District Court at Buffalo, on the same day, accompanied with directions to him from the bankrupt's attorneys *not to file the same until directed by them.* On the 3d day of June, at 2 P. M., and three hours after the said levy is made on the second execution and the debt, as it was believed, secured, the petition is filed, and that by direction by telegram from Fowler's attorneys.

No satisfactory evidence can be given or plausible theory invoked available to overcome the irresistible logic of these facts. The whole was a fraudulent scheme devised by J. Henry Fowler, the son of the bankrupt, and the attorney in fact of Sage, the complainant, and Monell his representative, acting in conjunction with the attorneys of the bankrupt, to secure to Sage an illegal preference, if he was in fact a creditor or, through the instrumentality of the judgments,

based upon a fictitious demand, to defraud the honest creditors of their rights and save the estate to the bankrupt.

The fact that the real or pretended demand of the wife was not used as the instrument to perpetrate the fraud is explained by the suggestion that the mode adopted was less likely to challenge the attack of the assignee or creditors than would have been if the claim of the wife had been the foundation of the judgments.

III

The first action was commenced April 28, 1875, upon which the first judgment in question was recovered.

Subsequent to that time and from day to day the bankrupt continued to order goods on credit from dealers which were forwarded to him and placed in the stock in part and in part deposited in the cellar of the store in unbroken packages down to the time of the rendering of that judgment and the issue and levy of the execution thereon; and said execution was levied upon such new stock as well as the old with intent to have the same applied in payment of said execution.

Schedules showing such purchases are found from page 204 to 227, and the amount so purchased on credit was $5,057. These were new goods and comprised the principal part of the bankrupt stock in value when the levy was made.

Some of these goods were reclaimed by the vendors. Fols. 463, 466.

Some remained in the original packages. Fols. 465, 477, 703, 704.

The goods thus purchased were not needed or required or used in the stock from which the daily sales were made. Fol. 498.

And were kept part in the back part of the store and part down cellar. Fols. 516, 518. Print-104

Goods were purchased in unusual quantities. Fols. 530, 532. Print-106-107

These goods were, many of them, received at bankrupt's store very soon before he filed his petition. Pages 108 to 112. Print-43-4

Previous to the petition in bankruptcy, the bankrupt shipped goods at various times to Auburn; there was a shipping book kept in which goods so shipped were entered, showing the amount and value. This book disappeared just before the bankruptcy proceedings and has never been seen since. Pages 113-14.

There was no jobbing done by the bankrupt. Fols. 576, 474. Print-116-95

Goods came to the store not marked. Fol 580. P 116

Upon this branch of the case the whole evidence shows the fraudulent intent of the bankrupt after he was sued, to procure from dealers on credit goods in large quantities to the end that they might be levied upon by the judgments in question, procured through the instrumentality of his son and by another relative of the family, the complainant standing in that relation.

Hannequin vs. Naylor, 24 N. Y., 139.
See opinion of James Judge, p. 141.
Johnson vs. Monell, 2 Keyes 655-662, 3.
Byrd & Hall vs. Hall, 2d id., 646.
Devor vs. Brandt, 53 N. Y., 462, 465.
Wright vs. Brown, 3 vol. No. 15, Weekly Digest, 344.
In re Baker 14 B.R. 443

In this case there was no change, so far as the evidence shows, in the means or ability of the bankrupt to pay between the 28th of April and the time of filing his petition in bankruptcy.

IV.

There was no actual seizure of the property of the bankrupt on either execution until after the petition in bankruptcy had been filed, whatever the intent of the parties might have been on that subject.

The execution on the judgment first docketed for $4,052, exhibit 5, page 199 is received by the sheriff of Onondaga county May 31, 1875, at 9 A. M., No levy in form appears to have been made on that, page 201.

The second execution set out at page 202 was received by same sheriff June 3, 1875, at 10:55 A. M. No levies endorsed ; page 203.

The witness heard the Deputy Sheriff receiving the execution say, "I went over there and told Mr. Fowler I had an execution against him, and asked him if he could pay it, he said he could not pay it and then I said I would have to make levy upon the stock of goods, which I did," folio 643. I think we closed the store that night. Folio 647.

The only evidence of a levy on the first execution is an admission found at fol. 636. There was no seizure or taking possession of the bankrupt's property until the evening of June 3, and after the petition was filed.

The property upon the filing of that, passed to the hands of the assignee in bankruptcy, under Secton 5044 of the Act freed from any lien of these pretended levies.

Sage Jr., vs. Wynkoop, 16 B. R. 367, and cases there cited.

V.

Certain evidence which was offered and given before the examiner was objected to by the complainant. What parts or portion of it was sought to be surpressed upon the hearing does not appear. A general ruling seems to have been made by the Circuit Court that the

motion to surpress be overruled. No exception is entered to the ruling of the Court, nor does the ruling extend to, or cover any specific objection, or point to any particular evidence. Under these circumstances it would seem that no question was presented by the record for the judgment of this Court.

If the questions are here and open for review, it is insisted that the evidence taken under the complainant's objection was competent. The objections are innumerable, and cannot possibly be examined in detail. among the most prominent is the objection to the petition in bankruptcy, this was competent as a record of the Court to show that the debtor had filed a voluntary petition, the time of filing, and the circumstances under which it was filed, as bearing upon and tending to characterize the acts and intent of the parties upon the main question in the case, viz:—The illegal preference—its existance was necessarily averred in the pleadings, and the fact was a proper and legitimate one to be proven.

The objection made to it is that it was incompetent and immaterial and not binding on plaintiff, folio 449. P. 90 If it was admissable for any purpose, the objection was not well taken.

It was objected that the invoice book of purchases containing the original bills kept by the bankrupt and received with his other books by the assignee, were not evidence of the purchases. Fowler the bankrupt, very soon after filing his petition fled the country and from that time remained away, his whereabouts was unknown to the defendant, the assignee or even to his the bankrupt's family. Fol. 831. Prin 2-167

It was proved by the employees in the store, that at about the time the bills bore date, the articles mentioned in them came to the bankrupt's store from the

persons named as sellers; p. 91 &c., Some of these goods, most of them remained in the original packages were reclaimed by the selllers after the petition was filed, upon the ground that the sale was fraudulant on the part of the vendee. Fowler examined the goods upon their arrival with the invoices and checked some, they were a part of his books and papers received by the assignee, the bankrupt had absconded and his evidence could not be procured. Under these circumstances after being thus verified, it is confidently submitted that they were properly in evidence.

Another principle may be invoked to sustain their admissibility. The evidence clearly shows that there was a conspiracy between the bankrupt, the creditor, and their representatives, not only to acquire an illegal preference under the Act, but as a fair and legitimate conclusion, with the design and intent, that the insolvent should purchase and acquire a large quantity of goods, without the intent or means of payment, add thereto the stock and subject them to the levy of the executions in question, and which it was expected were soon to issue. The amount unpaid thus obtained and added comprises a large proportion of the stock levied upon. In this view the evidence was admissible against all connected with the conspiracy.

Again the same facts disclosed by these invoices were shown by the petition and schedules in bankruptcy, and their introduction as independent proof was only cumulative and could have had no effect upon the issue and if an error was committed it was immaterial and should be disregarded.

Cannon vs. Pratt, 99 W. S., 619.

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Cannon vs. Pratt, 99 W. S., 619.

VI.

The decree entered herein should be affirmed with such damages for the delay occasioned by this appeal as to the court shall seem just.

GEO. N. KENNEDY,
Solicitor and of cousel for Defts.

14-322

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 152.

FELIX COLLINS, JOHN H. BEALL, CHARLES HICKS, ET AL., PLAINTIFFS IN ERROR,

vs.

W. W. RILEY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 6, 1879.

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1 UNITED STATES OF AMERICA, *ss:*

Pleas held before the honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, on the 8th day of April, A. D. 1878.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the district court of the United States for the district of West Virginia, at Clarksburg, in said district, for the month of April, 1868, came William W. Riley, a resident and citizen of the State of Ohio, by his attorney, and filed his declaration against Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Philander V. Austin, Henry Fling, Granville Tingler, Aaron Schoolcraft, Nilson Cunningham, and Wesly McGill, residents and citizens of the State of West Virginia, defendants, with a notice in writing thereto, subjoined by the plaintiff's attorney, addressed to the defendants, and notifying them that the said declaration would be filed on this day, together with an affidavit of the service of the declaration and notice aforesaid.

2 Whereupon it appearing by said affidavit that the said Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Samuel B. Fredericks, Philip J. Fredericks, Philander S. Austin, Henry Fling, Nilson Cunningham, Wesley McGill, Granville Tingler, and Aaron Schoolcraft have each been duly served with a copy of the declaration and notice thereto subjoined, and they not appearing, it is ordered that unless they have legal notice of this order, do appear before the judge of our said court on the first Monday in April next, and plead to the said declaration, their default will be entered and judgment given against them, and a writ of possession awarded the plaintiff. Which said declaration, together with the notice and proof of service thereon endorsed, is in the words and figures following, to wit:

Declaration.

In the district court of the United States for the district of West Virginia, held at Clarksburg.

William W. Riley, a resident and citizen of the State of Ohio, complains of Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Samuel B. Fredericks, Phillip J. Fredericks, Philander S.
3 Austin, Henry Fling, Granville Tingler, Aaron Schoolcraft, Wilson Cunningham, and Wesly McGill, residents and citizens of the State of West Virginia, and within the district aforesaid, for that heretofore, to wit, on the first day of January, 1868, the plaintiff was possessed of and owned in fee simple a certain tract of land situate on waters of Spruce Creek and Grass Run, branches of the right-hand fork of Hughes River, in the county of Ritchie, and within the judicial district aforesaid, and bounded as follows, to wit:

Beginning at a hickory and dogwood, thence south 3°, east 800 poles, crossing Grass Run, to a beech; thence north 87°, east 800 poles, crossing Fling's Fork of Grass Run, to dogwood; thence north 3°, west 800 poles, crossing Grass Run and the right-hand fork thereof, to a hickory; thence south 87°, west 800 poles, crossing Dry Fork of Spruce Creek, to beginning; containing four thousand acres, and being the same land that was granted by the Commonwealth of Virginia, on the 19th day of July, 1786, to Samuel Young, by her two patents of two thousand

4 acres each, of great value, to wit, of the value of $10,000; and being so possessed thereof, as aforesaid, the said Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Samuel B. Fredericks, Phillip J. Fredericks, Philander S. Austin, Henry Fling, Granville Tingler, Aaron Schoolcraft, Wilson Cunningham, and Wesley McGill, defendants above named, afterwards, to wit, on the 2nd day of January, 1868, entered into and upon said premises and unlawfully withhold from heirs, the plaintiff, the possession thereof, to his damages $10,000. And hence he sues.

WILLIAM W. RILEY.

GEO. H. LEE,
JOHN S. HOFFMAN,
B. WILSON,
Pl'f's Atto.

To Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Samuel B. Fredericks, Phillip J. Fredericks, Philander S. Austin, Henry Fling, Granville Tingler, Aaron Schoolcraft, Wilson Cunningham, and Wesley McGill.

Take notice that I shall file the foregoing declaration in eject-
5 ment in the clerk's office of said court, at rules to be held therein for the month of April, 1868, to wit, on the first Monday of said month.

WM. W. RILEY.

WEST VIRGINIA,
Ritchie County, to wit:

I, Ro. S. Blair, notary public in and for the county and State aforesaid, do hereby certify that John M. Mitchel, a credible person, this day personally appeared before me, in my said county, and made oath that he served the within declaration in ejectment, and the notice thereto appended, on Felix Collins, John H. Bell, Charles Hicks, Nicholas H. Fredericks, Samuel B. Fredericks, Philip J. Fredericks, Philander S. Austin, Henry Fling, Wilson Cunningham, and Wesley McGill, defendants therein named, on the 27th day of March, 1868, by delivering to each of them in person true copies thereof in writing; and that on this 28th day of March, 1868, served the within declaration aforesaid and notice thereto appended on the within-named Granville Tingler and Aaron Schoolcraft, defendants therein named, by delivering to each of them in person true copies thereof in writing.

6 Given under my hand, this the 28th day of March, 1868.

RO. S. BLAIR,
Notary Public.

And at another day, to wit, at rules held in the clerk's office of said court for the month of May, 1868:

Common order not executed.

And at another day, to wit, at rules held in the clerk's office of said court for the month of June, 1868, came the plaintiff, by his attorney, and it appearing that the defendants have been duly served with a copy of the conditional order made in this cause, and they not appearing, it is considered that the plaintiff recover against the defendants the land in the declaration mentioned, with the appurtenances.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, the 26th day of August, A. D. 1868:

(436.) This day came the parties, by their attorneys, and thereupon the said defendants for plea say they are not guilty of unlawfully
7 withholding the premises claimed by the plaintiff in his said declaration, and of this they put themselves upon the country. And the plaintiff doth the like. And on motion of the plaintiff, by his attorney, it is ordered that any authorized survey, of this judicial district do go upon the lands in controversy and survey and lay out the same as either party shall require, and return nine fair plats and four reports thereof to this court. And the defendants here suggest that the plaintiff is not a resident of this State, and that security for costs be required of him.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Friday, April the 2nd, 1869:

(478.) This day came the plaintiff, by his attorney, and on his motion it is ordered that Milton Norris, esq., do go upon the land in controversy in this cause and survey and lay out the same as either party shall require, and return nine fair plats and four reports thereof to this court; and this cause is continued until the next term.

And at another day, to wit, at a district court of the United
8 States for the district of West Virginia, continued and held at Clarksburg on Friday, September 17th, 1869:

(P. 485.) This day came the parties, by their attorneys, and by consent it is ordered that John R. Boggess, surveyor, do go upon the land in controversy and survey and lay out the same as either party shall require, and return nine fair plats and four reports thereof to this court; and this cause is continued.

(348.) And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, August 26th, 1874:

Upon motion of the plaintiffs, and at their costs, this cause is continued until the next term, at which time this cause will not be continued on motion of the plaintiffs for any ordinary cause.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, March 31st, 1875:

(392.) This day came the parties, by their attorneys, and on motion of the plaintiff the report of Surveyor Boggess is recommitted to him
9 to do such additional surveying as either party may require, and make report thereof to court; and on the further motion of the plaintiffs he has leave to amend his declaration, provided such amendment shall not embrace new parties or other land than that embraced by the present count, provided such amendment or amendments shall be served on the attorney of the defendants sixty days before the next term. And this cause is continued until the next term, at the costs of the plaintiff, which are to be paid within sixty days. And on motion of the defendants it is ordered that the plaintiff file, with the papers of this cause, an abstract of his title papers, at least sixty day' before the next term of this court. And on motion of the plaintiff the defendants are also required to file an abstract of their title papers within the like period. And the court doth here enter of record that this cause shall not be continued at the next term for the absence of counsel or other ordinary cause.

And at another day, to wit, at a district court of the United
10 States for the district of West Virginia, continued and held at Clarksburgh, on Monday, August 30, 1875:

(431.) This day came the plaintiff, by his attorney, and here suggests that since the institution of this suit, Philip J. Frederick, one of the defendants in this cause, has departed this life; whereupon, on motion of the plaintiff, it is ordered that a writ of scire facias be awarded against the heirs of said Philip J. Frederick, deceased, returnable at December rules, 1875; and this cause is continued.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Friday, March 24, 1876:

(461.) The death of Philip J. Frederick having been heretofore suggested, on motion of the plaintiff, by his attorney, it is ordered that a writ of scire facias be awarded against Frances Frederick, William Frederick, David Frederick, Leah Cain, wife of James Cain, formerly Leah Frederick, James Cain, James Frederick, Sophronia Frederick, Samuel Frederick, Edward L. Frederick, and Benjamin W.
11 Frederick, children and heirs-at-law of said Philip J. Frederick, deceased, returnable here, on the first day of the next term.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, March 29, 1878:

(473.) This day came the parties, by their attorneys, and on motion of the plaintiff, by his attorney, it is ordered that this cause be continued until the next term, but this continuance is at the costs of the said plaintiff; and on motion of the defendants they have leave to take the deposition of S. G. Goff, upon giving twenty days' notice of the time and place of taking said depositions to the plaintiff or his counsel of record; and like leave is granted the plaintiff to take the deposition of J. F. W. Holt, upon giving like notice of the time and place of taking said deposition to the said defendants or their counsel of record.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Thursday, November 2nd, 1876:

12 (507.) This day came the parties, by their attorneys, and thereupon came a jury, to wit, John Clinger, Henry C. Isenhart, William Cullison, Andrew S. Criss, James Herridon, Wilson Waldeck, Thomas S. Spates, William P. Irwin, M. G. Holmes, H. A. Brannon, John Lee, and Fernando A. Robinson, all good and lawful men of this judicial district, who being duly sworn to well and truly try the issue in this cause, and having partly heard the evidence, and it being *to late* too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Friday, November the 3rd, 1876:

(512.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and

the same not being concluded, and it being too late to finish the
13 trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Saturday, November the 4th, 1876:

(514.) This day came again the parties, by their attorneys, and the jury empan*m*eled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Monday, November the 6th, 1876:

(518.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on Saturday last, and having further heard the evi-
14 dence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day *day*, the jury were adjourned over until to-morrow morning at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Tuesday, November the 7th, 1876:

(519.) This day came the parties, by their attorneys, and the jury empanneled and sworn*ed* in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, November 8, 1876:

(522.) This day came the parties, by their attorneys, and the jury empanneled and sworn*e* in this cause appeared in court according to their adjournment on yesterday, and having fully heard the evidence,
15 and the arguments of counsel not *not* being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Thursday, November 9, 1876:

(523.) This day came again the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having fully heard the evidence and arguments of counsel, retir'ed to their chamber to consider of their verdict, and after some time returned into court, and upon their oaths do say, "We, the jury, find for the defendants."

And thereupon the plaintiff, by his attorney, moved the court to set aside the verdict of the jury and grant him a new trial herein, of which motion the court takes time to consider thereof until to-morrow.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarks-
16 burg on Friday, November the 10th, 1876:

(524.) This day came the parties, by their attorneys, and the court having fully heard the motion of the plaintiff to set aside the verdict of the jury in this cause and grant a new trial herein, it is considered by the court that the verdict of the jury aforesaid be set aside, and a new trial be granted the plaintiff herein, he paying the costs of the present term of this court within thirty days.

And on motion of the plaintiff the report and return of survey made by Surveyor Boggess is recommitted to him, to lay down and report such additional matter as may be required by either party.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Tuesday, March 27, 1877:

(548.) This day came the parties, by their attorneys, and thereupon came a jury, to wit, Jasper L. Hall, James E. Murdock, Daniel W. Rector, Newton G. Shreves, Samuel Walker, Elisha Owens, George
17 Sargent, V. B. Trimble, Thomas P. Dugam, Stanley T. Carter, Asberry H. Troxel, and Columbus Shrewsberry, all good and lawful men of this judicial district, who being duly sworn to well and truly try the issue in this cause, and having partly heard the evidence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day, the jury were adjourned over until to-morrow morning at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, March 28th, 1877:

(550.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on yesterday; and thereupon, by consent, George Sargent, one of the jurors sworn in this cause, is withdrawn, and the rest of jury from the further consideration of this cause are discharged, and this cause is continued until the next term of this court for a trial thereof to be had; and by like consent this cause is revived
18 against the heirs of Philip J. Frederick, deceased, to wit, Francis Frederick, David Frederick, William Frederick, James Frederick, Sophronia Frederick, Samuel Frederick, Edward L. Frederick, Benjamin Frederick, Weedon Frederick, James Cain, and Leah Cain his wife, formerly Leah Frederick; and it appearing to the court that Samuel Frederick, Sophronia Frederick, James Frederick, Edward L. Frederick, and Weedon Frederick are infants under the age of 21 years, on motion of the plaintiffs Robert S. Blair is assigned as guardian ad litem to said infant defendants, to defend them in this cause; and by like consent all the defendants in this cause waive all objections to the deposition of J. F. W. Holt, taken and filed in this cause, and consent that it may be read without objection if offered by the plaintiff.

And by like consent either party may have additional surveying or platting done on giving the usual notice.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Thursday, the 11th day of October, 1877:

19 This day came the parties, by their attorneys, and thereupon came a jury, to wit, Thomas F. Conway, Beverly H. Lurty, Jacob Barnett, Jeremiah R. Cunningham, Josiah H. Link, A. L. Hustead, John G. Gettings, Charles H. Pollock, D. P. Morgan, L. D. Wire, William A. Northcott, and John M. Wire, all good and lawful men of this judicial district, who being sworn to well and truly try the issue in this cause, and having partly heard the evidence, and the same not being concluded, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at district court of the United States for the district of West Virginia, continued and held at Clarksburg on Friday, October 12th, 1877:

(60.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until
20 to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Saturday, October 13th, 1877:

(63.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Tuesday morning next at 9 o'clock.

(65.) And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Tuesday, October 16th, 1877:

This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until
21 to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Wednesday, October 17, 1877:

(67.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence, and the arguments of counsel not being concluded, and it being too late to finish *to finish* the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Thursday, October 18, 1878:

This day came again the parties, by their attorneys, and the jury empanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence

and arguments of counsel retired to their chamber to consider
22 of their verdict, and after some time returned into court, and not having agreed upon a verdict, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Friday, October 19, 1877:

(70.) This day came again the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and retired to their chamber to consider of their verdict, and after some time returned into court, and not having agreed upon a verdict, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Saturday, October 20, 1877:

(74.) This day came the parties, by their attorneys, and the jury
23 empanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and again retired to their chamber to consider of their verdict, and after some time returned into court, and not having agreed upon a verdict, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next at 9 o'clock.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Monday, October 22, 1879.

(76.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court according to their adjournment on Saturday last, and again retired to their chamber to consider of their verdict, and after some time returned into court, and not having agreed upon a verdict, and it being to' late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 8 o'clock.

And at another day, to wit, at a district court of the United
24 States for the district of West Virginia, continued and held at Clarksburg on Tuesday, October 23d, 1877:

(78.) This day came the parties, by their attorneys, and the jury empanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and retired to their chamber to consider of their verdict, and after some time returned into court, and upon their oaths do say: We, the jury, find for the plaintiff the lands described in the declaration filed in this cause, and laid down on the plat of Surveyor John R. Boggess filed in this cause, marked "A, Verdict Plat," and known and designated on said plat as Young's No. 4 and the lower half of Young's No. 5, and bounded as follows: beginning at a dogwood, "B," and running N. 3 W. 400 poles to "H;" S. 89 W. 400 poles to "I;" N. 3 W. 400 poles to beech at "D;" S. 87 W. 400 poles to a hickory and dogwood at "E;" S. 3 E. 800 poles to a beach at "I;" N. 87 E. 800 poles to the beginning; containing 3,000 acres. Except as to two undivided thirds of 136 acres claimed by Felix Collins, and bounded as

described on said plat as follows, to wit: Beginning at a gum at "1,"
25 and running S. 44 W. 134 poles to a white oak; S. 19 W. 40 poles to a white oak; N. 75½ W. 56 to a small sycamore; S. 79 W. 30 poles to a red oak; N. 3 W. 40 to pointers; N. 15 E. 138 poles to pointers; S. 75 E. 175 poles to the beginning; containing one hundred and thirty-six acres. And except as to two undivided thirds of 278 acres claimed by John H. Beall, and bounded as follows, to wit: Beginning at a beech, corner to L. Maxwell, at "2," and running N. 5 W. 30 p's to a white oak; N. 19 E. 38 p's to a white oak; N. 44 E. 134 poles to a gum at "1;" S. 75 E. 356 poles to a stake; south 50 poles to stake on the original lines; S. 87 W. 445 poles to the beginning. And except as to two undivided thirds of 95 acres and 23 acres claimed by Charles Hicks and Levi Fling, and bounded as follows, to wit: Beginning at a white oak at "3," and running N. 15 E. 126 poles to a beech; N. 75 W. 118 poles to a gum; S. 15 W. 131 poles to pointers; S. 75 E. 118 poles to the beginning. The other tract of 23 acres bounded as follows, viz: Beginning at the W. O. at Fig 3, and running N. 15 E. 86 p's; N. 56 E. 14 poles to a beech; S. 21 E. 94 poles to a poplar; N. 72 E. 45 poles to the original line; then by 2 lines thereof S. 3 E. 15 poles to a dogwood at "B;" S. 87 W. 135
26 poles stake; N. 16 E. 6 poles; S. 75 E. 30 p's to the beginning. And except as to two undivid' thirds of 172 acres claimed by Nicholas H. Fredericks, and bounded as follows, to wit: Beginning at a white oak and pointers at "4," and running S. 15 W. 152 poles to a stake on original line; S. 3 E. 172 poles to a stake; S. 75 E. 35 poles to stake; N. 15 E. 130 poles to a dogwood; east 60 poles to a sycamore; N. 45 E. 11 poles to a stone; N. 29 E. 38½ poles to a buckeye; N. 1½ E. 118 poles to 2 dogwoods; N. 75 W. 155 poles to the beginning. And except as to two undivided thirds of 175 acres claimed by Samuel B. Fredericks, and bounded as follows, to wit: Beginning at a rock and beech at "5 X," and running N. 15 E. 168 poles to north line of Sleeth tract; N. 75 W. 178 poles to 2 dogwoods; S. 1½ W. 118 poles to a buckeye; S. 29½ W. 38 poles to a stone; S. 55 E. 72 poles to a stake; N. 15 E. 16 poles to a red oak; S. 75 E. 92 poles to the beginning. And except as to two undivided thirds of 711 acres claimed by Philander S. Austin, and bounded as follows, to wit: Beginning at a gum at "6," and running S. 75 E. 372 poles to pointers; N. 15 E. 230 poles; N. 75 W. 126½ p's; N. 15 E. 126½ poles; S. 75 W. 126½ poles; N. 15 E. 35 poles to the original line; and with same S. 87 W. 292 poles to "I;" N. 3 W. 115 poles; N. 75
27 W. 65 poles to S. B. Frederick's corner; and then with his line S. 15 W. 400 poles to the beginning. And except as to two undivided thirds of one hundred acres claimed by Henry Fling, and bounded as follows, to wit: Beginning at "7," a corner to Philander Austin, and then running by three of his lines N. 75 W. 126½ poles; N. 15 E. 126½ poles; S. 75 E. 126½ poles; thence S. 15 W. 126½ poles to the beginning. And except as two undivided thirds of another tract of 105 acres claimed by Henry Fling, and bounded as follows, to wit: Beginning at a beech at "8," and running N. 15 E. 145 poles to pointers; N. 75 W. 118 poles to a white oak; S. 15 W. 140 poles to a gum; S. 75 E 118 poles to the beginning. And also as to two undivided thirds of 20 & 19 acres claimed by Wilson Cunningham, and bounded as follows, to wit: Beginning at a white at "9," and running N. 75½ W. 56 poles to a small sycamore; S. 79 W. 30 ps' R. O. S. 3; E. 37 poles to a beech at "F;" N. 87 E. 85 poles to "2," a beech; N. 5 W. 30 poles to the beginning containing 20 acres. The other piece or lot beginning at pointers at "10," and running N. 15 E. 138 poles to a stake & pointers; N. 75 W. 45 poles to a stake; S. 3 E. 150

28 poles to the beginning; containing 19 acres being parts of the lands claimed by the defendants respectively. And as to the two-thirds of the lands hereinbefore described and excepted we find for the said defendants, and as to the remaining one-third of the lands hereinbefore excepted and claimed by the said defendants, we find the following facts: That Frederick Switzer died on the day of , 1823, possessed in fee of lot No. 4 and the lower half of No. 5, as hereinbefore found for the plaintiff, leaving three heirs-at-law who inherited said property, one of whom, Polly, had prior to his death intermarried with Abraham Wagner; and that subsequent to his death, to wit, on the day of January, 1868, the said Abraham Wagner and Polly, his wife, conveyed to the plaintiff in this cause all right and title in said lands, and that before the commencement of this suit Abraham Wagner died, on the day of February, 1868, and the said Polly Wagner died afterwards, on the day of March, 1868; and we further find that at the date of the deed executed by the said Abraham and Polly Wagoner to the plaintiff in this
29 cause, the said Abraham Wagoner's right to recover against the said defendants was barred by the statute of limitation. Upon this state of facts as to the interest of Polly Wagoner, if the law be for the plaintiff, then we find for the plaintiff in fee the remaining one-third of the several tracts of land claimed as aforesaid by the defendants, and of which two-thirds have been found for them; if the law be for the defendants, then we find for the said defendants the one undivided third part of the said land conveyed by the said Abraham Wagoner and wife, of which we have herein found two undivided third parts for the defendants.

And as to the def'ts Granville Tingler, Aaron Schoolcraft, and John W. McGill, we find for them.

And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Clarksburg on Monday, April the 8th, 1878:

(153.) This day came the parties, by their attorneys, and thereupon the defendants by their attorney moved the court to arrest judgment for the plaintiff $, and to render judgment for the defendants upon
30 the special verdict heretofore found for various reasons, appearing upon the face of the record; and thereupon the plaintiff moved the court to enter judgment for said plaintiff upon the special verdict aforesaid. And the court having maturely considered said motions is of opinion to overrule the motions of the said defendants and render judgment for the plaintiff as against the defendants, Felix Collins, John H. Beall, Charles Hicks, Levi Fling, Nicholas H. Frederick, Samuel B. Frederick, Philander S. Austin, Henry Fling, and Wilson Cunningham.

It is therefore considered by the court that the plaintiff recover against the said defendant Felix Collins one undivided third part or share of a tract or parcel of 136 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendant Felix Collins, and mentioned and described in the special verdict rendered in this cause as lying within the following boundaries: Beginning at a gum at "1;" and running S. 44 W. 134 poles to a white oak; S. 19 W. 40 poles to a white oak; N. 75½ W. 56 to a small sycamore; S. 79 W. 30 poles to a red oak; N. 3 W. 40 to pointers; N. 15 E. 138
31 poles to pointers; S. 75 E. 177 poles to the beginning; containing one hundred and thirty-six acres. And that the plaintiff also recover of the defendant John H. Beall one undivided third part or

parcel of 278 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendant John H. Beall, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a beech, corner to L. Maxwell, at "2," and running N. 5 W. 30 p's to a white oak; N. 19 E. 38 p's to a white oak; N. 44 E. 134 poles to a gum at "1;" S. 75 E. 356 poles to a stake; south 50 poles to stake on the original line; S. 87 W. 445 poles to the beginning. And that the plaintiff also recover against the defendants Charles Hicks and Levi Fling one undivided third part or share of a tract of 95 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendants last aforesaid, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a white oak at "3," and running N. 15 E. 126 poles to a beech; N. 75 W. 118 poles to a gum; S. 15 W. 131 poles to pointers; S. 75
32 E. 118 poles to the beginning. And also one undivided third part of another tract of 23 acres, part of the land in the plaintiff's declaration mentioned, claimed by said defendants last mentioned, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at the W. O. at Fig. 3, and running N. 15 E. 86 p's; N. 56 E. 14 poles to a beech; S. 21 E. 94 poles to a poplar; N. 72 E. 45 poles to the original line; then by 2 lines thereof S. 3 E. 15 poles to a dogwood at "B;" S. 87 W. 135 poles stake; N. 16 E. 6 poles; S. 75 E. 30 p's to the beginning.

And that the plaintiff also recover against the defendant Nicholas H. Fredericks one undivided third part or share of a tract or parcel of 172 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendant last aforesaid, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a white oak and pointers at "4," and running S. 15 W. 152 poles to a stake on the original line; S. 3 E. 172 poles to stake; S. 75 E. 35 poles to stake; N. 15 E. 130 poles to a dogwood; east 60 poles
33 to a sycamore; N. 45 E. 11 poles to a stone; N. 29 E. 38½ poles to a buckeye; N. 1¾ E. 118 poles to 2 dogwoods; N. 75 W. 155 poles to the beginning.

And that the plaintiff recover against the defendant Samuel B. Fredericks one undivided third part or share of a tract or parcel of 175 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendant last aforesaid, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a rock & beech at "5," and running N. 15 E. 168 poles to a north line of Sleeth tract; N. 75 W. 178 poles to 2 dogwoods; S. 1½ W. 118 poles to a buckey'; S. 29½ W. 38 poles to a stone; S. 55 E. 72 poles to a stake; N. 15 E. 16 poles to a red oak; S. 75 E. 92 poles to the beginning.

And that the plaintiff recover against the defendant Philander S. Austin one undivided third part or share of a tract or parcel of 711 acres of land, part of the land in the plaintiff's declaration mentioned, and claimed by the defendant last aforesaid, and mentioned and described in said special verdict, and lying within the following boundaries: Beginning at a gum at "6," and running S. 75 E. 372 poles to pointers; N. 15 E. 230 poles; N. 75 W. 126½ p's; N. 15 E. 126½ poles; S. 75
34 W. 126½ poles; N. 15 E. 35 poles to the original line; and with same S. 87 W. 292 poles to "I;" N. 3 W. 115 poles; N. 75 W. 65 poles to S. B. Frederick's corner; and thence, with his line, S. 15 W. 400 poles to the beginning.

And that the plaintiff recover against the defendant Henry Fling one undivided third part or share of a tract or parcel of 100 acres of land,

part of the land in the plaintiff's declaration mentioned, and claimed by the defendant Henry Fling, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at "7," at corner to Philander Austin, and then running, by three of his lines, N. 75 W. 126½ poles; N. 15 E. 126½ poles; S. 75 E. 126½ poles; thence S. 15 W. 126½ poles to the beginning. And also one undivided third part or share of a tract or parcel of 105 acres of land, part of the land in the plaintiff's declaration*ed* mentioned, also claimed by the defendant Henry Fling, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a beech at "8," and running N. 15 E. 145 poles to pointers; N. 75 W. 118 poles to a white oak; S. 15 W. 140 poles to a gum; S. 75 E. 118 poles to the beginning.

35 And that the plaintiff recover against the defendant Wilson Cunningham one undivided third part or share of a tract or parcel of 20 acres of land, part of the land in the plaintiff's declaration mentioned, claimed by the defendant last aforesaid, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at a white oak at "9," and running N. 75½ W. 56 poles to a small sycamore; S. 79 W. 30 p's R. O.; S. 3 E. 37 poles to beech at "F;" N. 87 E. 85 poles to "2," a beech; N. 5 W. 30 poles to the beginning; containing 20 acres. And also a like part of a tract or parcel of 19 acres of land, part of the land in the plaintiff's declaration mentioned, also claimed by said last-named defendant, and mentioned and described in said special verdict as lying within the following boundaries: Beginning at pointers at "10," and running N. 15 E. 138 poles to a stake and pointers; N. 75 W. 45 poles to a stake; S. 3 E. 150 poles to the beginning; containing 19 acres.

And it is further considered by the court that the plaintiff recover against the said defendants Felix Collins, John H. Beall, Charles
36 Hicks and Levi Fling, Nicholas H. Fredericks, Samuel B. Fredericks, Philander S. Austin, Henry Fling, and Wilson Cunningham his costs about his suit in this behalf expended; and writs are awarded the plaintiff, directed to the marshal of the court, commanding him to place the plaintiffs in possession of the lands so recovered by him; and it is further considered that the defendants Granville Tingle, Aaron Schoolcraft, and John W. Gill be discharged from this suit and go thereof without day, and that they recover from the plaintiff their costs about their defence in this behalf expended; and the defendants desiring that writ of error should issue in this cause to the Supreme Court of the United States from the judgment in this cause, the same is allowed on condition that they or some one for them execute bond in the penal sum of $500, conditioned as required by law, which bond was thereupon executed in open court, and the court here certifies that the amount in dispute in this cause, exclusive of costs, exceeds the value of two thousand dollars.

37 Verdict plat marked A, filed in this cause and referred to, in the verdict of the jury is hereto attached as part hereof.

(Here follows map marked page 37.)

The plaintiff, in support of the issue joined on his part in this cause, gave in evidence to the jury a deed of Abraham Waggner and Polley Waggner to William W. Riley, in these words.

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[Republic Printing Co., Springfield, Ohio.]

Warranty deed with dower.

Know all men by these presents that we, Abraham Waggner and Polley Waggner, his wife, of the county of Champaign, of the State of Ohio, in consideration of the sum of one hundred dollars to them
38 paid by William Wilshire Riley, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said William Wilshire Riley, his heirs and assigns forever, the following real estate situate in the county*s* of Ritchie and Gilmer, in the State of West Virginia, & bounded and described as follows, viz: All the interest of said Abraham and Polley Waggoner in one thousand acres of land lying and being in Gilmer County, in the State of West Virginia, on the waters of Crow's Creek, a branch of the Little Kanawha River, and bounded as follows: Beginning at a hickory, corner to Samuel Young's survey No. 2, thence by the same south three degrees east four hundred poles to a maple; thence north eighty-seven degrees east four hundred poles to a buckeye tree, corner to G. Turner's survey; thence by the same north three degrees west four hundred poles to a sugar tree, corner to Thomas and Boden's survey No. 2; thence by the same south eighty-seven degrees west four hundred poles to the beginning, originally patented to Samuel Young, dated the 19th
39 day of July, 1786, duly recorded at Richmond. Also two thousand acres in Ritchie County, West Virginia, on the waters of Spruce Creek, a branch of the right-hand fork of Hughes River, and described as follows: Beginning at a corner of Isaac Sidman's survey No. 11, thence south E. ° 800 poles to a beech; thence north 87° east 400 poles to a dogwood; thence north 3° west 800 poles to a beech; thence south 87° west 400 poles to Robert Lilbrorn's survey No. 11, to the beginning, as per patent to Samuel Young, dated 19th of July, 1786. Also another tract of two thousand acres on Spruce Creek, a branch of the right-hand fork of Hughes River aforesaid, and described as follows, to wit: Beginning at a beech, corner to Samuel Young's survey No. 4, thence south 3° east 800 poles, by a line thereof, to a dogwood; thence north 87° east 400 poles, by a line thereof, to a dogwood; thence north 3° west 800 poles to a hickory; thence south 87° west 400 poles to the beginning, as per patent to Samuel Young bearing date July
40 19th, 1786, all of said property belonging to the heirs of Frederick Switzer, deceased. The amount hereby conveyed is all our right, title, and interest in the above tracts of land by inheritance from the said Frederick Switzer, deceased; to have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said William Wilshire Riley, his heirs and assigns, forever. And the said Abraham Waggoner & Polley Waggoner, his wife, for themselves and their heirs, do hereby covenant with the said William Wilshire Riley, his heirs and assigns, that they are lawfully seized of the premises aforesaid, and that they will forever warrant and defend that they have not conveyed said land to any other party or parties.

In witness whereof the said Abraham Waggoner and Polley Waggoner, his wife, who hereby relinquishes right of dower in the premises, have hereunto set their hands and seals this twenty-fifth day of January, in the year of Lord one thousand eight hundred and sixty-eight.

41 ABRAHAM WAGONER. [SEAL.]
her
POLLEY + WAGGONER. [SEAL.]
mark.

Executed in the presence of—
D. W. TODD,
J. W. ENGLE.

STATE OF OHIO,
Champaign County, ss:

Be it remembered that on this twenty-fifth day of January, A. D. 1868, before me, the subscriber, a notary public in and for said county, personally came the above named Abraham Waggoner, and Polley Waggoner, his wife, the grantors on the above conveyance, and acknowledged the signing and sealing of the same to be their voluntary act and deed for the uses and purposes therein mentioned; and the said Polley Waggoner, wife of the said Abraham Waggoner, being at the same time examined by me separate and apart from her said husband, and the contents of said instrument being by me made known and explained to her, then declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof I have hereunto subscribed my name and
42 affixed my notarial seal on the day and year last aforesaid.

[SEAL.] D. W. TODD,
Notary Public.

THE STATE OF OHIO,
Champaign County, ss:

I, the undersigned, D. W. Todd, a notary public in and for said county and State, do hereby certify that Abraham Wagoner and Polly Waggoner, his wife, whose names are signed to the writing and deed above, bearing date on the 25th day of January, 1868, this day personally appeared before me, in my said county, and acknowledged the same.

The said Polly being duly examined by me privily and apart from her said husband, and having the said writing and deed fully explained to her, she, the said Polly Wagoner, acknowledged the said writing and deed to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand and seal this 25th day of January, 1868.

[NOTARIAL SEAL.] D. W. TODD,
Notary Public.

43 THE STATE OF OHIO,
Champaign County, ss:

I, V. Horr, clerk of the court of common pleas in the said county and State, do hereby certify that D. W. Todd, before whom the foregoing deed was executed and acknowledged, at the date of the same and now is an acting notary public in & for said county & State duly commissioned and qualified as such, & that the foregoing deed is executed & acknowledged in accordance with the law of Ohio.

I further certify that the foregoing signature purporting to be his is genuine.

Witness my hand & official seal this 27th day of January, A. D. 1868.

{ COMMON PLEAS OF THE COUNTY OF CHAMPAIGN. }

V. HORR, *Clerk.*

Received Nov. 6th, 1876, at 5 o'clock a. m. Recorded Nov. 6th, 1876, at 5 o'clock a. m., in Ritchie County.

Record of Deeds, vol. 18, pages 465, 466, & 467.

Teste:

G. W. AMAS, *Clerk.*

Also a deed of Samuel Swetzer to William W. Riley, in these words:

44 *Deed.*

Know all men by these presents that I, Samuel Swetzer, of Wayne County, Ohio, the grantor, in consideration of the sum of one hundred dollars in hand paid by William Willshire Riley, of Columbus, Franklin County, Ohio, the grantee, do give, grant, bargain, sell, and convey unto the said grantee, his heirs and assigns, the following described premises situated in the State of West Virginia, county of Ritchie and Gilmer, and bounded and described as follows, viz: All the interest of said Samuel Swetzer in one thousand acres of land lying and being in Gilmer County, West Virginia, on the waters of Crow's Creek, a branch of the Little Kanawha, and bounded as follows: Beginning at a hickory, corner to said Samuel Young's survey No. 2; thence by the same south three degrees east four hundred poles to a maple; thence north eighty-seven degrees east four hundred poles to a buckey',
45 corner to G. Turner's survey; thence by the same north three degrees west four hundred poles to a sugar tree, corner to Thum and Boden's survey No. 6; thence by the same south eighty-seven degrees west four hundred poles to the beginning, originally patented to Samuel Young, dated the nineteenth day of July, one thousand seven hundred and eighty-six, duly record' at Richmond. Also two thousand acres in Ri'chie County, West Virginia, on the waters of Spruce Creek, a branch of the right hand fork of Hughes River, described as follows: Beginning at the corner of Isaac Simmons' survey No. 11; thence SE. 800°, poles to a beech; thence north 87° east 400 poles to a dogwood; thence north 3° west 800 poles to a beech, south 87° west 400 poles to Robert Sylburn's survey No. 11, to the beginning, as per patent to Samuel Young dated 19th July, 1786.

Also another tract of two thousand acres on Spruce Creek, a branch of the right hand fork of Hughes River, aforesaid, and described as follows, to wit: Beginning at a beech, corner to Samuel Young's
46 survey No. 4; thence south 3°, east 800 poles by a line thereof to a dogwood; north 87°, east 400 poles, by a line thereof, to a dogwood; north 3° west 800 poles to a hickory; south eighty-seven degrees, west 400 poles, to the beginning, as per patent to Samuel Young bearing date July 19th, 1786, situated in Ri'chie County, West Virginia, all of said property belonging the heirs of Frederick Swetzer, deceased. The amount hereby conveyed is one undivided quarter of said premises, being all my right, title, and interest in the above tracts of land by inheritance from my father, the said Frederick Switzer, deceased. To have and to hold the above-granted and bargained premises, with the appurtenances thereto belonging, unto said grantee, his heirs and assigns, forever; and Samuel Swetzer does, for himself and heirs, covenant with the said grantee, heirs and assigns, that at and until the ensealing of these presents he is well seized of the premises as a good and indefeasible estate in fee-simple, and has good right to bar-
47 gain & sell the same in manner & form as above written, and that the same are free from all encumbrances whatsoever, and

will warrant and defend said premises, with the appurtenances, to the said grantee, his heirs and assigns, forever against all lawful claims and demands of all persons whomsoever claiming to claim from or under him, the said Swetzer, Samuel Swetzer, his heirs and assigns.

In witness whereof I have hereunto set my hand and seal the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and sixty-four.

his
SAMUEL + SWETZER. [L. S.]
mark.

Signed, sealed and delivered in the presence of—
H. O. McCLARAN.
T. E. PECKINPAUGH.

[50 c. inter. revenue. 50 c. Dec'r 29, 1864.]

THE STATE OF OHIO,
Wayne County, ss:

Before me, a clerk of the court of common pleas in and for said county, personally appeared Samuel Switzer and acknowledged that he did sign and seal the foregoing instrument, and that the same is his
48 free act and deed.

In witness whereof I have hereunto set my hand and official seal this 29th day of December, A. D. 1864.

{ COMMON PLEAS, WAYNE COUNTY, OHIO. }

C. C. PARSINS,
Clerk of the Court of Common Pleas, Wayne County, Ohio.

WEST VIRGINIA, *ss:*

I, James McKinney, recorder of Ritchie County, in the State aforesaid, do certify that the foregoing deed, together with the certificate of acknowledgment thereto annexed, was duly admitted to record in deed-book 8, page 255 & 256, this 7th day of March, '65.

Teste:

JAMES McKINNEY, *R. R. C.*

WEST VIRGINIA,
Gilmer County:

RECORDER'S OFFICE,
June 1st, 1865.

The foregoing deed, together with the certificate of acknowledgement thereto annexed, was this day presented in said office and duly admitted to record therein.

Teste:

A. L. S. VARNER, *R. G. C.*

Also a deed of George Switzer & wife to Wm. Wilshire Riley in these words:

49 *Deed.*

Know all men by th*is* presents that we, George Swetzer and Lucy A. Swetzer, his wife, of Dayton, Montgomery County, Ohio, in consideration of the sum of two hundred dollars in hand paid by Wm. Wilshire Riley, of Columbus, Ohio, have bargained and sold, and *does* hereby grant, bargain, sell, and convey unto the said Wm. Wilshire

Riley, and unto his heirs and assigns forever, the following premises, situate in the counties of Gilmer & Ritchie, in the State of West Virginia, and bounded and described as follows, to wit: All the interest of said George & Lucy A. Swetzer in one thousand acres of land on Tanner's Fork on the waters of Crow Creek, in Gilmer County, Virginia (West Va.), originally patented to Sam'l Young, about seven miles northwest of Glenville, and about five miles north from the Little Kanawha River. Also two thousand acres in Ritchie County, West Virginia, on the waters of Spruce Creek, a branch of the right-hand fork of Hughes River, described as follows: Beginning at the corner
50 of Isaac Simmons' survey No. 11; thence S. 3° E. 800 poles to a beech; north 87° east 400 poles to a dogwood; north 3° W. 800 poles to a beech; south 87° west 400 poles, to Robert Sylburn's survey No. 11, to the beginning, as per patent to Samuel Young, dated 19th July, 1786. Also another tract of two thousand acres on Spruce Creek, a branch of the right-hand fork of Hughes River, & described as follows, to wit: Beginning at a beech corner to Sam'l Young's survey No. 4; thence south 3°, E. 800 poles, by a line thereof, to a dogwood; north 87°, east 400 poles to a dogwood; north 3 west 800 poles to a hickory; south eighty-seven degrees west 400 poles to the beginning, as per patent to Samuel Young, bearing date July 19th, 1786, situated in Ritchie County, West Virginia, all of said property belonging to the heirs of Frederick Switzer, dec'd, the amount intended to be conveyed hereby being one undivided fifth of said premises.

To have and to hold said premises, with the appurtenances,
51 unto the said Wm. Wilshire Riley and his heirs and assigns forever. And the said George Switzer, for himself and heirs, does hereby covenant with said Wm. Wilshire Riley, heirs and assigns, that he will forever warrant and defend the same, with the appurtenances, unto the said Wm. Wilshire Riley and his heirs and assigns against the lawful claims of all persons whomsoever claiming and to claim from or under him, the said George Switzer.

In testimony whereof the said George Switzer and Lucy A. Switzer, his wife, have hereunto set their hands and seals, this seventh day of December, in the year of our Lord one thousand eight hundred and sixty-four.

GEO. SWITZER. [L. S.]
LUCY A. SWITZER. [L. S.]

Executed in the presence of—
MARY E. SWITZER.
J. R. WALLACE.

STATE OF OHIO,
Montgomery Co., ss:

Before me, a notary public within *the* for said county, person-
52 ally appeared the above named George Switzer & Lucy A. Switzer, his wife, and acknowledged the signing and sealing of the above conveyance to be their voluntary act and deed, for the uses and purposes therein expressed.

And the said Lucy A. Switzer, being examined by me separate and apart from her said husband, and the contents of said instrument made known to her by me, she then declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and official seal

on this seventh day of December, in the year one thousand eight hundred and sixty-four.

[NOTARIAL SEAL.] J. R. WALLACE,
Notary Public, Montgomery, Ohio.

[50c. Inter. revenue. 50c. Dec. 7th, 1864.]

WEST VIRGINIA, *ss:*

I, James McKinney, recorder of Ritchie County, in the State
53 aforesaid, do certify that the foregoing deed, together with the certificate of acknowledgement thereto annexed, was duly admitted to record in deed book No. 7, page 478, this 22d day of December, 1864.

Teste: JAMES McKINNEY, *R. R. C.*

WEST VIRGINIA,
Gilmer County:

RECORDER'S OFFICE,
June 1st, 1865.

The foregoing deed, together with the certificate of acknowledgment annexed thereto, was this day presented in said office and duly admitted to record therein.

Teste: A. L. S. VARNER, *R. G. C.*

Also a patent of the Commonwealth of Virginia to Samuel Young, assignee of Alexander Ramsey, in these words:

Patent.

Patrick Henry, esquire, governor of the Commonwealth of Virginia, to all, whom these presents shall come greeting:

Know ye, that by virtue in consideration of a land office treasury warrant number eighteen thousand and thirty-three, issued the twenty-third day of July, one thousand seven hundred and eighty-three, there is granted by the said Commonwealth unto Samuel Young,
54 assignee of Alexander Ramsay, a certain tract or parcel of land, containing two thousand acres, by survey, bearing date the eighth day of June, *one* one thousand seven hundred and eighty-five, lying and being in the county of Harrison, on Spruce Creek, a branch of the right hand fork of Hughes River, & bounded & followeth, to wit: Beginning at a beech corner to his survey No. 4, thence south three degrees, east eight hundred poles by a line thereof to a dogwood; north eighty-seven degrees east four hundred poles to a dogwood; north three degrees west eight hundred poles to a hickory; south eighty-seven degrees west four hundred poles to the beginning, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Samuel Young and his heirs forever.

In witness whereof the said Patrick Henry, esq'r, governor of the Commonwealth of Virginia, hath hereunto set his hand, and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the nineteenth day of July, in the year of our Lord one thousand
55 seven hundred and eighty-six, and of the Commonwealth the eleventh.

[SEAL.] P. HENRY.

(Endorsement on patent:) Samuel Young is entitled to the within mentioned tract of land, John Hawia, Re. L. Off.

Also a patent of the Commonwealth of Virginia to Samuel Young, assignee of Frederick Stover, in these words:

Patent.

[Patrick Henry, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye, that by virtue and in consideration of a land office treasury warrant, number eighteen thousand and twenty-two, issued the twenty-third day of July, one thousand seven hundred and eighty-three, there is granted by said Commonwealth unto Samuel Young, assignee of Frederick Stover, a certain tract or parcel of land, containing two thousand acres, by survey bearing date the eighth day
56 of June, one thousand seven hundred and eighty-five, lying and being in the county of Harrison, on the waters of Spruce Creek, a branch of the right hand fork of Hughes River, and bounded as followeth, to wit: Beginning at a hickory and dogwood, corner to Isaac Sidman's survey, No. 11 thence south three degrees east eight hundred poles by a line thereof to a beech; north eighty-seven degrees east four hundred poles to a dogwood; north three degrees west eight hundred poles to a beech; south eighty-seven degrees west four hundred poles, by a line of Robert Sylbourn's survey No. 11, to the beginning, with its appurtenances to have and to hold the said tract or parcel of land, with its appurtenances, to the said Samuel Young and his heirs forever.

In witness whereof the said Patrick Henry, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed at Richmond,
57 on the nineteenth day of July, in the year of our Lord one thousand seven hundred and eighty-six, and of the Commonwealth the eleventh.

[SEAL.] P. HENRY.

(Endorsement on patents:) Samuel Young is entitled to the within mentioned tract of land. John Hawia, Re L. Off.

Also a deed of John Hart to Samuel Young, in these words:

Deed.

This indenture, made the twelfth day of January, in the year of our Lord one thousand seven hundred and ninety-seven, between John Hart, of the county of Philadelphia, innholder, of the one part, and Samuel Young, of the city of Philadelphia, merchant, of the other part, witnesseth that the said John Hart, for & in consideration of the sum of seven hundred and fifty pounds, specie, to him in hand paid by the said Samuel Young at the time of the execution hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, re-
58 leased, and confirmed, and by these presents, doth grant, bargain, sell, release, and confirm unto the said Samuel Young, his heirs and assigns, all those three tracts or parcels of land lying and being in the county of Harrison and State of Virginia, one of them beginning at a hickory and dogwood, corner to Isaac Sidman's survey No. 11; thence south three degrees east eight hundred poles by a line

therof to a beech; north eighty-seven degrees east four hundred poles to a dogwood; north three degrees west, eight hundred poles to a beech; south eighty-seven degrees west four hundred poles by a line of Robert Silburn's survey No. 11 to the beginning, containing two thousand acres.

One other of them beginning at a beech, corner to said Young's survey N. 4; thence south three degrees east eight hundred poles by a line thereof to a dogwood; north eighty-seven degrees east four hundred poles to a dogwood; north three degrees west eight hun-
59 dred poles to a hickory; south eighty-seven degrees west four hundred poles to the beginning, containing two thousand acres; and the other of them beginning at a hickory, corner to said Young's survey No. 2, and running thence south three degrees east four hundred poles with a line thereof to a maple; north eighty-seven degrees east four hundred poles to a buckeye; north three degrees west four hundred poles, to a sugar tree; south eighty-seven degrees, west four hundred poles to the beginning, containing one thousand acres, which three described tracts or parcels of land the Commonwealth of Virginia, by three distinct patents, all dated the nineteenth day of July, 1786, grant unto the said Samuel Young in fee simple, who, by deed dated the third day of November, anno Domini 1795, granted the said three described tracts of land and premises unto the said John Hart in fee simple, as in and by the said three recited patents and
60 deeds, reference being thereunto had, will more fully and at large appear, together also with all and singular the buildings, improvements, ways, woods, waters, water courses, rights, members, liberties, privileges, liens, detainments, and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions, remanders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, claim, and demand whatsoever of him, the said John Hart, as well at law as in equity, of, in, to, and out of the same; to have and to hold the said three described tracts or parcels of land, hereditaments, and premises hereby granted, with the appurtenances, to the said Samuel Young, his heirs and assigns, to and for his and their own proper use and behoof forever. And the said John Hart and his heirs, all and singular the premises hereby granted, with the appurtenances, unto the said Samuel Young,
61 his heirs and assigns, against him, the said John Hart, and his heirs, and against all other person or persons whatsoever lawfully claiming or to claim the same by or from or under him, them, or any of them, shall and will warrant and forever defend by these presents.

In witness whereof the said parties have interchangeably set their hands and seals hereunto; dated the day and year first above written.

JOHN HART. [SEAL.]

Seal' and delivered in the presence of us—
JOHN DAVIS.
MATT'W HUSTON.

The twentieth day of January, anno Domini 1797, before me, Hilary Baker, esquire, mayor of the city of Philadelphia, State of Pennsylvania, came the above-named John Hart, the grantor, and acknowledged the above written indenture to be his act and deed, and desired the same may be recorded as such, according to the laws of Virginia.

62 In testimony whereof I, the said mayor, have hereunto signed

my name, and caused the seal of the said city to be affixed, the day and year aforesaid.

{ SEAL OF THE CITY OF PHILA- } HILARY BAKER,
{ DELPHIA. MDCCLXXIX. } *Mayor.*

At a court held for Wood County on Monday, the 3rd day September, 1804, this indenture of bargain and sale between John Hart of the one part, and Samuel Young of the other part, was presented in court, and the certificates hereunto annexed of Hilary Baker, mayor of the city of Philadelphia, in the State of Pennsylvania, of the acknowledgement thereof before him, and is ordered to be recorded.

Teste:

JOHN STOKELY, *Cl.*

Endorsement on deed.

Received the day of the date of the within indenture of the within named Samuel Young the sum of two thousand dollars, being the full consideration money within mentioned.

JOHN HART.

Witnesses at signing:
JNO. DAVIS.
MATTᵉ. HUSTON.

63 Also, a deed of Jesse Milhous to Frederick Swetzer, in these words:

Deed.

This indenture, made the sixteenth day of March, in the year of our Lord one thousand seven hundred and eighty-nine, between Jesse Milhous, of the city of Philadelphia, and State of Pennsylvania, dealer, of the one part, and Frederick Swetzer, of Allen Township, in the county of Cumberland, and State aforesaid, farmer, of the other part, witnesseth: That the said Jesse Milhous, for and in consideration of the sum of one hundred pounds, speice, to him in hand paid by the said Fred-'rick Switzer at the time of the execution hereof, the receipt of which is hereby acknowledged, hath, and hereby doth, grant, bargain, sell, alien, release, and confirm unto the said Frederick Switzer, his heirs and assigns, forever, all the following described tract or parcel of land, situate in Harrison County, in the State of Virginia, and bounded as follows, viz: Beginning at a dogwood, corner of Samuel Young's land (No. 5), and running thence with a line of the same south three
64 degrees east four hundred poles to a dogwood, north eighty-seven degrees east four hundred poles to a hickory, north threee degrees west four hundred poles to a black oak, south eighty-seven degrees west four hundred poles, to the beginning, containing one thousand acres of land (it being a part of a large tract of land granted to Samuel Young by the Commonwealth of Virginia, by patent, under the hand of his excellency Patrick Henry, governour, and the seal of said Commonwealth, dated at Richmond the eight' day of July, in the year of our one thousand seven hundred and eighty-six, as by the said patent recorded in the land office at Richmond may appear; and whereas the said Samuel Young, by deed duly executed, dated the seventh day of August, in the year of our Lord one thousand seven hundred and eighty-eight, did grant and convey the said tract of land, with the

appurtenances, unto the said Jesse Milhous, his heirs and assigns, in fee), together with all and singular the ways, woods, waters,
65 water-courses, rights, liberties, privileges, advantages, hereditaments, and appurtenances whatsoever unto the same belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profeets thereof; and also all the estate, right, title, and interest whatsoever, both in law and equity, of the said Jesse Milhous, of, in and to the same and every part thereof.

To have and to hold the said described tract of one thousand acres of land, hereditaments and premises hereby granted, with the appurtenances, unto the said Frederick Switzer, his heirs and assigns, to and for the only proper use & behoof of the said Fred'rick Switzer, his heirs and assigns forever.

And the said Jesse Milhous & his heirs, all and singular the said, hereby grant premises, and every part thereof, with the appurtenances, unto the said Fred'rick Switzer, his heirs and assigns, against him, the said Jesse Milhous, and his heirs, and against all manner of
66 person and persons whatsoever, lawfully claiming or to claim the same by, from, or under him, them, or any of them, shall and will warrant and forever defend these presents.

In witness whereof the said parties have interchangeably set their hands and seals hereto on the day and year above written.

JESSE MILHOUS. [SEAL.]

Sealed and delivered in the presence of us.
JACOB SAYLER.
LEWES YOUNG.

PENNSYLVANIA, *ss:*

Before us, the subscribers, t'o of the justices of the peace, and of the court of common pleas in and for the county of Philadelphia, in the said State, personally appeared the above-named, Jesse Milhous, and acknowledged the above indenture to be his act and deed, in order that it may be as such recorded.

Witness our hands and seals this sixteenth day of March, 1789.

ISAAC HOWELL. [SEAL.]
L. WEISS. [SEAL.]

67 Received on the day of the date of the above indenture one hundred pounds specie, being in full of the consideration money therein mentioned.

Witness my hand.

JESSE MILHOUS.

Witness present:
LEWIS YOUNG.

Endorsement on deed.

At a court held for the county of Harrison on the sixteenth day o August, one thousand seven hundred and ninety-six, ordered that deed of conveyance for 1,000 acres of land from Jesse Milhous to Fred rick Swetzer be recorded.

Teste: BENJ. WILSON, *Clk.*

Harrison County clerk's *of* office. Book No. 2, folio 346. Recorded and examined. B. Wilson.

Also a deed of Samuel Young to Jacob Miller in these words:

Deed.

This indenture, made the fourteenth day of January, in the year of our Lord one thousand seven hundred and ninety-seven, between Samuel Young, of the city of Philadelphia, in the State of Pennsyl-
68 vania, merchant, of the one part, and Jacob Miller, of the township of East Pennsbury, in the county of Cumberland and State aforesaid, yeoman, of the other part, witnesseth that the said Samuel Young, for and in consideration of the sum of fourteen hundred milled silver dollars to him in hand paid by the said Jacob Miller at the time of the execution hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and conferim, unto the said Jacob Miller, his heirs and assigns, all that certain tract or parcel of land, containing two thousand acres, by survey bearing date the 8th day of June, 1785, lying and being in the county of Harrison and State of Virginia, on the waters [*of Spruce] Creek, a branch of the right-hand fork of Hughes River, and bounded as followeth, to wit: Beginning at a hickory and dogwood corner to
69 Isaac Sidman's survey, No. 11, thence south three degrees east eight hundred poles by a line thereof to a beech; north eighty-seven degrees east four hundred poles to a dogwood; thence north three degrees west eight hundred poles, by said Samuel Young's survey, No. 4, granted, or intended to be granted, to Conrad Renegar and John Barnhart to a beech, a corner of Robert Lylburn's survey No. 12; thence by the same south eighty-seven degrees west four hundred poles to the beginning (being the same land and premises which the Commonwealth of Virginia, by their letters patent, under the hand of Patrick Henry, esquire, gove'nor and lesser seal of the said Commonwealth, dated the nineteenth day of July, in the year of our Lord one thousand seven hundred and eighty-six, duly examined and recorded at Richmond, granted unto the said Samuel Young, in fee simple, as in and by the said recited patent more fully appears); together
70 with all and singular the ways, woods, waters, water courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining and the reversions, remainders, rents, issues & profets thereof, and also all the estate, right, title, interest, property, claim, & demand whatsoever of him, the said Samuel Young, as well at law as in equity, of, in, to and out of the same; to have and to hold the said described tract or parcel of land, hereditaments, and premises hereby granted, with the appurtenances, to the said Jacob Miller, his heirs and assigns, to and for the only proper use and behoof of the said Jacob Miller, his heirs, and assigns forever. And the said Samuel Young and his heirs, all and singular the premises hereby granted with the appurtenances to the said Jacob Miller, his heirs and assigns, against him, the said Samuel Young, and his heirs, and against all other person or persons what-
71 soever, lawfully claiming or to claim by, from, or under him, them, or any of them, shall and will warrant, and forever defend, by these presents.

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* In pencil.

In witness whereof the said parties have interchangeably set their hands, and seals hereunto, dated the day and year first above written.

SAMUEL YOUNG. [SEAL.]

Sealed and delivered in the presence of us—
JOHN CAMAN.
JAS. BRADLEY.

Received the day of the date of the above indenture, of the above named Jacob Miller, the sum of fourteen hundred dollars (1,400 doll's) being the full consideration money above mentioned.

SAMUEL YOUNG.

Witness at signing—
JOHN CAMAN.
JOS BRADLEY.

CITY OF PHILADELPHIA:

Before me, Hilary Baker, esquire, mayor of the said city, personally came the above named Samuel Young, and acknowledged the above written indenture, to be his act and deed, and desired the same
72 may be recorded as such, according to the laws of the State of Virginia.

In testimony whereof I, the said mayor, have hereunto signed my name and caused the seal of the said city to be affixed the sixteenth day of January, anno Domini, one thousand seven hundred and ninety-seven.

[SEAL.] HILARY BAKER, *Mayor.*

At a court held for Wood County, on Monday, the 3 day of Septem ber, 1804, this indenture of bargain and sale between Samuel Young of the one part and Jacob Miller of the other part, was presented in court, together with the certificates thereunto annexed from Hilary Baker, esquire, mayor of the city of Philadelphia, certifying the acknowledgement thereof before him of the said Samuel Young, and ordered to be recorded.

Teste:

JOHN STOKELY, *C'k.*

Also a deed from Jacob Miller to Fredrick Swisher, in these words:

73 *Deed.*

This indenture, made the 23rd day of November, in the year of our Lord one thousand eight hundred, between Jacob Miller, of the county of Cumberland, and State of Pennsylvania, of the one part, and Frederick Swisher, of the county and State aforesaid, of the other part. Whereas the Commonwealth of Virginia, by their letters patent, under the hand of Patrick Henry, esquire, gove'nor, and lesser seal of the said Commonwealth, dated the nineteenth day of July, in the year of our Lord one thousand seven hundred and eighty-six, duly examined and recorded at Richmond, granted unto Samuel Young, in fee simple, all that certain tract or parcel of land, containing two thousand acres by survey bearing date the eighth day of June, one thousand seven hundred and eighty-five, lying and being in the county of Harrison, and State of Virginia, on the waters of Spruce Creek, a branch of the right hand fork of Hughes River, and bounded as followeth,
74 to wit: Beginning at a hickory and dogwood corner to Isaac

Sidman's survey No. 11, thence south three degrees, E eight hundred poles by a line thereof to a beech north eighty-seven degrees; east four hundred poles to a dogwood; thence north three degrees west eight hundred poles by said Samuel Young's survey No. four, granted, or intended to be granted, to Conrad Renegar and John Bamhart, to a beech a corner of Robert Lylburn's survey No. 12; thence by the same south eighty-seven degrees W. four hundred poles to the beginning, as in and by the said recited patent more fully appears; and whereas, by deed indented, dated the fourteenth day of January, in the year of our Lord one thousand seven hundred and ninety-seven, for the consideration therein mentioned, the said Sam'l Young did grant, bargain, sell, release, and confirm unto the aforesaid Jacob Miller, and to his
75 heirs and assigns forever, the above-described tract of two thousand acres of land, with the appurtenances, and situate as aforesaid, reference being had to the said indenture may more fully and at large appear: Now this indenture witnesseth that the said Jacob Miller, for and in consideration of the sum of seven hundred dollars, to hi min hand paid by the aforesaid Frederick Swisher at the time of the execution hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and confirm unto the said Frederick Swisher, his heirs and assigns, all that certain tract or parcel of land containing *two* thousand acres, it being the lower part of all that certain tract or parcel of land containing two thousand acres described as aforesaid, with the appurtenances, together with all and singular the ways, woods, waters, water-courses,
76 rights, liberties, privileges, hereditaments and appurtenances whatsoever to the said two thousand acres of land belonging in anywise appertaining, and the reversions, remainders, issues and profits thereof, and also all the estate, right, title, interest, property, claim and demand whatsoever of him, the said Jacob Miller, as well at law as in equity of, in, to, and out of the said two thousand acres of land; to have and to hold the said described tract or parcel of two thousand acres of land, hereditaments and premises hereby granted, with the appurtenance', to the said Fredrick Swisher, his heirs and assigns, to and for the only proper use and behoof of the said Frederick Swisher, his heirs and assigns, forever. And the said Jacob Miller and his heirs, all and singular, the said one thousand acres of land hereby granted, with the appurtenances, to the said Frederick Swisher, his heirs and assigns, against him, the said Jacob Miller, and his
77 heirs, and against all other person or persons whatsoever, lawfully claiming, or to claim, by, from or under him, them or any of them, shall and will warrant and forever defend by these presents. In witness whereof the said parties have interchangeably set their hands and seals hereunto, the day and year first above written.

JACOB MILLER. [SEAL.]

Sealed and delivered in the presence of—

SAM'L DUICAN.

JOSEPH CANNON.

Received on the day of the date of the foregoing indenture, of and from Frederick Swisher, the sum of seven hundred dollars, it being in full of the consideration money, within expended. Witness my hand.

JACOB MILLER.

Teste:

SAMUEL DUNCAN.

CUMBERLAND COUNTY, *ss:*

Before me, the subscriber, one of the associate judges of the court of common plea', & in and for the county aforesaid, personally came the above named Jacob Miller and acknowledged the above writ-
78 ten indenture to be his act and deed, and desired the same to be recorded as such according to the laws of Virginia.

In testimony whereof I have hereunto set my hand & seal the twenty-third day of November, MDCCC.

[SEAL.] JOHN CREIGH.

At a court held for Wood County, on Monday, the 3rd day of September, 1804:

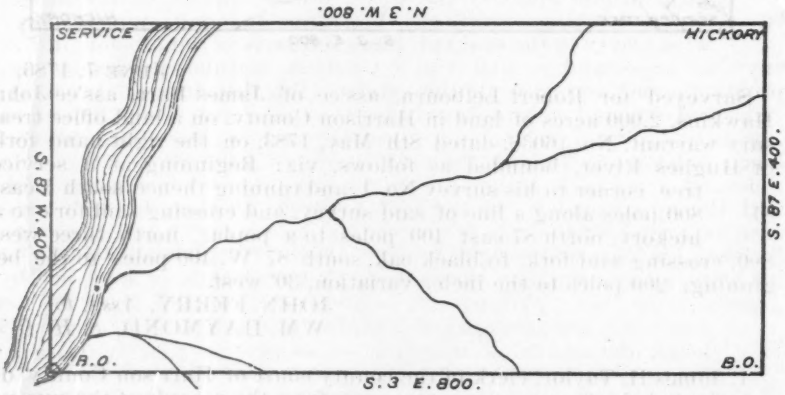
This deed of bargain and sale, between Jacob Miller of the one part, and Frederick Swisher of the other part, was presented in court, and the certificate hereunto annexed from John Creigh, one of the associate judges of the court of common pleas for Cumberland County, State of Pennsylvania, certifying the acknowledgement thereof before him, and is ordered to be recorded.

Teste.

JOHN STOKELY, *C'k.*

79 Also a copy of a survey made for Robert Lilbourn, in these words:

No. 1.



7 JUNE, 1785,

Surveyed for Robert Lelberm, ass'ee of James Barr, ass'ee of John Hawkins, 2,000 acres of land, in Harrison County, on a land office treasury warrant, No. 16036, dated 8th of May, 1783, on the right hand fork of Hughes River, bounded as followeth, viz: Beginning at a black oak about 10 poles from the south bank of said river, & about one mile and one-half above the forks of the same, and running thence south 3° E. 800 poles to a black oak; north 87 E. 400 poles to a hickory; north 3 west 800 poles, crossing said fork, to a service tree; south 87 west 400 poles, crossing said fork through an island, to the beginning; by a scale of 200 p's to an inch; variation 30 mi. west.

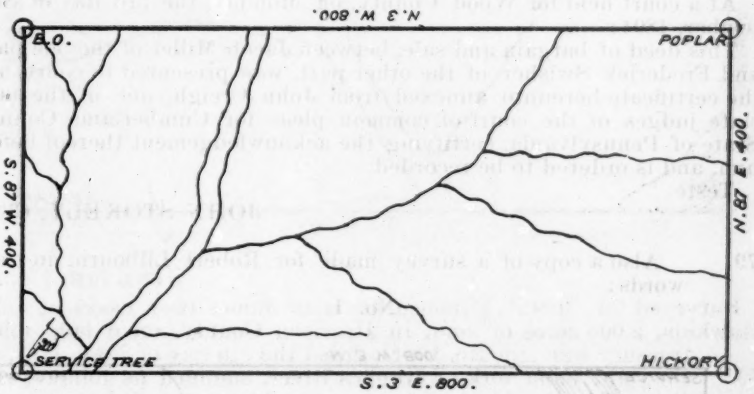
JOHN FERRY, *Ass't. to*
WM. HAYMOND, *S. H. C.*

80 I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyors' books in my possession and under my control, the surveyor being absent and having no separate office at the court-house for the books and papers of his office. 28th March, 1877.

JAMES H. TAYLOR. *Clerk.*

Also a copy of a survey made for Robert Lilbourn, in these words:

No. 2.



JUNE 7, 1785,

Surveyed for Robert Lelbourn, ass'ee of James Barr, ass'ee John Hawkins, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 16038, dated 8th May, 1783, on the right hand fork of Hughes River, bounded as follows, viz: Beginning at a service tree, corner to his survey No. 1, and running thence south 3 east
81 800 poles along a line of said survey, and crossing said fork to a hickory, north 87 east 400 poles to a poplar, north three west 800, crossing said fork, to black oak, south 87 W. 400 poles to the beginning. 200 poles to the inch: variation, 30' west.

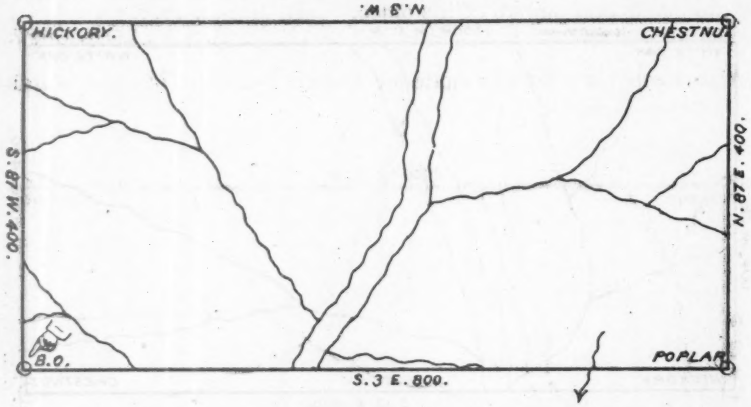
JOHN FERRY, *Ass't. to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyors books in my possession and under my control, the surveyor being absent, and having no separate office at the court-house for the books and papers of his office, 28 March, 1877.

JAMES H. TAYLOR, *Clerk.*

Also a copy of a survey made for Robert Lilbourn, in these words:

No. 3.



JUNE 7TH, 1785.

Surveyed for Robert Lilbourn, ass'ee of James Barr, ass'ee of John Hawkins, 2,000 acres of land, in Harrison County, on a land office treasury warrant, No. 16047, dated the 8th day of May, 1783, on
82 the right hand fork of Hughes River, bounded as follows, viz: Beginning at a black oak corner to his survey No. 2, and running thence south 3 east along a line thereof 800 poles, crossing said fork, to a poplar, north 87 east 400 poles to a chestnut, north 3 W. 800 poles, crossing said fork, to a hickory, south 87 west 400 to the beginning, 200 poles to an inch; variation, 30' to the west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

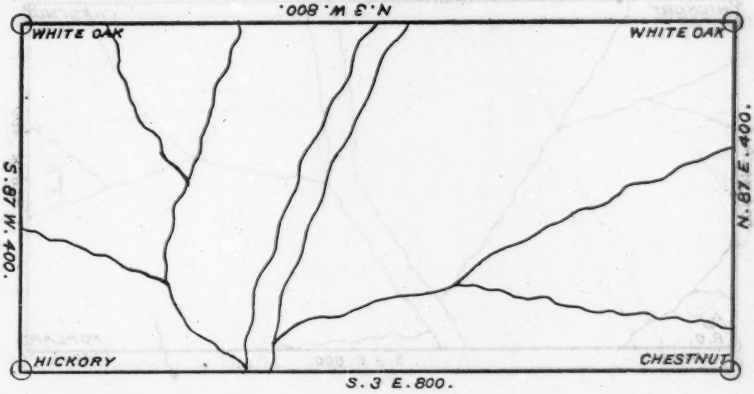
I. James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent, and having no separate office at the court-house for the books and papers of his office.

28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

83 Also a copy of a survey made for Robert Lilboun, in these words:

No. 4.



JUNE 7TH, 1785.

Surveyed for Robert Lilbourn, ass'ee of James Barr, ass'ee of John Hawkins, 2,000 acres of land, in Harrison County, on a land office treasury warrant No. 16040, dated 8th May, 1783, on the right hand fork of Hughes River, bounded as followeth, viz: Beginning at a hickory corner to his survey No. 3, & running thence south 3 E. 800 poles along a line of said survey & crossing said fork to a chestnut, north 87 east 400 to a white *a* oak, north 3 west 800, crossing said fork, to a white oak, south 87 west 400 to the beginning. Scale of 200 poles to an inch; variation, 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

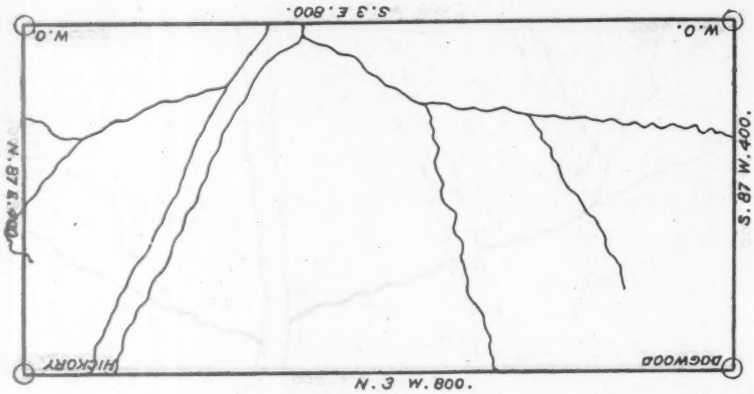
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no separate office at the court-house for the books and papers of his office.

Given under my hand this 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

84 Also a copy of a survey made for Robert Lilbourn, in thes' words:

No. 5.



JUNE 7TH, 1785.

Surveyed for Robert Lelborne, ass'ee of James Barr, ass'ee of John Hawkins, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 16042, dated 8th May, 1783, on the right hand fork of Hughes River, bounded as followeth, viz: Beginning at a white oak corner to his survey No. 4, & running thence south 3 east 800 poles along a line thereof, crossing the said fork, to a white oak, north 87 east 400 poles to hickory, north 3 west 800 poles to a dogwood, south 87 west 400 poles to the beginning. 200 poles to the inch; variation, 30 min. west.

JOHN FERRY, *Ass't.*
W. HAYMOND, *S. H. C.*

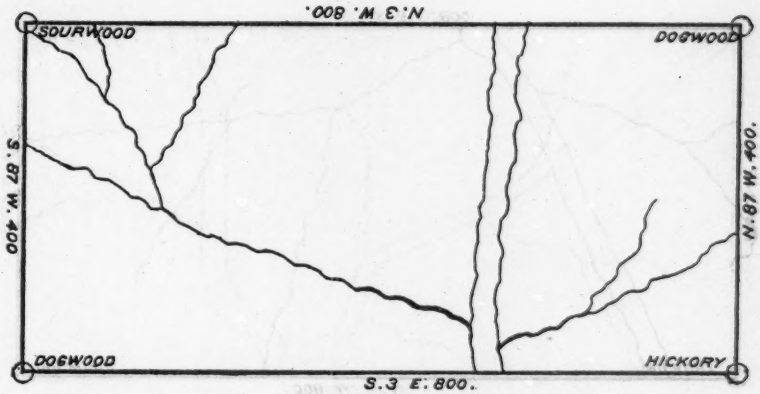
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no separate office at the court-house for the books & papers of his office.

28th Mar., 1877.

JAMES H. TAYLOR, *Clerk.*

85 Also a copy of a survey made for Robert Lilbourn in these words:

No. 6.



JUNE THE 7TH, 1785.

Surveyed for Robert Lilbourne, ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 19937, dated the 17th October, 1783, on the right hand fork of Hughes River & bounded as followeth, viz: Beginning at a dogwood corner to said Lilbourn's fifth survey and thence by a line of said survey S. 30 E. 800 poles, crossing said fork, to a hickory, N. 87 E 400 poles to a dogwood, N. 3 W. 800 poles, crossing said fork, to a sourwood, N. 87 W. 400 poles to the beginning. 200 poles to the inch.

JOHN FERRY *Ass't to*
W. HAYMOND, *S. H. C.*

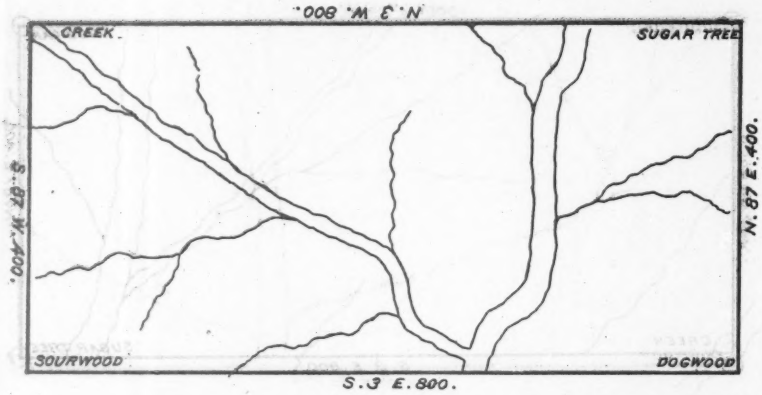
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's book in my possession & under my control, the surveyor being absent and having no separate office at the court-house for the books and papers of his office.

Given under my hand 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

86 Also a copy of a survey made for Robert Lilbourne in these words:

No. 7.



JUNE THE 7TH, 1875.

Surveyed for Robert Lilbourn, ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 19937, dated the 17th of October, 1783, on the right hand fork of Hughes River, bounded as followeth, viz: Beginning at sourwood corner to his survey No. 6 & running thence along a line, *thence of* south 3 east 800 poles, crossing said fork, to a dogwood, north 87 east 400 to a sugar tree, north 3 west 800, crossing said fork, to a creek, south 87 west 400 poles to the beginning. 200 poles to the inch; variation, 30 min. to west.

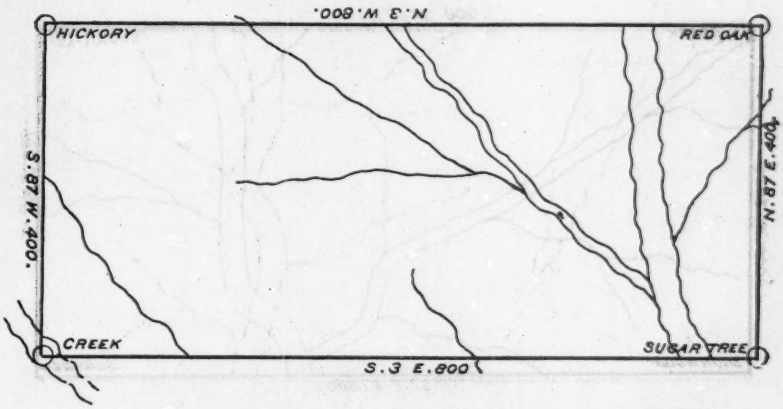
JOHN FERRY, *Ass't to*
W. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's book in my possession and under my control, the surveyor being absent and having no separate office at the court-house for the books & papers of his office. Given under my hand this 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

87 Also a copy of a survey made for Robert Lilbourn in these words:

No. 8.



JUNE, THE 7TH, 1785.

Surveyed for Robert Lelbourn ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 *thousand* acres of land in Harrison County on a land office treasury warrant, No. 19935, dated 17th October, 1783, on the right-hand fork of Hughes River & bounded as followeth, viz: Beginning at a large creek, corner to said Lelbourn's 7th survey, and thence south 3 east by a line of said survey 800 poles, crossing said fork to sugar tree; north 87 east 400 to a red oak; north 3 west 800, crossing the said fork to a hickory; S. 87 W. 400 poles to the beginning. 200 poles to the inch; variation 30 minutes to the west.

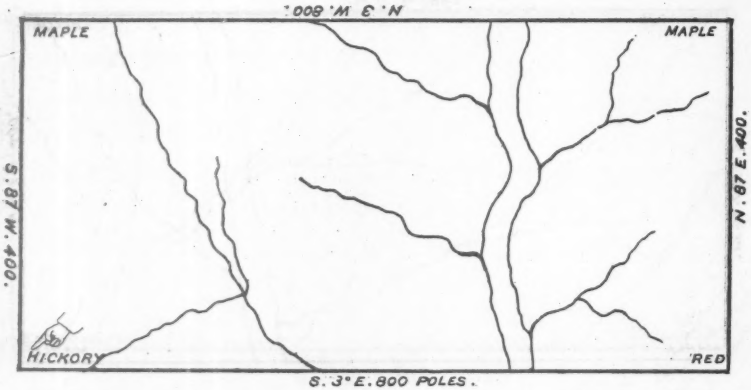
JOHN FERRY, *Ass't to*
W. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent & having no seperate office at the court-house for the books & paper' of his office. 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

88 Also a copy of a survey made for Robert Lilbourn in these words:

No. 9.



JUNE, THE 7TH, 1785.

Surveyed for Robert Lilbourn, assignee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison County on a land office treasury warrant, No. 19940, dated the 17th October, 1783, on the right-hand fork of Hughes River, bounded as follows, viz: Beginning at a hickory, corner to his survey No. 8, running thence along a line of said survey S. 3 E. 800 poles, crossing said fork to a red oak; north 87 east 400 poles to a maple; north 3 west 800, crossing said creek to a maple; south 87 west 400 poles to the beginning. 200 to the inch; variation 30 min. to the west.

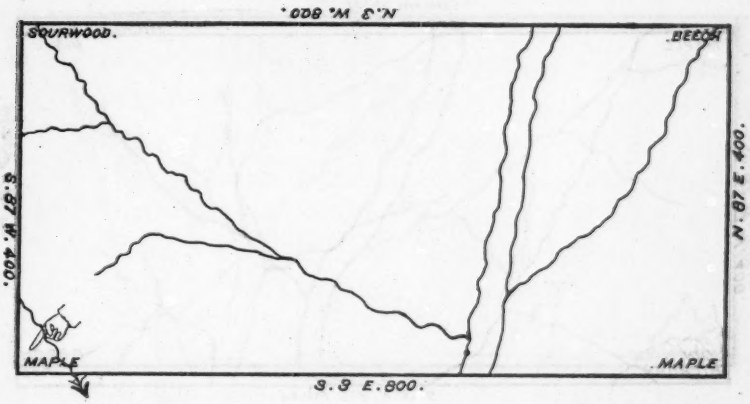
JOHN FERRY, *Ass't to*
W. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the *from the* records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office. Given under my hand 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

89 Also a copy of a survey made for Robert Lelbourn in these words:

No. 10.



JUNE THE 7TH, 1785.

Surveyed for Robert Lelbourn, ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison , on a land-office treasury-warrant, No. 19939, dated the 17th of October, 1783, on the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a maple, corner to his survey No. 9, and running thence with a line of said survey S. 3 E. 800 poles, crossing said fork of Hughes River to a big maple; N. 87, E. 400 poles to a beech; N. 3 W. 800 poles, crossing said fork to a sourwood; S. 87 W. 400 to the beginning. 200 poles to the inch; variation 30 min. west.

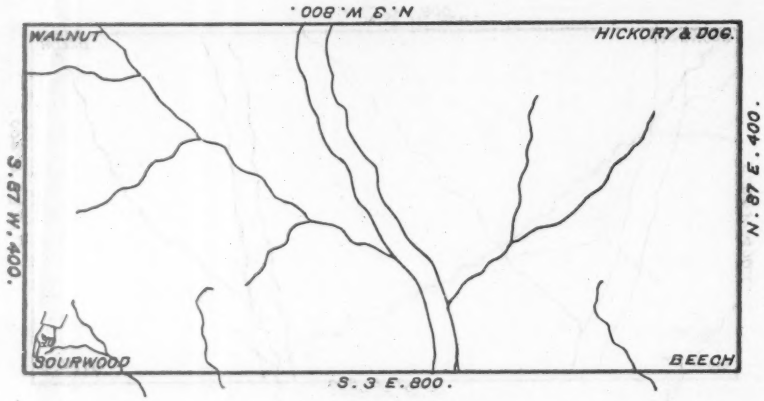
JOHN FERRY, *As't to*
WM. HAYMOND.

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court house for the books & papers of his office. Given under my hand the 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

90 Also a copy of a survey made for Robert Lilbourn in these words:

No. 11.



JUNE 7TH, 1785.

Surveyed for Robert Lelbourn, ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison County, on a land-office treasury-warrant, No. 19938, dated 17th October, 1783, on the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a sourwood, corner to his survey No. 10, thence along a line thereof south 3 east 800 poles, crossing said fork to a beech; north 87 E. 400, to a hickory & dogwood; north 3 west 800 to a walnut; south 87 W. 400 poles to the beginning. 200 poles to inch; variation 30 min. west.

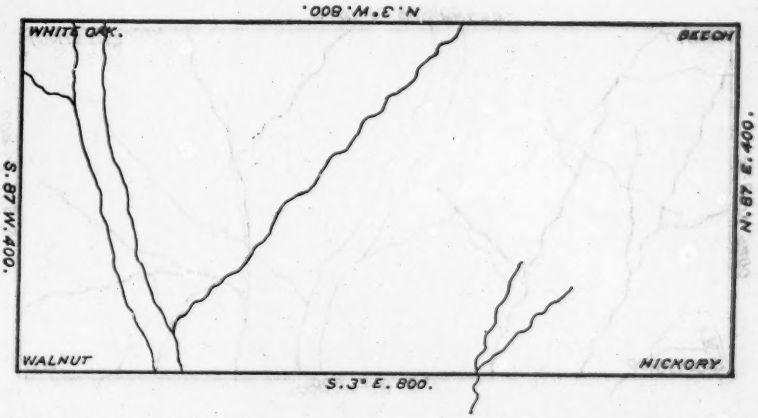
JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court house for the books and papers of his office. 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

91 Also a copy of a survey made for Robert Lilbourn in these words:

No. 12.



JUNE THE 7TH, 1785.

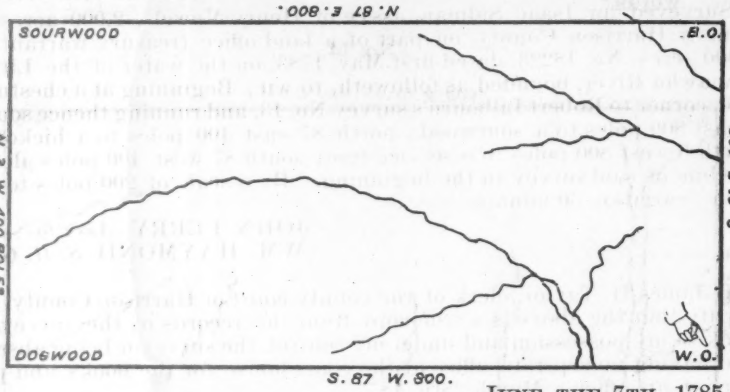
Surveyed for Robert Lelbourn, ass'ee of James Barr, ass'ee of Alexander Dick, 2,000 acres of land in Harrison County, on a land-office treasury-warrant, No. 19949, dated 17th October, 1783, on the right-hand fork of Hughes River, and bounded as follows, viz: Beginning at a walnut, corner to said Selbourn's eleventh survey, and thence S. 3 E. 800 poles, with a line of said survey and crossing the said fork, to a hickory; thence N. 87 E. 400, to a beech; N. 3 W. 800 poles, crossing the said fork, to a white-oak; S. 87 W. 400 poles to the beginning. 200 poles to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court house for the books and papers of his office. Given under my hand this 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

No. 15.



JUNE THE 7TH, 1785.

Surveyed for Robert Lelbourn, ass'ee of James Barr, ass'ee of Alexander Dicks, 2,000 acres of land in Harrison County, on a land-office treasury warrant, No. 19941, dated the 17th Octo., 1783, on the waters of the right-hand fork of Hughes River, bounded as followeth, to wit: Beginning at a white-oak, corner to his survey No. 14, and running thence south, thence east along a line of said survey 400 poles to a black-oak; north 87 east 800 to a sourwood; north 3 west 400 to a dogwood, corner to a survey of said Lilbourn's; thence south 87 west 800 poles along a line of his sixth and fifth surveys to the beginning. 200 poles to the inch; variation 30 min. west.

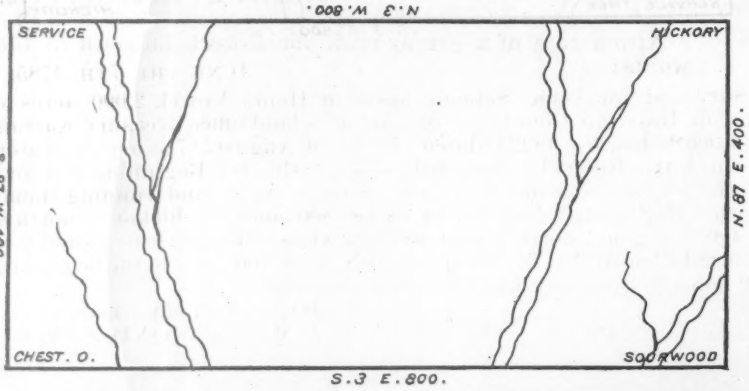
JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office. Given under my hand this 28' Mar., 1877.

JAMES H. TAYLOR, *Clerk.*

95 Also a copy of a survey made for Isaac Sidman in these words:

No. 1.



JUNE 7TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Henry Vowels, 2,000 acres of land in Harrison County, on part of a land-office treasury warrant of 4,000 acres, No. 18223, dated first May, 1783, on the water of the Little Kanawha River, bounded as followeth, to wit: Beginning at a chestnut oak, corner to Robert Lilbourn's survey No. 13, and running thence south 3 east 800 poles to a sourwood; north 87 east 400 poles to a hickory; north 3 west 800 poles to a service tree; south 87 west 400 poles along the line of said survey to the beginning. By a scale of 200 poles to an inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

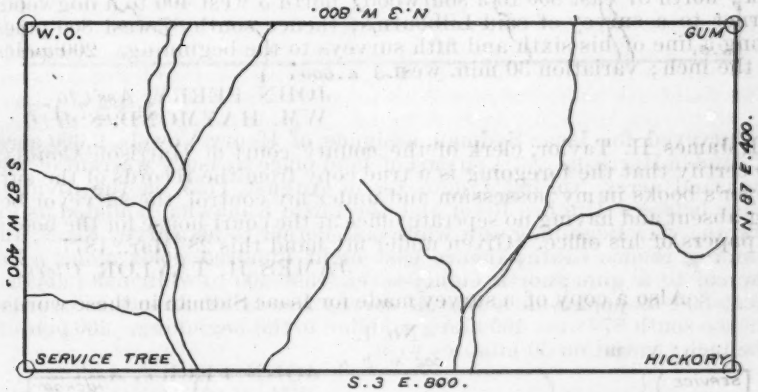
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the above is a true copy from the records of the surveyor' book in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office. March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

96 Also a copy of a survey made for Isaac Sidman in these words:

No. 2.



JUNE THE 7TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Henry Vowel, 2,000 acres of land in Harrison County, on *of* part of a land-office treasury warrant of 4,000 acres, No. 18223, dated the 1st of August, 1783, on the waters of the Little Kanawha, bounded as followeth, viz: Beginning at a service tree, corner to a survey of said Sidman, No. 1, and running thence south 3 east along a line of said survey 800 poles to a hickory; north 87 E. 400 to a gum; north 3 west 800 to a white-oak, corner to a survey of Robert Lilbourn, No. 13; thence south 87 west 400 poles to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

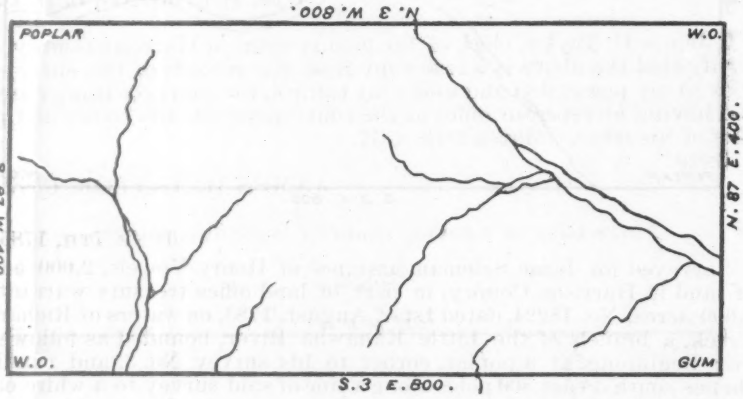
I, James H. Taylor, clerk of Harrison County court, do certify that the above is a true copy from the record of the surveyor' books in my possession and under my control, the surveyor being absent and having no seperate at the court-house for the books & papers of his office. March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

97 Also a copy of a survey made for Isaac Sidman in these words:

No. 3.



JUNE 7, 1785.

Surveyed for Isaac Sydman, assignee of Henry Vowels, 2,000 acres of land in Harrison , on part of land-office treasury warrant of four thousand acres, No. 18224, date 1st of August, 1783, on the dividing ridge between Hughes River and the Little Kanawha, bounded as followeth, viz: Beginning at a white-oak, corner to his survey No. 2, and running thence south; thence east eight hundred poles along a line thereof to a gum; north eighty-seven east 400 to white-oak; north 3 west 800 to poplar on a line of survey No. 14 of Robert Lilbourn's; thence south 87° west 400 along said line to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the above is a true copy from the records of the surveyor's office in my possession and under my control, the surveyor being absent & having no seperate office at the court-house for the books & papers of the office.

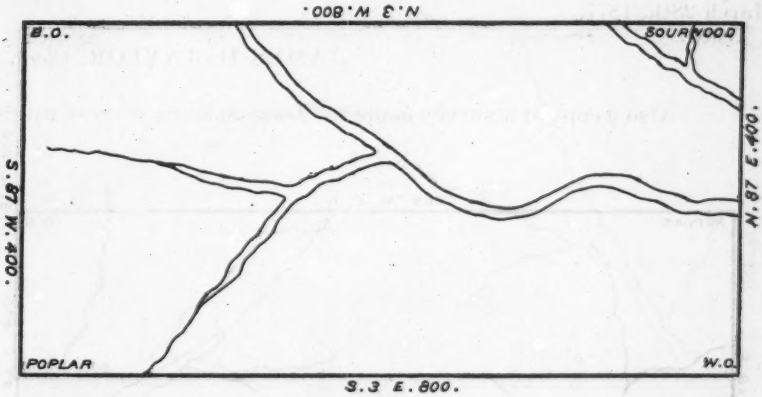
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

98 Also a copy of a survey made for Isaac Sidman in these words:

No. 4.



JUNE 7TH, 1785.

Surveyed for Isaac Sideman, assignee of Henry Vowels, 2,000 acres of land in Harrison County, in part of land-office treasury warrant of 4,000 acres, No. 18224, dated 1st of August, 1783, on waters of Richard's Creek, a branch of the Little Kanawha River, bounded as followeth, viz: Beginning at a poplar, corner to his survey No. 3, and running thence south 3 east 800 poles along a line of said survey to a white oak; north 87 east 400 to a sourwood; north 3 west 800 poles to a black oak; south 87 W. 400 poles along a line of Robert Lilbourn' survey No. 14 to the beginning. Variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the books of the surveyor of said county in my possession & under my control, the surveyor being absent & having no seperate office at the court-house for the books & papers of his office.

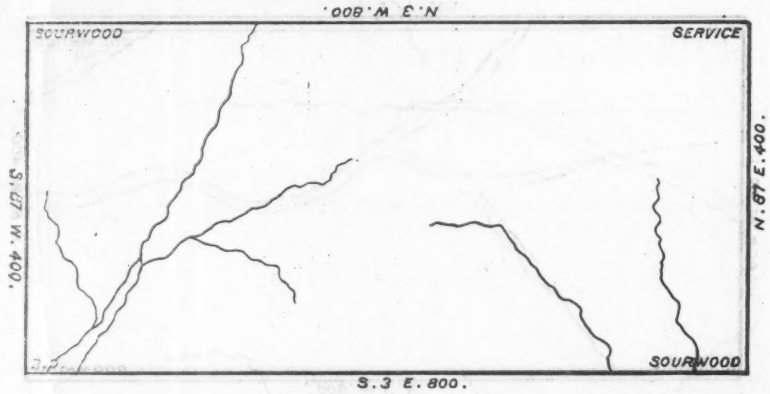
March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

99 Also a copy of a survey made for Isaac Sidman in these words:

No. 5.



JUNE THE 7TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Henry Vowels, 2,000 acres of land in Harrison County, on part of a land-office treasury warrant of 4,000 acres, No. 18225, dated the 1st of August, 1783, on the waters of *of* Hughes River, bounded as followeth, viz: Beginning at a black-oak, corner to his survey No. 4, & running thence south 3 east 800 poles along a line thereof to a sourwood; north 87 east 400 to a service tree; north 3 west 800 to a sourwood in a line of Robert Lelbourn's; thence south 87 west 400 poles to the beginning. 200 poles to inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the above is a true copy from the records of the surveyor's books in my possession & under my control, the surveyor being absent and having no seperate office at the court-house' for the books and papers of his office.

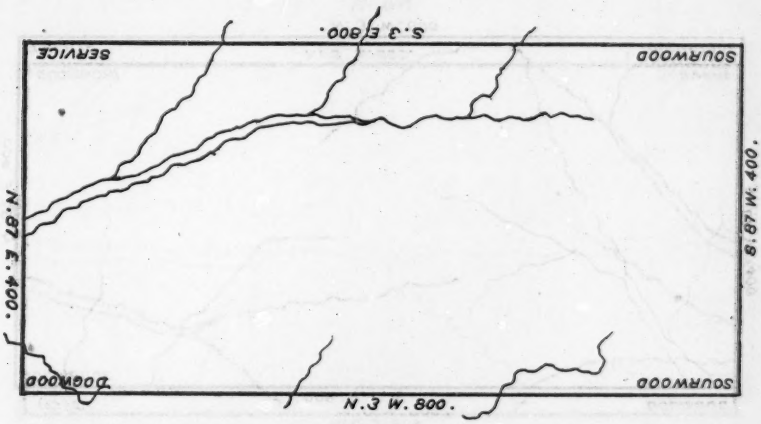
March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

100 Also a copy of a survey made for Isaac Sedman in these words:

No. 6.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sidman, assignee of Henry Vowels, 2,000 acres of land in Harrison County, on parts of a land-office treasury warrant of 4,000 acres, No. 18225, dated 1st August, 1783, on the waters of Richard's Creek, and bounded as followeth, viz: Beginning at a sourwood, corner to his survey No. 5, and running thence along a line of said survey S. 3 E. 800 poles to a service tree; N. 87 E. 400 poles to a dogwood; N. 3 W. 800 poles to a sourwood; S. 87 W. 400 poles along a line of Robert Lilbourn's survey No. 15 to the beginning. 200 poles to the inch; variation 3 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no sepreate office at the court-house for the books & papers of his office.

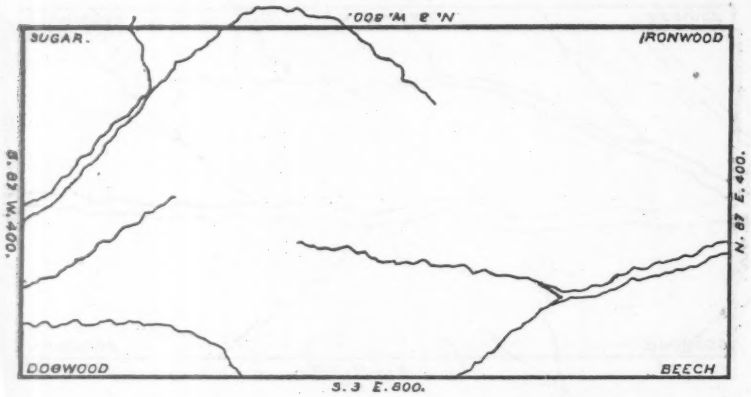
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

101 Also a copy of a survey made for Isaac Sidman in these words:

No. 7.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Henry Vowels, 2,000 acres of land in Harrison County, on part of a land office treasury warrant of 4,000 acres, No. 18159, dated the 28th July, 1783, on the waters of the right hand fork of Hughes River, bounded as followeth, viz: Beginning at a dogwood, corner to a survey of Robert Lillborun's No. 15, running thence south 3 east 800 poles to a beech in a line said Sidman's survey No. 6; north 87 east 400 to an ironwood; north 3 west 800 to a sugar tree; south 87 west 400 poles along a line of said Lilurn's survey No. 7 to the beginning. 200 poles to the inch; var'ation 30 min. west.

JOHN FERRY, *Ass't. to*
WM. HAYMOND, *S. H. C.*

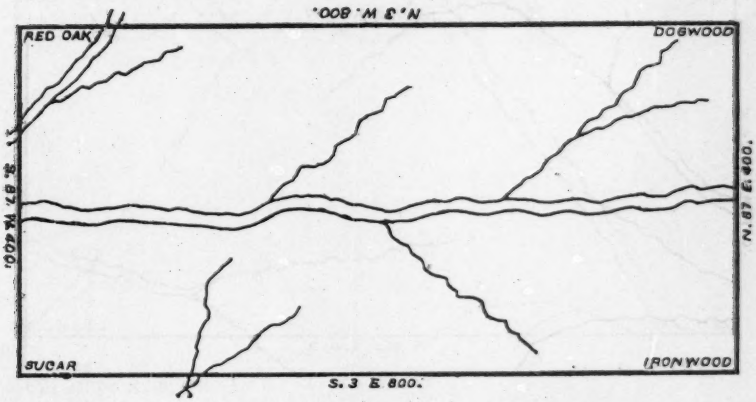
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the above is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office. 28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

102 Also a copy of a survey made for Isaac Sidman in these words:

No. 8.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Henry Vowells, 2,000 acres of land in Harrison County, on parts of land office treasury warrant of 4,000 acres, No. 18159, dated the 28th of July, 1783, on the waters of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a sugar tree, corner to his survey No. 7, and running thence south 3 east 800 poles along a line thereof to a' ironwood; north 87 east 400 poles to a dogwood; north 3 west 800 poles to a red oak; south 87 west 400 along a line of Robert Lilbourn's survey No. 8 to the beginning. 200 poles to inch; variation 30 min. west.

JOHN FERRY, *Assistant to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, certify that the foregoing is a true copy from the records of the surveyor's book in my possession and under my control, the surveyor being absent and having so seperate office at the court-house for the books & papers of his office.

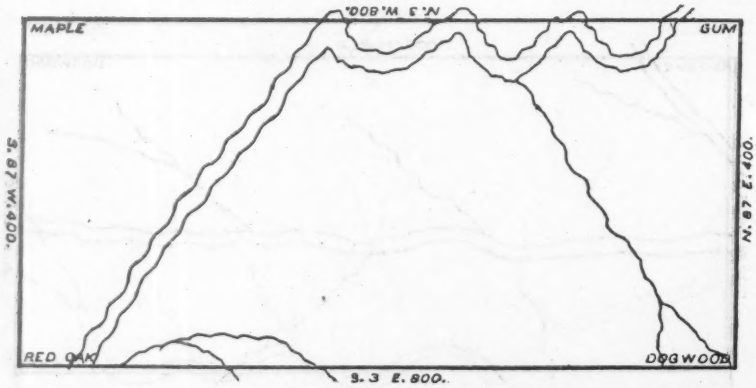
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

103 Also a copy of a survey made for Isaac Sedman in these words:

No. 9.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sedman, ass'ee of Col*l*o. William McWilliams, 2,000 acres of land in Harrison County on a land office treasury warrant, No. 15719, dated the 8th of May, 1783, on the waters of the right-hand fork of Hughes River and bounded as followeth, viz: Beginning at a red oak, corner to his survey No. 8; thence along a line of said survey S. 3 E. 800 poles to a dogwood; N. 87 E. 400 poles to a gum; N. 3 W. 800 to a maple; thence by a line of Robert Lelbourn's survey No. 9, S. 87 W. 400 poles to the beginning. 200 poles to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office.

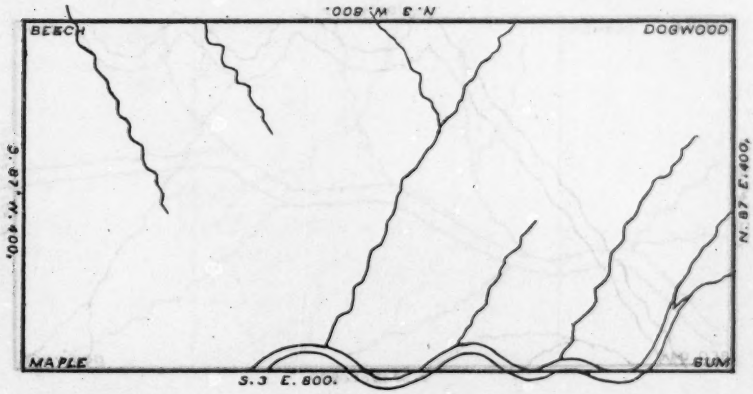
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

104 Also a copy of a survey made for Isaac Sidman in these words:

No. 10.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Thomas Gibson, ass'ee of Colo. William McWilliams, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 15722, dated the 8thMay, 1783, on Buzzard , at branch of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a maple, corner to his survey No. nine, and running thence south 3 east 800 poles along a line thereof to a gum; north 87 E. 400 to a dogwood; north 3 west 800 to a beech; south 87 W. 400 poles along a line of Robert Lelbourn's survey No. 10 to the beginning. 200 poles to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

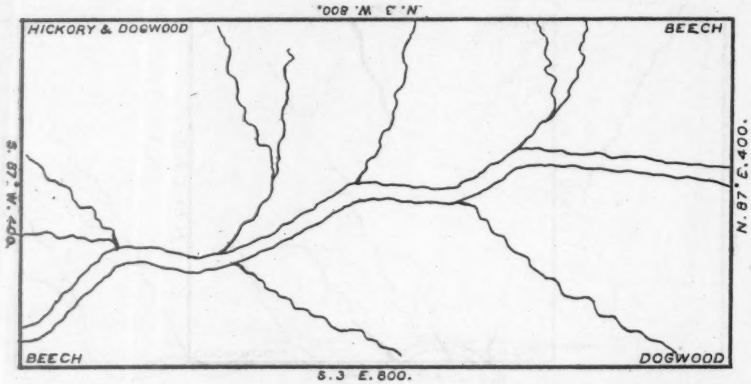
I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession & under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office.

28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

105 Also a copy of a survey made for Isaac Sidman in these words :

No. 11.



JUNE THE 8TH, 1785.

Surveyed for Isaac Sidman, ass'ee of Col. Wm. McWilliam, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 15733, dated the 8th day of May, 1783, on the Spruce Creek, a branch of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a beech, corner to his 10th survey, and running thence south 3 east along a line thereof 800 poles to a dogwood; north 87 east 400 to a beech; north 3 west 800 to a hickory & dogwood; south 87 west 400 poles along a line of Robert Lilburne's survey No. 10 to the beginning. 200 poles to inch; variation30 min. west.

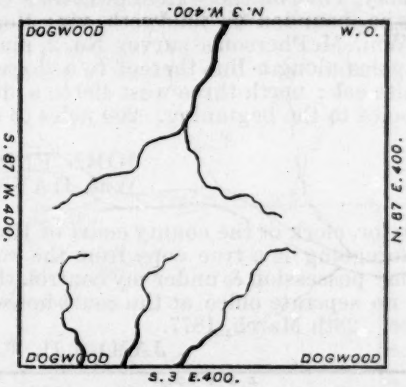
JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the for'going is a true copy from the records of the surveyor's books in my possession & under my control, the surveyor being absent and having no seperate office for the books & papers of his office. 28th March, 1878.

JAMES H. TAYLOR, *Clerk.*

106 Also a copy of a survey made for Samuel Young in these words:

No. 1.



JUNE 8TH, 1785.

Surveyed for Samuel Young, ass'ee of Alexander Dicks, 1,000 acres of land in Harrison County, on a land office treasury warrant, No. 16155, dated the 8th May, 1783, on the waters of Crow's Creek, a branch of the Little K'nawha, boundes as followeth, viz: Beginning at a dogwood, corner to Wm. McPherson's survey No. 2, and running thence south 3 degrees E. 400 poles along a line thereof to a dogwood; north 87° east 400 poles to a white oak; north 3° west 400 to a dogwood, and thence south 7° west 400 poles to the beginning. 200 poles to inch; variation 30 min. west.

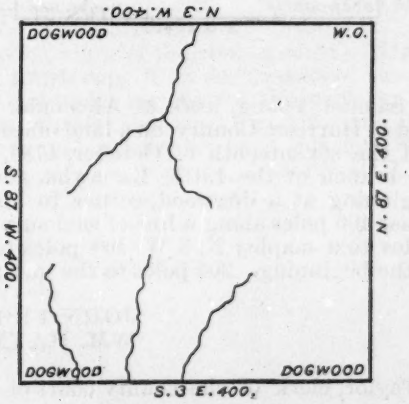
JOHN FERRY, *Ass't to*
T. HAYMOND, *S. H. C.*

A copy. Teste:

JAMES H. TAYLOR,
Clerk of the County Court of Harrison County, W. Va.

107 Also a copy of a survey made for Samuel Young in these words:

No. 1.



JUNE THE 8TH, 1785.

Surveyed for Samuel Young, ass'ee of Alexander Dick, 1,000 acres of land in Harrison County, on a land office treasury warrant, No. 16155, dated the 8th of May, 1783, on the waters of Crow's Creek, a branch of the Little Kanawha, bounded as followeth, viz: Beginning at a dogwood, corner to Wm. McPherson's survey No. 2, and running thence south 3 east 400 poles along a line thereof to a dogwood; north 87 E. 400 poles to a white oak; north three west 400 to a dogwood, & thence south 87 W. 400 poles to the beginning. 200 poles to inch; variation 30 min. west.

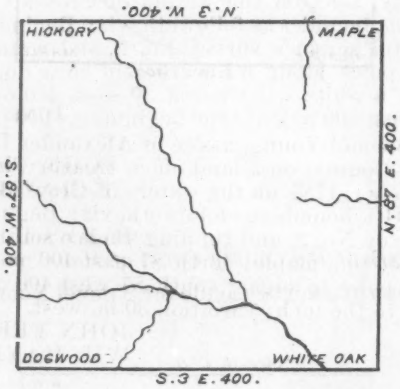
JOHN FERRY, *Ass't to,*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession & under my control, the surveyor being absent & having no seperate office at the court-house for the books & papers of his office. 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

108 Also a copy of a survey made for Samuel Young in these words:

No. 2.



JUNE THE 8TH, 1785.

Surveyed for Samuel Young, ass'e of Alexander Dick, 1,000 *thousand* acres of land in Harrison County, on a land office treasury warrant, No. 19929, dated the seventeenth of October, 1783, on the waters of Crow's Creek, a branch of the Little Kanawha, and bounded as followeth, viz: Beginning at a dogwood, corner to his survey No. 1, & thence south 3 east 400 poles along a line of said survey to a white oak; N. 87 E. 400 poles to a maple; N. 3 W. 400 poles to a hickory; S. 87 W. 400 poles to the beginning. 200 poles to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

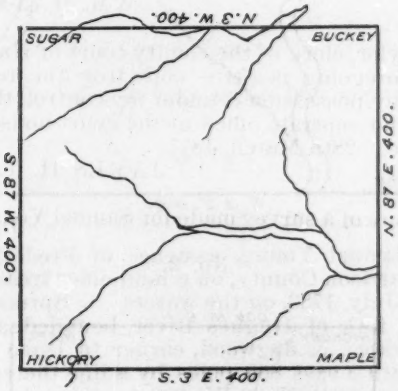
I, James H. Taylor, clerk of the county court of Harrison County,

do certify that the for'going is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office. Given under my hand 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

109 Also a copy of a survey made for Samuel Young in these words:

No. 3.



JUNE THE 8TH, 1785.

Surveyed for Samuel Young, ass'ee of Alexander Dick, 1,000 acres of land in Harrison County, on a land office treasury warrant, No. 19922, dated the 17 October, 1783, on the waters of Crow's Creek, a branch of the Little Kanawha, boundes as followeth, viz: Beginning at a hickory, corner to his survey No. 2, and running thence south 3 east 400 poles with a line thereof to a maple; north 87 east 400 poles to a buckeye; north 3 west 400 poles to sugar; south 87 west 400 poles to the beginning. 200 poles to the inch; variation 30 m. west.

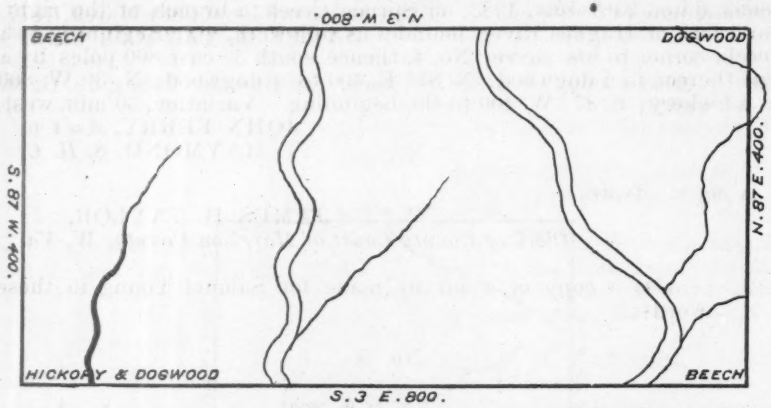
JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison, do certify that the above is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office. Given under *under* my hand this 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

110 Also a copy of a survey made for Samuel Young in these words:

No. 4.



JUNE 8TH, 1785.

Surveyed for Samuel Young, assignee of Frederick Stober, 2,000 acres of land in Harrison County, on a land-office treasury warrant, No. 18022, dated 23rd July, 1783, on the waters Spruce Creek, a branch of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a hickory & dogwood, corner to Isaac Sidman's, survey No. 11; thence south 3 east 800 poles by a line thereof to a beech; N. 87° E. 400 to a dogwood; N. 3° W. 800 to a beech; S. 87° W. 400 by a line of Robert Lilbourne's survey, No. 11, to the beginning. Variation 30 min. west.

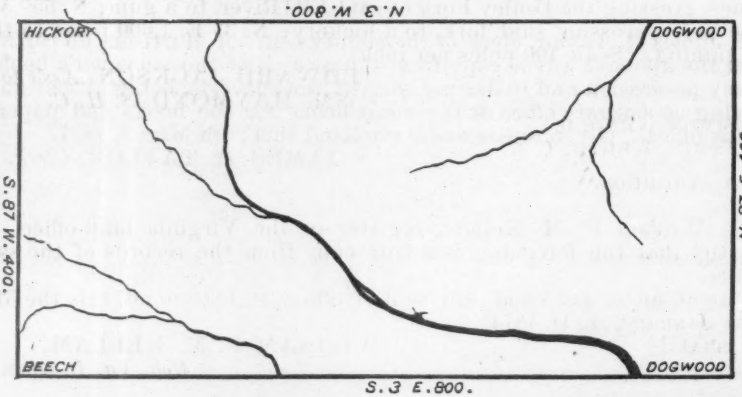
JOHN FERRY, *Ass't to*
T. HAYMOND, *S. H. C.*

A copy. Teste:

JAMES H. TAYLOR,
Clerk of Harrison County Court, W. Va.

111 Also a copy of a survey made for Samuel Young in these words:

No. 5.



JUNE THE 8TH, 1785.

Surveyed for Samuel Young, ass'ee of Alexander Ramsey, 2,000 acres of land in Harrison County, on a land-office treasury warrant, No. 18033, dated 23rd July, 1783, on Spruce Creek, a branch of the right-hand fork of Hughes River, boundes as followeth, viz: Beginning at a beech, corner to his survey No. 4, thence south 3° east 800 poles by a line thereof to a dogwood; N. 87° E. 400 to a dogwood; N. 3° W. 800 to a hickory; S. 87° W. 400 to the beginning. Variation, 30 min. west.

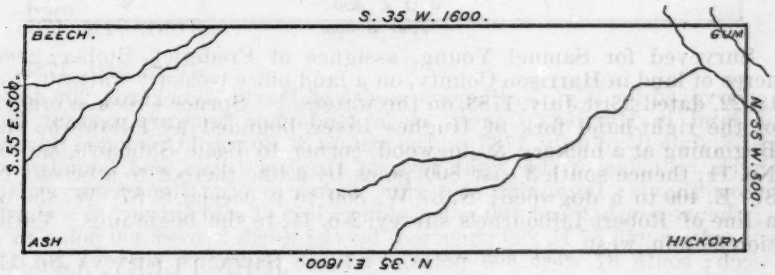
JOHN FERRY, *Ass't to*
T. HAYMOND, *S. H. C.*

A copy. Teste:

JAMES H. TAYLOR,
Clerk of County Court of Harrison County, W. Va.

112 Also a copy of a survey made for Samuel Young in these words:

No. 5.



4 JULY, 1785.

Surveyed for Samuel Young, ass'ee of David Davis, 5,000 acres of land in Harrison County, on a land-office treasury *treasury* warrant, No. 20101, dated 20 October, 1783, on the waters of Elk River, bounded as followeth, viz: Beginning at an ash, corner to his survey No. 4, which is on the Little Kanawha River, above Bull's Town; thence by a line of said survey S. 55° E. 500 poles to a beech; S. 35° W. 1,600 poles, crossing the Holley Fork of said Elk River, to a gum; N. 55° W. 500 poles, crossing said fork, to a hickory; N. 35 E. 1,600 poles to the beginning. Scale 400 poles per inch.

EDWARD JACKSON, *Ass't to*
WM. HAYMOND, *S. H. C.*

SIMON ARNOLD,
JAMES KEETH, *C. C.*

No variation.

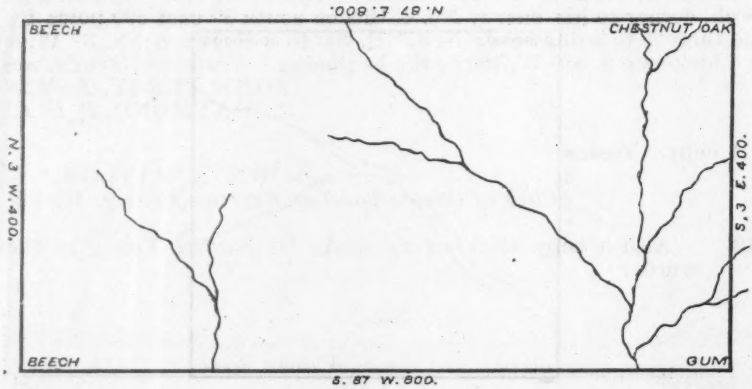
I, William P. M. Kellam, register of the Virginia land-office, do certify that the foregoing is a true copy from the records of the said office.

Given under my hand and seal of office, at Richmond, this the 31st day January, A. D. 1874.

[SEAL.] WILLIAM P. M. KELLAM,
Reg. Va. L. Office.

113 Also a copy of a survey made for Wm. McPhersin in these words:

No. 1.



JUNE 8TH, 1785.

Surveyed for Wm. McPherson, ass'ee of David Rynehardt, 200 acres of land in Harrison County, on a land-office treasury warrant, No. 18077, date 23 of July, 1783, on the waters of Buzzard Creek and Spruce Creek, branches of the right fork of Hughes River, and bounded as followeth, viz: Beginning at a gum, corner to Wm. Steuart survey No. 3; thence south 3 east 400 poles, along a line of said survey, to a chestnut oak; north 87 E. 800 poles to a beech; north 3 west 400 poles to a beech; south 87 west 800 poles, by Isaac Sedman's surveys No. 11, No. 10, to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY. *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office.

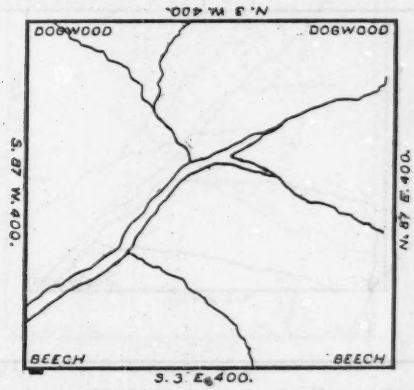
March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

114 Also a copy of a survey made for Wm. McPherson in these words:

No. 2.



JUNE THE 8TH, 1785.

Surveyed for William McPherson, ass'ee of Alexander Dick, 1,000 acres of land in Harrison County, on a land-office treasury warrant, No. 19911, dated the 17th of October, 1783, on Spruce Creek, a branch of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a beech, corner to his survey No. 1, and running thence south 3 east 400 poles, along a line thereof, to a beech; north 87 east 400 to a dogwood; north 3 W. 400 to a dogwood; thence south 87 west 400 poles, along a line of Samuel Young's survey No. 4, to the beginning. 200 to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

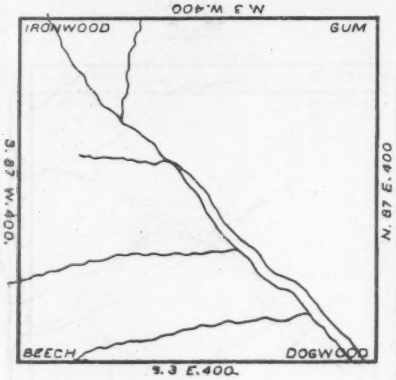
I, James H. Taylor, clerk of the county court of the county of Harrison, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office.

Given under my hand this 28th March, 1877.

JAMES H. TAYLOR, *Clerk.*

115 Also a copy of a survey made for William Steuart in these words:

No. 1.



JUNE 8TH, 1785.

Surveyed for William Setuart, ass'ee of Alexander Dix, 1,000 acres of land in Harrison County, on a land-office treasury warrant, N. 19914, date 17 October, 1783, on the waters of Richards Creek, and bounded as followeth, viz: Beginning at a beech on a line of Isaac Sidman's survey No. 6, thence S. 3 E. 400 poles, along said line, to a dogwood; thence N. 87 E. 400 poles to a gum; N. 3 W. 400 poles to an ironwood; thence S. 87 W. 400, along a line of Isaac Sidman survey No. 7, to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office.

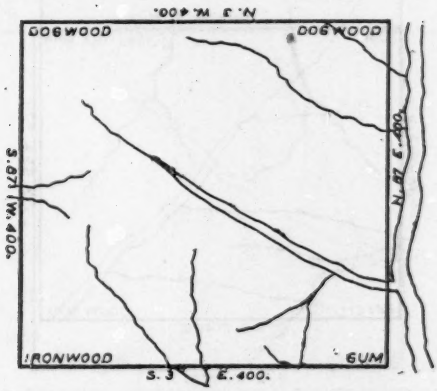
28 March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

116 Also a copy of a survey made for Wm. Steuart in thes' words:

No. 2.



JUNE 8, 1785.

Surveyed for William Stuats, ass'ee of Samu'l M. Brown, 1,000 acres of land in Harrison County, on a land-office treasury warrant, No. 16388, dated the 13th May, 1783, on the waters of Richard Creek, a branch of the Little Kanawha, bounded as followeth, viz: Beginning at ironwood, corner to his survey No. 1, and running thence south 3 east, along a line thereof, 400 poles to a gum; north 87 E. 400 poles to a dogwood; north 3 west 400 poles to a dogwood; south 87 west 400 poles, along a line of Isaac Sidman's survey No. 8, to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession & under my control, the surveyor being absent and having no separate office at the court-house for the books and papers of his office.

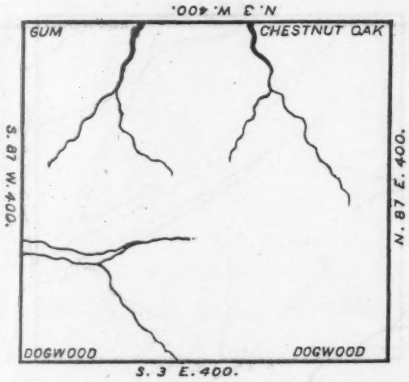
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

117 Also a copy of a survey made for Wm. Stuart in these words:

No. 3.



JUNE THE 8, 1785.

Surveyed for William Steaurt, ass'ee of Samuel M. Brown, 1,000 acre' of land in Harrison County, on a land-office treasury warrant, No. 16390, dated the 13th May, 1783, on the waters of Buzzard Creek, a branch of the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a dogwood, corner of a survey, No. 2, and running south 3 E. 400 poles, along a line thereof, to a dogwood; north 87 east 400 to a chestnut oak; north 3 west 400 to a gum; S. 87 W. 400 poles, along a line of Isaac Sidman's survey No. 9, to the beginning. 200 poles to the inch; variation 30 min. west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent, and having no seperate office at the court-house for the books & papers of his office.

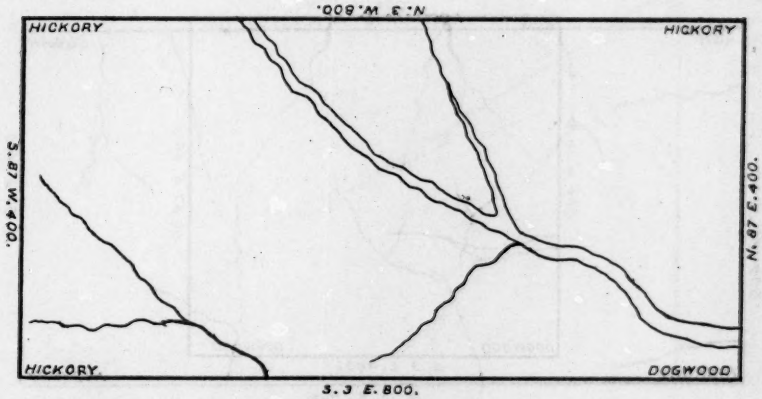
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

118 Also a copy of a survey made for Thom & Boden in these, words:

No. 1.



JUNE 8, 1785.

Surveyed for Messrs. Thume & Boden, ass'ee of Alexander Russel ass'ee of David Anderson, 2,000 acres of land in Harrison County, on part of a land-office treasury warrant, 6,000 acres, No. 18965, dated the 29 of August, 1783, on the waters of Crow's Creek, a branch of the Little Kanawha, bounded as follows, viz: Beginning at a hickory, corner to a survey to Samuel Youngs, No. 5, and running thence south 3 east 800 poles, along a line thereof, to a dogwood; north 87 E. 400 to a hickory; north 3 west 800 to a hickory; south 87 west 400 poles to the beginning. 200 poles to the inch; variation 30 minutes west.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the surveyor's books in my possession and under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office.

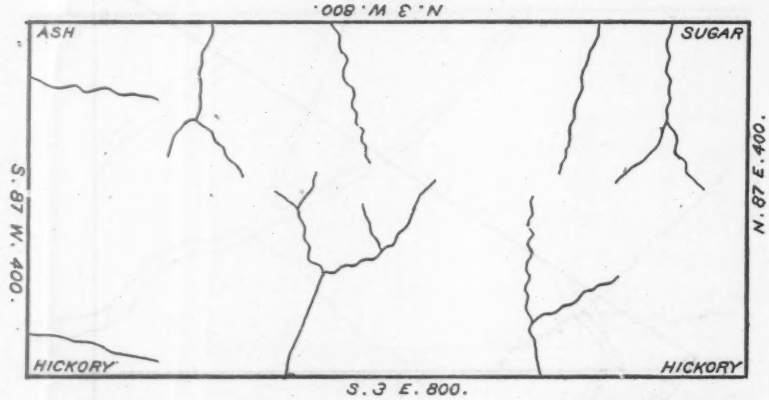
28th March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

119 Also a copy of a survey made for Thum & Boden in these words:

No. 2.



JUNE 8TH, 1785.

Surveyed for Messrs. Thum & Boden, assignee of Alexander Russell, assignee of David Anderson, 2,000 acres of land in Harrison County, on part of a land-office *office* treasury , of 6,000 acres, No. 18965, dated 29th of August, 1783, on waters of Crow's Creek and waters of Hughes River, bounded as followeth, viz: Beginning at a hickory, corner to their survey No. 1, thence south 3 east 800 poles, by a line thereof, to a hickory; north 87 east 400 poles to a sugar-tree; north 3 west 800 poles to an ash; S. 87 W. 400 poles to the beginning. Variation 30 min. west.

JOHN FERRY, *Assistant to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true from the records of the surveyor's books in my possession & under my control, the surveyor being absent and having no seperate office at the court-house for the books & papers of his office.

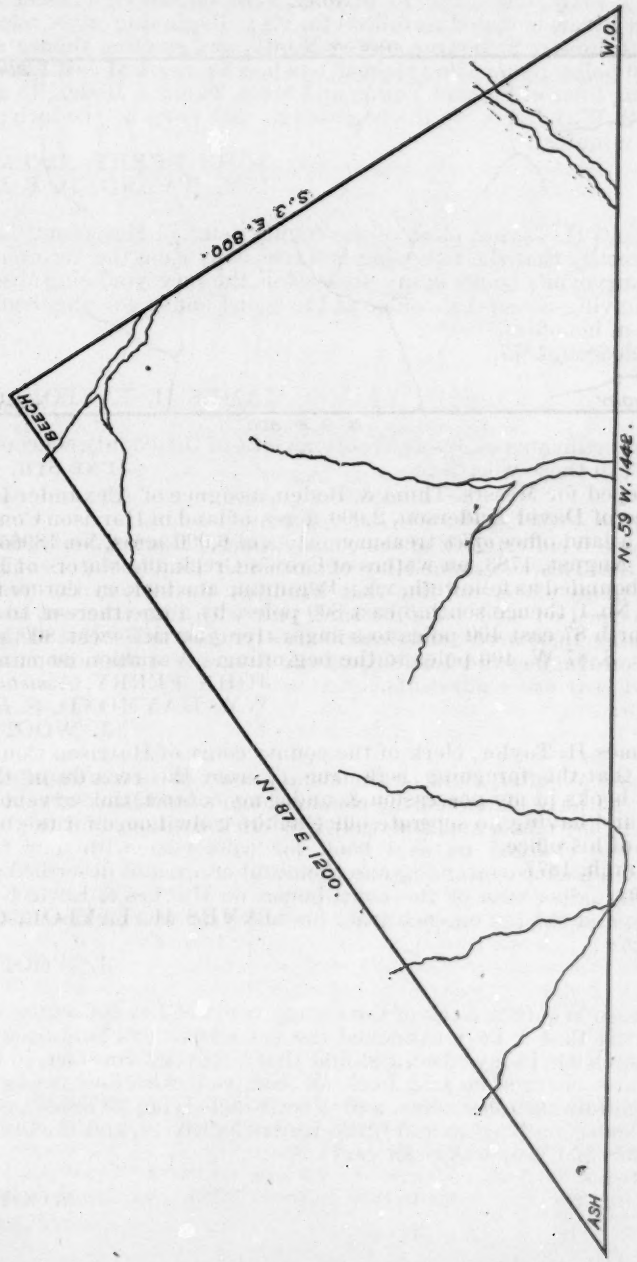
28 March, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

120 Also a copy of a survey made for Thum & Boden in these words:

No. 5.



JUNE 8TH, 1785.

Surveyed for Messrs. Thum & Boden, ass'ee of Samuel M. Brown, 3,000 acres of land in Harrison County, on a land-office treasury warrant, No. 16415, dated the 15 of May, 1783, on the right-hand fork of Hughes River, bounded as followeth, viz: Beginning at a white-oak, corner to Robert Selbourne survey No. 12, and running thence south 3 east 800 poles, along a line thereof, to a beech; north 87 east 1,200 poles, adjoining lines of Samuel Young and Mess. Thum & Boden, to an ash; north 59, W. 1,442 to the beginning. 200 poles to the inch; variation 30 minutes.

JOHN FERRY, *Ass't to*
WM. HAYMOND, *S. H. C.*

I, James H. Taylor, clerk of the county court of Harrison County, do certify that the foregoing is a true copy from the records of the
121 surveyor's books in my possession, the surveyor being absent and having no seperate office at the court-house for the books and papers of his office.

March 28th, 1877.

Teste:

JAMES H. TAYLOR, *Clerk.*

Also certificates of Jessie Woofter, clerk of the county court of Lewis County, in these woords:

STATE OF WEST VIRGINIA:

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner' land-books of said county, on file in my office, and find that Fredrick Switzer, in the year 1823, was charged on said book for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER.

I, Jesse Woofter, clerk of the county court of Lewis County, do certify that I have examined the commissioner's land-book of said county, on file in my office, and find that Frederick Switzer, in the year 1824, was charged on said book for said year with four tracts of
122 land, each containing one thousand acres, and described as lying 30 miles west of the court-house, on Hughes & Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER.

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-book of said county, on file in my office, and find that Frederick Swetzer, in the year 1825, was charged on said book for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER.

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-book of said county, on file in my office, and find that Frederick Switzer, in
123 the year 1826, was charged on said book for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER,

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-books of said county, on file in my office, and find that Frederick Swtizer, in the year 1827, was charged on said book for said year with four tracts of land, each containing one thousand acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER,

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-books of
124 said county, on file in my office, and find that Frederick Switzer, in the year 1828, was charged on said book for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER,

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-books of said county, on file in my office, and find that Frederick Swetzer, in the year 1829, was charged on said book for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles west of the court-house, on Hughes and Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER.

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-books of
125 said county, on file in my office, and find that Frederick Swetzer, in the year 1830, was charged on said book for said year with four tracts of land, each containing one thousand acres, and described as lying 30 miles west of the court-house, on Hughes & Little Kanawha Rivers, and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTER.

I, Jesse Woofter, clerk of the county court of Lewis County, do hereby certify that I have examined the commissioner's land-books of said county, on file in my office, and find that Frederick Swetzer, in the year 1831, was charged on said books for said year with four tracts of land, each containing 1,000 acres, and described as lying 30 miles

west of the court-house, on Hughes & Little Kanawha Rivers, a
tax on each tract for said year was eight cents.

Teste:

J. WOOFT

I, Jesse Woofter, clerk of the county court of Lewis Count
hereby certify that I have examined the commissioner's land-
of said county, on file in my office, and find that Fred
126 Swetzer, in the year 1832, was charged on said books for
year with four tracts of land, each containing 1,000 acres,
described as lying 30 miles west of the court-house, on Hughes
Little Kanawha Rivers, and the tax on each tract for said year
eight cents.

Teste:

J. WOOFTE

I, Jesse Woofter, clerk of the county court of Lewis County,
hereby certify that I have examined the commissioner's land-book
said county, on file in my office, and find that Frederick Swetze
the year 1833, was charged on said books for said year with four tr
of land, each containing one thousand acres, and described as lyin
miles west of the court-house, on Hughes and Little Kanawha Riv
and the tax on each tract for said year was eight cents.

Teste:

J. WOOFTE

I, Jesse Woofter, clerk of the county court of Lewis County,
hereby certify that I have examined the commissioner's la
127 books of said county, on file in my office, and find that Frede
Swetzer, in the year 1834, was charged on said books for
year with four tracts of land, each containing 1,000 acres, and descri
as lying 30 miles west of the court-house, on Hughes and Little
nawha Rivers, and the tax on each tract for said year was eight ce

Teste:

J. WOOFTE

Also a certificate of the auditor of public accounts for the Comm
wealth of Virginia, in these words:

COMMONWEALTH OF VIRGINIA,
Office of the Auditor of Public Accounts:

RICHMOND, VA., *June* 3, 187

I, William F. Taylor, auditor of public accounts for the Comm
wealth of Virginia, hereby certify that I have caused the records of
office to be carefully examined, and that it appears from the land-bo
of the commissioners of the revenue for the county of Lewis, forme
in the Commonwealth of Virginia, but now in the State of West
ginia, for the year 1817, 1818, 1819, 1820, & 1821, that Frederick Sw
zer is not assessed and charged with taxes on any tract of land.

Given under my hand the day and year above written.

WM. F. TAYLOR,
Aud. Pub. Acc'ts

128 The deposition of George Swetzer, takin on the 20th day
August, 1875, and filed by the plaintiff, to be read in the cau
is as follows:

And the said GEORGE SWETZER, being carefully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, saith in answer to the following questions:

1st question by the plaintiff, WM. WILLSHIRE RILEY:

State where you reside, your age, and occupation.

Answer. I reside the city of Columbus, county of Franklin, State of Ohio; my occupation, dentistry; my age, fifty-five years.

2nd. State whether yourself, Samuel Swetzer, and Palley Waggoner were the reputed children and heirs-at-law of Frederick Swetzer, deceased.

Answer. We were the children and heirs-at-law of Frederick Swetzer, deceased; the said Polley Waggoner was my half sister; we both had one father (said Frederick Swetzer). She married one Abram Waggoner ten or twelve years before our father's death.

3rd. How many acres of land did your father own in West Virginia, on the waters of Hughes River and Little Kanawha River, now
129 Richie and Gilmer Counties?

Answer. I always understood it to be five thousand acres—four thousand in Richie County and one thousand acres in Gilmer County, of Samuel Young's survey.

4th. When did your father die, and did he own said land at his death?

Answer. My father died about the year 1823, and he was the owner of said land at his death.

5th. What did you and your brother and said sister do with said land after your father's death?

Ans. We all sold our interests in said lands to William Willshire Riley, as I believe. I sold my interest to him, said Riley.

6th. What acts of ownership, if any, did you exercise over said lands from the time of your father's death until you sold to said Riley?

Answer. I had the land surveyed. I paid the arrearage of taxes and penalties on it, according to the instructions of auditor of State about the year 1847, or between the years 1847 to 1850. I sold 200 acres of the land to J. R. Goff on the 22nd September, 1853, and when
130 the time for payment came due, which was about the 1st of April, 1854, I went to see him to get the payment he was to make me, but he was not able to pay me, and he had made an improvement on one hundred acres of it, which he offered me in payment, and I took it, and he conveyed back to me one hundred acres of the land which he had improved, and I let him keep the other one hundred acres. I then rented to him the one hundred acres he had conveyed to me, for fifty dollars a year. I gave him a written lease at that rate for the land, and when I sold the land to said William Wilshire Riley I transferred the lease to him.

And further affiant saith not.

GEORGE SWETZER.

Also the deposition of JOHN W. F. HOLT, taken on the twelfth day of September, 1876, and filed by said plaintiff, to be read as evidence in the trial of this cause, is as follows:

And JOHN W. F. HOLT, a witness for the said plaintiff, of lawful age, being first duly sworn, deposes and says:

1st inter'ogatory by pl'ff. Examine the following deeds and patents, to wit: Deed for Jesse Millhous to Frederick Switzer, dated 16th
131 March, 1789; patent from the Commonwealth of Virginia to Samuel Young, assignee of Alexander Ramsey, dated nineteenth

July, 1786; patent from the Commonwealth of Virginia to Samuel Young, assignee of Frederick Stover, dated 19th July, 1786; deed from Samuel Young to Jacob Miller, dated 14th January, 1797; deed from John Hart to Samuel Young, dated 12th January, 1797; and deed from Jacob Miller to Frederick Swisher, dated 23d November, 1800, and state whether or not you ever saw those deeds and patents before; and, if so, when, under what circumstances?

Answer. I saw these papers in the hands of George Swetzer, about the year 1850 or 1851. At that time he delivered them to me, and they remained in my hands some two or three years.

2d inter'ogatory. State why they were delivered to you.

Answer. They were delivered to me for the purpose of identifying the land. I was acting as his agent.

3d inter'ogatory. What land do you refer to?

Answer. The land mentioned in said deeds and patents.

4th inter'ogatory. State whether you were ever upon the land,
132 exercising acts of control over said land, in pursuance of your agency.

Answer. I was upon the land, and claimed the land for Swetzer.

5th inter'ogatory. State who resided upon the land, and under whose claim they entered and held the same.

Answer. The old man Frederick lived upon the land, and one or two of his sons; also Philander S. Austin lived upon the land; also Henry Fling, Strother G. Goff, and there may have been others, but I do not now remember them. The old man Frederick, as I understood from him, was holding under Switzer, and Strother G. Goff held under Switzer, after I sold to him as agent for Swetzer; that is to say, the old man Frederick said that he entered under the old man Swetzer and held under him.

6th inter'ogatory. State, if you know, when the old man Frederick and the other parties named by you entered upon said land.

Answer. My impression is it was about the year 1835 or 1836
133 when the old man Frederick moved upon said land. Strother G. Goff and his son entered upon the land, I think, about the year 1851 or 1852. I do not know with accuracy when the others entered.

7th inter'ogatory. State whether you was frequently upon said land after you became his agent.

Answer. I was.

8th inter'ogatory. State whether your claim of said land, on behalf of the Swetzers, was open and notorious, and whether you sold any of said land and placed the purchaser in the possession of the land so sold.

Answer. My claims as such agent was open and notorious, and I sold a portion of the land to James R. Goff, his father, Strother G. Goff, acting in the purchase as his agent, and he remained in possession under his purchase. Strother G. Goff has my title-bond, evidencing the contract, and I have the notes.

8th inter'ogatory. State whether the papers hereinbefore referred to were all the papers handed to you, and if there were any other papers please specify them.

134 Answer. There were a good many other papers handed me other than those referred to, among which was various tax receipts & redemption receipts, and redemption receipts from auditors, letters, and memorandums concerning the land, and my impression is that there

were other deeds than those referred to, all which I returned back to George Swetzer.

9th inter'ogatory. State, if you know, whether George Swetzer, or any other of the heirs of Frederick Swetzer, were ever upon said land lying on Grass Run.

Answer. I know that George Swetzer was upon the land, claiming it as one of the heirs of Frederick Swetzer. He was there two or three times to my knowledge, and I heard of him being there beyond the times named.

10th inter'ogatory. State, if you recollect, particularly of the deed of Jacob Miller to Frederick Swetzer, as one of the papers handed to you as agent, and which you subsequently returned to George Swetzer.

135 Answer. My impression is that that deed was among the papers handed to, and which I returned to Swetzer.

11th inter'ogatory. Have you any doubt of the fact that the deed now exhibited is the same deed received by you and returned to said George Swetzer?

Answer. I have no doubt. According to my best recollection it is the same deed.

And further this deponent saith not.

J. F. W. HOLT.

136 The defendants, in support of the issue joined on their part in this cause, gave in evidence to the jury a deed, from D. W. Sleeth and wife to Philip J. Frederick, in these words:

Deed.

This deed, made the 19th day of March, 1851, by and between David W. Sleeth and Elizabeth, his wife, of the first part, and Philip J. Frederick, of the second part, all of the county of Ritchie and State of Virginia, witnesseth that for and in consideration of two hundred dollars, to him in hand paid, the said D. W. Sleeth and wife doth grant unto the said Philip J. Frederick all of a certain tract or parcel of land lying on Grass Run, in the *the* county and State aforesaid, and bounded as follows: Beginning at a rock and beech, corner to Samuel B. Frederick, and with three of his lines N. 75 W. 92 poles to a rock at the turnpik'; S. 15 W. 16 to a stake; N. 55 W. 72 to a stone on the north side of Grass Run, corner to Nicholas W. Frederick; and with three of his lines S. 45 W. 11 to sycamore; west 60 to a dogwood; S. 15 130 to a stake; S. 75 E. 226 pole' to a stone pile and pointers; N. 15 E.
137 148 to the beginning; containing two hundred acres, more or less; to have and to hold the above described premises with its appurtenances to the said Philip J. Frederick and his heirs forever. And the said D. W. Sleeth binds himself to warrant and defend the same against all persons and claims whatsoever. Witness the following seals and signatures.

DAVID W. SLEETH. [SEAL.]
ELIZABETH SLEETH. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid and State of Virginia, do hereby certify that David W. Sleeth, party to a certain deed bearing date the 19th day of March, 1851, and hereunto annexed, personally appeared before us in our

county aforesaid, and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgement to the clerk of the county court of Ritchie County, in order that the said deed may be recorded. Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

138 We, Benjamin Webb and Andrew Law, justices of the peace in the county and State aforesaid, do hereby certify that Elizabeth Sleeth, wife of David W. Sleeth, party to a certain deed bearing date on the 19th day of March, 1851, and hereunto annexed, personally appeared before us in our county aforesaid, and being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Elizabeth Sleeth, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it. Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, do hereby certify that the foregoing deed of sale from D. W. Sleeth & wife to Philip J. Frederick, for 200 acres of land lying in Ritchie County on Grass Run, was presented in the clerk's office on the 15th day of August, 1851, together with the proper certificate of acknowledged thereof tax paid, and admitted to record.

Teste: JAMES McKINNEY, *Clerk.*

139 Also a deed of D. W. Sleeth & wife to N. Frederick in these words:

Deed.

This deed, made the 19th day of March, 1851, between David W. Sleeth and Elizabeth, his wife, of the first part, and Nicholas H. Frederick, of the second part, both of the county of Ritchie and State of Virginia, witnesseth that in consideration of two hundred dollars, to him in hand paid, the said D. W. Sleeth doth grant unto the said Nicholas H. Frederick all of a certain tract or parcel of land lying on Grass Run, in the county and State aforesaid, bounded as follows, to wit: Beginning at a white oak and pointers, the N. W. corner of D. W. Sleeth's original tract of 2,000 ar., thence with the west line of the same S. 15° W. 296½ pole' to a beech; then leaving said line S. 75 E. 84 p's to a stake; N. 15 E. 130 p's to a dogwood; east 60 to a sycamore on the south bank of Grass Run; N. 45 E. 11, crossing said run to a stone; then with two lines of Samuel Frederick, N. 29½ E. 38½ p's a buckeye; N. 1½ E. 118 to two dogwoods on the north line of the original tract, and with it N. 75 W. 155 to the beginning; containing two hundred acres,
140 more or less; to have and to hold the above described premises to the said Nicholas H. Frederick and his heirs forever. And the said D. W. Sleeth binds himself to warrant and defend the same against all persons and claims whatsoever.

Witness the following signatures and seals:

DAVID W. SLEETH, [SEAL.]
ELIZABETH SLEETH. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, do hereby certify that David W. Sleeth and Elizabeth, his wife, parties to a certain deed bearing date the 19th day of March, 1851, and hereunto annexed, personally appeared before us in our county aforesaid, and acknowledged the same to be their act and deed; and the said wife being examined by us privily and apart from her said husband, and having the deed fully explained to her, declared that she had willingly signed, sealed, and delivered the same, and that they desired us to certify the same to the clerk of the county court, to be recorded.

141 Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, do hereby certify that the foregoing deed of sale from D. W. Sleeth and wife to Nicholas H. Frederick, for 200 acres of land, lying in Ritchie County, of Grass Run, was presented in the clerk's office on the 15th day of August, 1851, together with the certificate of acknowledgment thereof, tax paid, and admitted to record.

Teste: JAMES McKINNEY, *Clk.*

Also a deed of D. W. Sleeth and wife to S. B. Frederick in these words:

This deed, made the 19th day of March, 1851, by and between David W. Sleeth and Elizabeth, his of the one part, and Samuel B. Frederick, of the other part, all of the county of Ritchie and State of Virginia, witnesseth that for and in consideration one hundred and seventy-five dollars, to him in hand paid, the said D. W. Sleeth and wife doth grant unto the said Samuel B. Frederick all of a certain tract or parsel of land lying on Grass Run, in the county and State aforesaid,
142 and bounded as follows: Beginning at a rock and beech, corner to Philip J. Frederick, 46 pole', south of the turnpike; thence N. 15° E. 168 p's to the north line of said Sleeth's tract, and with it N. 75 W. 178 p's to 2 dogwoods, corner to Nicholas H. Frederick and with two of his lines S. 1½ W. 118 p's to a buckeye; S. 29½ W. 38½ to a stone, corner to Philip J. Frederick; and with 3 of his lines S. 55 E. 72 p's to a stake; N. 15 E. 16 to a stone at the south side of the turnpike; S. 75 E. 92 to the beginning; containing 175 acres, more or less; to have and to hold the above-described premises with the appurtenances thereto belonging to the said Samuel B. Frederick and his heirs forever. And the said D. W. Sleeth binds himself to warrant and defend the same against all persons and claims whatsoever.

Witness the following seals and signatures.

DAVID W. SLEETH. [SEAL.]
ELIZABETH SLEETH. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, do hereby certify that David W. Sleeth and Elizabeth, his wife, parties to a certain deed bearing the 19th day of March,
143 1851, and hereunto annexed, personally appeared before us, in

our county aforesaid, and acknowledged the same to be their act and deed; and the wife being examined by us privily and apart from her said husband, and having the deed fully explained to her, declared that she had willingly signed, sealed, and delivered the same, and that wished not to retract it, and that they desired us to certify the same to the clerk of the county court, to be recorded.

Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, certify that the foregoing deed of sale from D. W. Sleeth to S. B. Frederick for 175 acres of land, lying on the south fork of Hughes River, was presented in my office on the 8th day of July, 1851, together with the certificate of acknowledgment thereof, tax paid, and admitted to record.

Teste: JAMES McKINNEY, *Clk.*

144 Also a deed of F. M. Sleeth to F. W. Callins in these words:

[Inter. revenue, 50c. F. M. S., Feb. 6th, 1865.]

Deed.

This deed, made the 6th of February, 1865, by and between Floyd M. Sleeth, of the county of Ritchie and State of West Virginia, of the first part, and Felix W. Callins, of the above county and State written, of the second part, witnesseth, that for and in consideration of the sum of three hundred and forty-two dollars and twenty-one ct's, to him in hand paid, the said Floyd M. Sleeth doth grant, bargain and sell unto the said Felix W. Callins the following lot or parcel of land, viz., being situated on Leather Bark Creek, Ritchie County, West Virginia, adjoining W. B. Cunningham, Sleeth and others: Beginning at a gum, corner to Sleeth's 1,001 acre tract; thence S. 44 W. 134 p's to a white oak; thence S. 19 W. 40 p's to a white oak; thence N. 75½ W. 56 p's, crossing said Leather Bark Creek, to a small sycamore standing in a bend of said creek; thence down said creek S. 79 W. 30 p's to a red oak, corner to W. B. Cunningham's survey; thence with two of his lines N. 48 W. 21 p's to a beech; thence N. 31½ E. 22 p's to a stake and pointers; thence N. 15 E. 138 p's, crossing the road leading from
145 Leather Bark Creek to the pike, to a stake and pointers; thence S. 73½ E. 177 p's to the beginning; containing one hundred and thirty-seven acres.

To have and to hold all of the above-described tract or parcel of land, with its appurtenances, to the said Felix W. Callins and his heirs forever. And the said Floyd M. Sleeth covenants and binds himself and his heirs to warrant and defend the same against all persons and claims whatsoever.

Witness the following seal and signature:

FLOYD M. SLEETH. [L. S.]

STATE OF WEST VIRGINIA, *ss:*

I, James McKinney, recorder in and for the county of Ritchie, in the State aforesaid, do certify that Floyd M. Sleeth, whose name is signed to the above writing, bear*reed* date on the 6th day of February, 1865,

has acknowledged the same before me in my office in the county and State aforesaid.

Given under my hand this 6th day of February, 1865.

JAMES McKINNEY, *R. R. C.*

WEST VIRGINIA, *ss:*

I, James McKinney, recorder of Ritchie County, in the State aforesaid, do certify that the foregoing deed and certificate were
146 duly admitted to record this 4th day of May, 1865, in deed book No. 8, page 545.

Teste:

JAMES McKINNEY, *R. R. C.*

Also a deed of D. W. Sleeth & wife to Levi Fling in these words:

Deed.

This indenture, made the 19th day of March, 1851, between David W. Sleeth and Elizabeth, his wife, of the county of Ritchie and State of Virginia, of the one part, and Levi Fling, of the county aforesaid and State aforesaid, of the other part, witnesseth, that the said David W. Sleeth and Elizabeth, his wife, for and in consideration of the sum of two hundred dollars, lawful money of Virginia, to them in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release and confirm unto said Levi Fling, his heirs and assigns forever, all of a certain tract or parcel of land, containing ninety-five acres, more or less, situate on the waters of Grass Run, with all its appurtenances, lying and being in the county of Ritchie and State of Virginia, and bounded as follows, to wit: Beginning at a white oak, the S. E. corner of
147 said Sleeth's survey of 2,000 acres; thence with the east line of the same N. 15 E. 126 poles to a beech; then le'ving said line N. 74 W. 118 to a gum; S. 16 W. 131 to pointers on the south line of S. Sleeth's survey, and with it S. 75 E. 118 to the place of beginning.

To have and to hold the above-described tract of land, with the appurtenances, to the said Levi Fling, his heirs and assigns forever, to and for the only proper use and behoof of the said Levi Fling, his heirs and assigns forever. And the said David W. Sleeth and wife, for them, their heirs, &c., doth hereby covenant to and with the said Levi Fling, his heirs and assigns forever, that they will forever warrant and defend the above-described premises to the said Levi Fling, his heirs and assigns forever, against all persons and claims whatsoever.

In testimony whereof the aforesaid David W. Sleeth and his wife hath hereunto set their hands and seals the day and year above written.

DAVID W. SLEETH. [SEAL.]
ELIZABETH SLEETH. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

148 We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that David W. Sleeth, party to a certain deed bearing date the 19th day of March, 1851, and hereunto annexed, personally appeared before us in

our county aforesaid and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgment to the clerk of the county court of Ritchie County, in order that the said deed may be recorded.

Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that Elizabeth Sleeth, the wife of David W. Sleeth, party to a certain deed bearing date on the 19th day of March, 1851, and hereunto annexed, personally appeared before us in our county aforesaid, and being examined by *es* privily and apart from her husband, and having the deed
149 aforesaid fully explained to her, she, the said Elizabeth Sleeth, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, certify that the foregoing deed of sale from D. W. Sleeth and wife to Levi Fling, for 95 acres of land (more or less) lying on the waters of Grass Run, was presented in my office on the 19th day of Sept., 1851, together with the certificates of acknowledgment thereof, tax paid, and admitted to record.

Teste:

JAMES McKINNEY, *Clk.*

Also a deed of L. A. Phelps to Cyrus Hall in these words:

This indenture, made the 17th day of January, in the year of our Lord one thousand eight hundred and fifty-two, between Lewis A.
150 Phelps, of the county of Ritchie and *and* State of Virginia, of the first part, and Cyrus Hall, of the *the* county and State aforesaid, of the other part, witnesseth that the said party of the first part, for and in consideration of the sum of one hundred dollars paid by the said party of the second part to said party of the first part, the receipt whereof is hereby acknowledged, hath granted, bargained and sold to said party of the second part all that certain piece, parcel or tract of land lying and being in the county of Ritchie, State of Virginia, situate on Leather Bark Creek, a tributary of the south fork of Hughes River, and described as follows, it being one undivided third part of three surveys pattented to Lewis A. Phelps lying on Leather Bark Creek aforesaid, and it being one undivided third part of the same tract of land which said Phelps heretofore conveyed to said Hall, which several surveys as aforesaid contained in the whole one thousand acres, the third part of the aforesaid surveys containing three hundred thirty-three and one-third acres.

To have and to hold all the one undivided third part of the above-
151 described land to and for the only proper use and be*be*hoof of the said party of the second part, his heirs and assigns forever. And

the said party of the first part will forever warrant and defend the above-described tract of land against all persons claiming the same through, by, or under him.

In witness whereof the said party of the first part has hereunto set his hand and seal this day and year first above written.

LEWIS A. PHELPS. [SEAL.]

Also a deed of D. W. Sleeth & wife to Henry Fling in these words:

This indenture, made the 19th day of March, 1851, between David W. Sleeth and Elizabeth, his wife, of the county of Ritchie and State of Virginia, of the one part, and Henry Fling, of the county of and State aforesaid, of the other part, witnesseth that the said David W. Sleeth and Elizabeth, his wife, for and in consideration of the sum of two hundred dollars lawful money of Virginia to them in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, re*f*eased and confirmed, and by these presents
152 doth grant, bargain, sell, alien, enfeoff, release and confirm unto said Henry Fling, his heirs and assigns forever, all of a certain tract or par*s*al of land lying on the waters of Grass Run, with its appurtenances, lying and being in the county of Ritchie and State of Virginia, and bounded as follows, to wit: Beginning at a beech tree, the second corner to John Fling, on the east line of said Sleeth's survey, and 15 pol's south of a run; thence N. 15 E. 145 p'l's to pointers; then leaving Sleeth's outline N. 75 W. 118 to a white oak*e* on Fisher's line; then S. 15 W. 140 to a gum, corner to John Fling; and, with his line reversed, S. 75 E. 118 p's to the place of beginning; containing 105 acres, be the same more or less; to have and to hold the above-described tract or par*s*al of lands, with the app*e*rtenances, to the said Henry Fling, his heirs and assigns forever, to and for the only proper use and behoof of the said Henry Fling, his heirs and assigns forever. And the said David W. Sleeth and wife for them and their heirs, &c., doth hereby covenant to and
153 with the said Henry Fling, his heirs and assigns forever, that they will forever warrant and defend the above-described tract of land to the said Henry Fling, his heirs and assigns forever, against all persons and claims whatsoever.

In testimony whereof the aforesaid David W. Sleeth and wife hath hereunto set their hands and seals the day and year above written.

DAVID W. SLEETH. [SEAL.]
ELIZABETH SLEETH. [SEAL.]

VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that David W. Sleeth, party to a certain deed bearing date the 19th day of March, 1851, and hereunto annexed, personally appeared before us, in our county aforesaid, and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgment to the clerk of the county court of Ritchie County, in order that the said deed may be recorded.

Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

154 VIRGINIA,
Ritchie County, to wit:

We, Benjamin Webb and Andrew Law, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that Eliza-

beth Sleeth, the wife of David W. Sleeth, party to a certain deed bearing date on the 19th day of March, 1851, and hereunto annexed, personally appeared before us, in our county aforesaid, and being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Elizabeth Sleeth, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 19th day of March, 1851.

BENJ. WEBB, *J. P.* [SEAL.]
ANDREW LAW, *J. P.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, do hereby certify that the foregoing deed of sale from David W. Sleeth and wife to Henry Fling, for 105 acres of land lying in Ritchie County
155 on Grass Run, was presented in the clerk's office on the 7th day of August, 1851, together with the certificate of acknowledgement thereof, tax paid, and admitted to record.

Teste:

JAMES McKINNEY, *Clk.*

Also a deed of Robert Tibbs and wife to Henry Fling in these words:

[50. 50.]

This indenture, made this 25th day of February, one thousand eight hundred and sixty-seven, between Robert Tibbs and Susan, his wife, of the first part, and Henry Fling, of the second part, all of the county of Ritchie and State of West Virginia, witnesseth:

That for and in consideration of six hundred dollars to them in hand paid by the said Henry Fling to the said Robert Tibbs and Susan, his wife, doth grant unto the said Henry Fling with covenants of general warranty the following tract or parcel of land lying on Grass Run, a branch of the south fork of Hughes River, in the county of Ritchie and State of West Virginia, and bounded as follows: Beginning at a chestnut oak on a ridge on the south side of said run, and running
156 thence so as to include one hundred acres in a square with parallel lines of equal length, having the forks of said run in and as the center where the run forks near the house, built on said land, which land is known as the tract which D. W. Sleeth sold to Nicholas Sleeth, to have and to hold the above described tract of land unto the said Henry Fling, his heirs and assigns forever.

Witness the following signatures and seals the day and year first above written.

[SEAL.]
her
SUSAN + TIBBS. [SEAL.]
mark.

Teste:

BENJ. F. STEWART.

STATE OF WEST VIRGINIA,
County of Wirt, to wit:

I, Benj. F. Stewart, a notary public for the county and State aforesaid, do certify that Susan Tibbs, wife of Robert Tibbs, whose name is signed to the writing above bearing date Feb. 25, 1867, personally appeared before me, in my county aforesaid, and being examined

by me privily and apart from her husband, and having the
157 aforesaid writing fully explained to her, she, the said Susan
Tibbs, declared that she had willingly executed the same and does not wish to retract it. Given under my hand this 25th day of February, 1867.

BENJ. F. STEWART,
Notary Public.

STATE OF WEST VIRGINIA, *ss:*

I, J. M. Woods, recorder of Ritchie County, in the State aforesaid, do certify that the deed hereto annexed, bearing date on the 25th day of February, 1867, together with the certificate of acknowledgment thereto annexed, was duly admitted to record in the recorder's office of the county aforesaid, in deed book No. 11, page 357, this the 19th day of March, 1867.

Teste:

J. M. WOODS, *R. R. C.*

Also a deed of John Murphy & wife to Benjamin Taylor, in these words:

Deed.

This indenture, made this 20th day of March, in the year of our Lord one thousand eight hundred and twenty, between John Murphy and
Prissilla, his wife, of Lewis County and State of Virginia, of the
158 one part, and Benjamin Taylor, of Harrison County and State
aforesaid, of the other part, witnesseth that the said John Murphey and Prissilla, his wife, for and in consideration of the sum of one thousand dollars lawful money of Virginia, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released and confirmed, & by these presents do grant, bargain, sell, alien, enfeoff, release and confirm to the said Benjamin Taylor, his heirs and assigns forever, all a certain tract or parcel of land lying and being in the county and State aforesaid, situated on Grass Run, a southerly branch of the south fork of Hughes River, and bounded as followeth, to wit: Beginning at a white oak, standing 140 poles on the northerly side of said run, and running thence S. 15 W. 400 poles, crossing said run by a wolf-pen built by James Malone and Cornelius Wyer to a black oak; thence S. 15 E. 200 poles to a beech, a divission corner, continuing the said course 200 poles to a hickory; also a divission corner continuing the same course 400 poles to a white oak; thence N. 15 E.,
200 poles to a chestnut oak; also a divission corner continuing the
159 same course 200 poles, crossing said run, to three hiccories; thence
N. 15 W. 400 poles to a red oak; also a divission corner continuing the same course 200 poles to a white oak; also a divission corner continuing the same course 200 poles to the beginning, containing 2,000 acres (divided into four tracts).

To have and to hold the above described tract or parcel of land, with the ap'urtenances, to the said Benjamin Taylor, his heirs and assigns, to the only proper use and behoof of the said Benjamin Taylor, his heirs and assigns. do hereby covenant to and with the said Benjamin Taylor, his heirs and assigns, that they, the said John Murphy and Prissilla, will warrant and defend the above described tract or parcel of land, with the appurtenances, to the said Benjamin Taylor, his heirs and assigns, and will warrant and forever defend against all persons and

claims whatsoever. In testimony whereof the aforesaid John
160 Murphey and Prissilla hath hereunto set their hand and seal the day and year above written.

JOHN MURPHY. [L. S.]
PRISSILLA MURPHY. [L. S.]

Signed, sealed, and delivered in the presence of—

LEWIS COUNTY, *to wit:*

Thomas Cunningham and Aaron Smith, magistrates of the county aforesaid, do hereby certify that John Murphey and Prissilla, his wife, parties to the within deed of conveyance, hath acknowledged the same before us on the 31st day of March, 1820, and desired us to certify the said acknowledgement to the clerk of the county court of Lewis in order that the said conveyance may be recorded, as witness our hands and seals the day and year above written.

THOMAS CUNNINGHAM. [L. S.]
AARON SMITH. [L. S.]

LEWIS COUNTY, *to wit:*

We, Thomas Cunningham and Aaron Smith, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that Prissilla Murphy, the wife of John Murphy, parties to a certain
161 deed for the conveyance of said estate to Benj'n Taylor, bearing date on the 20th day of March, 1820, and hereto annexed, personally appeared before us in our county aforesaid, and being examined by us, privily and apart from her husband, and having the deed aforesaid fully explained to her, the said Prissilla Murphy acknowledged the same to be her act and deed, and declared that she had willing' signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 31st day of March, 1820.

THO'S CUNNINGHAM. [L. S.]
AARON SMITH. [L. S.]

LEWIS COUNTY,
Clerk's Office:

Be it remembered that on the 4th day of April, 1820, this deed of bargain and sale from John Murphy and Prissilla, his wife, to Benjamin Taylor, with certificates of the acknowledgment thereof from under the hands and seals of Thomas Cunningham and Aaron Smith, two magistrates of the county of Lewis, was presented in the clerk's office and ordered to be recorded.

Teste:

D. STRINGER, *C. L. C.*

162 Also a deed of David Bennett to D. W. Sleeth, jr., in these words:

Deed.

This indenture, made this 27th day of September, in the year of our Lord, 1837, between David Bennett, of the county of Lewis and State of Virginia, of the one part, and David W. Sleeth, jr., of the county and State aforesaid, of the other part: Whereas by a decree entered in the circuit superior court of law and chancery, held at the courthouse of Lewis County the 12th day of April, 1836, in a cause therein lately depending between John Sleeth and David W. Sleeth, jr., plaint-

iffs, and Benjamin Taylor and William Powers, defendants, it was adjudged, ordered, and decreed that the aforesaid David Bennett be appointed a commissioner to sell at public auction before the court-house door of Lewis County on some court day, he, the said commissioner aforesaid, having first advertised the time and place of said sale at the court-house door aforesaid at least six weeks previous thereto, two certain tracts of land in the aforesaid plaintiff's bill mentioned,
163 or so much as may be necessary to make the amount of $273 50 cts., with interest thereon, from the 17th day of November, 1821, until paid, and the costs of this suit; and whereas in pursuance of the said decree the said David Bennett, commissioner as aforesaid, did, on the 10th day of January, 1837, before the court-house door aforesaid expose to sale the lands alluded to in the said decree on a credit of one, two, and three years; that is to say, one tract of 2,000 acres of land on Grass Run, conveyed by John Murphy & wife to the said Benjamin Taylor by deed bearing date the 20th of March, 1820, and another tract of land, containing 1,000 acres, on Leather Bark Creek, conveyed by John Murphey and wife to the said Benjamin Taylor by deed bearing date the 20th of March, 1820; notice of the time and place of which sale having been advertised as directed by the decree aforesaid, as will appear by the report respecting said sale made by said David Bennett, commissioner as aforesaid, to the said circuit superior court of law and chancery holden in Weston for the county of Lewis aforesaid,
164 at which sale the said David W. Sleeth, jr., became the purchaser of the said tracts of land, he being the highest bidder therefor, at the following prices, to wit, for one tract of 2,000 acres $285, and for the other tract of 1,000 acres $30.00, making in the whole $315.00.

This indenture therefore witnesseth that the said David Bennett, commissioner as aforesaid, as well for and in consideration of the premises aforesaid as of the sum of one dollar to him in hand paid by the said David W. Sleeth, jr., hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said David W. Sleeth, jr., his heirs and assigns, the two tracts or parcels of land before described, and which were sold by the said David Bennett, commissioner as aforesaid, at public auction as aforesaid; to have and to hold the said two tracts or parcels of land, together with the appurtenances thereto belonging or appertaining, to the said David W. Sleeth, jr., his heirs and assigns, to the only proper use and behoof
165 of the said David W. Sleeth, jr., his heirs and assigns forever.

And the said David Bennett, commissioner as aforesaid, the said two tracts of land and appurtenances against himself and his heirs, and all other persons claiming or to claim by, through, or under him, unto the said David W. Sleeth, jr., his heirs and assigns, shall and will by these presents warrant and forever defend.

In witness whereof the said David Bennett, commissioner as aforesaid, hath hereunto set his hand and seal the day and year first herein written.

DAVID BENNETT, [SEAL.]
Commissioner.

LEWIS COUNTY COURT,
Clerk's Office, 27 *Septe'r*, 1837.

This deed was presented in said office, acknowledged by David Bennett, commissioner, and admitted to record.

Teste:

J. TALBOTT, *C. L. C.*

Also a patent from the Commonwealth of Virginia to Lewis A. Phelps in these words:

166 *Patent.*

John B. Floyd, esquire, gove'ner of the Commonwealth of Virginia, to all whom these presents shall come, greeting:

Know ye, that in conformity with a survey made on the ninth day of February, one thousand eight hundred and fifty, by virtue of land office treasury warrant No. 18101, there is granted by the said Commonwealth unto Lewis A. Phelps a certain tract or parcel of land containing five hundred and seventy-five acres, lying and being in Ritchie County, on waters of Leather Bark Creek and Grey's Run, branches of the south fork of Hughes River, and bounded as follows, viz: Beginning at a beech, corner to 364-acre tract surveyed for Lewis Maxwell, standing on the south bank of said Leather Bark Creek above Cliff Rocks, near the Lynn Camp Fork; thence N. 5 W. 30 poles to a white oak, a corner to 1,404 acres surveyed for Jacob B. Blair; thence with two of his lines N. 19° E. 38 p's to a white oak; N. 44° E. 132 poles to a gum in a line of David W. Sleeth's 2,000 acres; thence with said line S. 75° E.
167 356 poles to a stake; thence south 272 poles, crossing Leather Bark Creek, to a chestnut on top of a ridge; thence S. 13° W. 70 poles to a white oak on top of a ridge; thence S. 62 W. 244 poles to a stake; thence N. 48½ W. 170 p's to a beech a corner to said 364 acres; thence N. 30 E. 238 p's to a stake in a line of said 364-acre survey, and thence with 13 lines thereof S. 63° E. 60 p's to a gum, S. 37° E. 33 p's to a beech, S. 79½ E. 40 p's to a white oak, S. 28° E. 42 p's to a beech, S. 2° E. 17 p's to hickory, S. 26° W. 42 poles to a white oak and water beech, N. 87½ E. 63 poles to a maple, N. 32° W. 31 poles to a white oak, N. 8° E. 32 p's to a gum, N. 69° E. 56 p's to a beech, N. 60° W. 48 poles to a white oak, N. 20° W. 142 poles to a red oak; thence west 330 poles, crossing said creek, to the beginning, with its appurtenances—

To have and to hold the said tract or parcel of land with its appurtenances to the said Lewis A. Phelps and his heirs forever.

[SEAL.] In witness whereof the said John B. Floyd, esquire, gove'ner of the Commonwealth of Virginia, hath hereunto set his hand
168 and caused the lesser seal of the said Commonwealth to be affixed at Richmond, on the fifth day of January, in the year of our Lord one thousand eight hundred and fifty-one, and of the Commonwealth the seventy-fifth.

JOHN B. FLOYD.

Lewis A. Phelps hath title to the within granted land.

S. H. PARKER, *Reg. L. Office.*

Also a copy of a patent of the Commonwealth of Virginia to John Murphy in these words:

Patent.

James P. Preston, esquire, gove'ner of the Commonwealth of Virginia, to all whom these presents shall come, greeting:

Know ye, that in conformity with a survey made on the thirteenth day of April, 1818, by virtue of a land office treasury warrant, number 5564, issued the 19th January, 1816, there is granted by the said Commonwealth unto John Murphy a certain tract or parcel of land con-

taining two thousand acres, situate in the county of Lewis, on Grass Run, a southerly branch of the south fork of Hughes River, and bounded as followeth, to wit:

Beginning at a white oak standing one hundred and forty
169 poles on the northerly side of said run, and running thence south fifteen degrees west four hundred poles, crossing said run by a wolf pen built by James Malone and Cornelius Wire, to a black oak; thence south seventy-five degrees east eight hundred poles, crossing waters of said run, to a white oak; thence north fifteen degrees east four hundred poles, crossing a fork and said run, to three hickories; thence north seventy-five degrees west eight hundred poles to the beginning; to have and to hold the said tract or parcel of land, with its appurtenances, to the said John Murphy and his heirs forever.

In witness whereof the said James P. Preston, esquire, gove'ner of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the twelfth day of April, in the year of our Lord one thousand eight hundred and nineteen, and of the Commonwealth the forty-third.

JAMES P. PRESTON.

LAND OFFICE,
Richmond, Virginia.

170 The foregoing is a true copy from the records.

Witness my hand and seal of office this 17th day of March, 1877.

[SEAL.] S. H. BOYKIN.
Reg'r Land Office.

Also a copy of a deed of J. B. Blair and wife to the heirs of D. W. Sleeth, dec'd, in these words:

Deed.

This deed made this 2nd day of October, 1854, between J. B. Blair and Josephine, his wife, of the first part, and Ann Sleeth, Floyd Sleeth and Chapman Sleeth, heirs of David W. Sleeth, deceased, of the second part, all of the county of Ritchie in the State of Virginia: Whereas the above named J. B. Blair and D. W. Sleeth (no' deceased), about the years 1849 & 1850, in the lifetime of said Sleeth, entered into a verbal agreement to enter a quantity of land lying on Leather Bark Creek in the county of Ritchie, and in pursuance of said agreement the said Blair & Sleeth entered the following tracts of land: One tract containing one hundred and thirty-five acres, lying on a ridge between Grass Run and Leather Bark Creek also a tract containing one hundred and twenty-three acres lying on Grass Run; also a tract containing
171 one hundred and sixty-two acres lying on the right-hand fork of Le'ther Bark Creek; also one other tract, containing fourteen hundred and one acres, lying on Leather Bark Creek, all of said tract lying in the county of Ritchie, in the State of Virginia; and whereas after making the entries aforesaid, to wit, on the 21st day of December, 1849, the said Blair executed to said Sleeth a memorandum in writing stating that the said Sleeth was a joint owner with said Blair in the four tracts of land above mentioned, and that the grants for said tracts were to issue in the name of said Blair, and af'er making the aforesaid memorandum by the said Blair, the said Sleeth departed this life, leaving Ann Sleeth, Floyd Sleeth and Chapman Sleeth his heirs at law, and the said Blair having since the

date of the aforesaid memorandum and since the death of the said D. W. Sleeth brought suit in chancery in the circuit court of Ritchie County against Elizabeth Sleeth, widow, and Ann Sleeth, Floyd Sleeth, and Chapman Sleeth, heirs of the said D. W. Sleeth, deceased, to obtain a
172 division of said tract of land, and the said circuit court having appointed John M. Wilson, jr., Enoch R. Hill, and William Holbert commissioners to lay off and divide the aforesaid tract of land between said Blair and the said heirs, and the said commissioners having made their report, and the said cause coming on to be heard on the 15th day of September, 1854, at a court held for the county of Ritchie, the following record was made in said cause: "John M. Wilson, jr., Enoch R. Hill, and William Holbert, commissioners appointed at the last term to make partition of the four tracts of land in the bill and proceedings mentioned between the said Blair and the said heirs of D. W. Sleeth, deceased, having made their report, and there being no exceptions taken thereto, the same is confirmed; and this cause coming on this day to be finally heard on the papers read at the former hearing, and the said report and amended & plat of commissioners was argued by counsel; and it appearing from said report that the said commissioners have assigned to the said Blair, as his half of the land
173 mentioned in the bill, the whole of the said tract of one hundred and thirty-five acres, the whole of the said tract of one hundred & sixty-two acres, the whole of the said tract of one hundred and twenty-three acres, and also that part of the said tract of 1,401 acres included within the following boundaries, to wit, beginning at a white walnut, the beginning corner of the said 1,401 acres tract, and a corner to a 35-acre survey made for said D. W. Sleeth; thence S. 40° E. 17 poles to a poplar, corner to lands claimed by Lewis Maxwell; thence with two of said Maxwell's line N. 52° E. 15 poles, crossing a branch of Leather bark Creek to a sugar, S. 56 E. 31 poles to a beech; thence S. 58° E. 210 poles to a hickory; thence S. 26° E. 270 poles *poles* to a stake in a line of said 1,401-acre tract; thence with the lines of said 1,401 tract to the beginning, and containing four hundred acres, as appears by said plat accompanying said report, on consideration whereof it is adjudged, ordered, and decreed that the said J. B. Blair hold and stand seized of the said land so assigned him in his own right in severalty; and it appearing to the court that
174 the title to the said lands is in the said Blair, no conveyance is necessary; and it further appearing to the court that the said commissioners have assigned to the said heirs a' their half of said lands the residue of said tract of 1,401 acres, after deducting therefrom the 400 acres assigned to the said Blair as aforesaid; it is further adjudged, ordered, and decreed that the said heirs hold and stand seized of the same in their own right; and the title to said land being in the said Blair, it is ordered that he convey to the said heirs the lands so assigned them as aforesaid, by deed, with covenants of special warranty, within sixty days from this date; and it is further ordered that the costs of this suit be paid in equal proportions by the said Blair and the said heirs, and that the said commissioners be allowed two dollars each per day for their aforesaid services, to be taxed in the said costs, and that A. I. Boreman, guardian ad litem to the infant defendants, be allowed five dollars, also to be taxed in the costs of this suit: Now, therefore, this deed witnesseth that the said J. B.
175 Blair and Josephine Ann, his wife, parties of the first part, in consideration of the premises and of one dollar to them in hand paid by the said parties of the second part, in pursuance of the decree

aforesaid, doth grant unto the said Ann Sleeth, Floyd Sleeth, and Chapman Sleeth, heirs as aforesaid, the following piece or parcel of land in the county of Ritchie, being the residue of the aforementioned survey of 1,401 acres, after taking therefrom the four hundred acres mentioned and described as aforesaid, to wit: Beginning at a hickory, in a line of the said 1,401-acre tract and a corner of the division line between the said Blair and the said heirs, and running thence S. 58 E. 416 poles to a sugar & gum; thence N. 5 E. 63 poles to a poplar; thence N. 25 E. 58 poles to a white-oak; thence N. 78 E. 314 poles to a white-oak; thence N. 36 W. 20 poles to a white-oak; thence N. 28 W. 38 poles to a white-oak; thence N. 19 E. 38 poles to a white-oak; thence N. 44 E. 132 poles to a gum; thence N. 75 W. 312 poles to a black-oak; thence S. 22 W. 140 poles to a white-oak; thence N. 59 W. 58
176 poles to a white-oak; thence N. 45 W. 30 poles to a white-oak; thence N. 76 W. 49 poles to a sugar; thence N. 69 W. 31 poles to a stake; thence S. 65 W. 86 poles to a stake; thence N. 23 E. 74 poles to a stake; thence N. 21 W. 50 poles to a white-oak; thence N. 33 W. 90 poles to a sugar; thence N. 67 W. 45 poles to a stake; thence N. 26 E. 270 poles to a beginning; containing one thousand and acres, more or less to have and to hold the last mentioned piece or parcel of land unto the said Ann Sleeth, Floyd Sleeth, & Chapman Sleeth, heirs of D. W. Sleeth, deceased, forever. And the said parties of the first part covenant to and with the said parties of the second part that they will warrant specially the property hereby conveyed.

Witness the following signatures and seals:

J. B. BLAIR. [SEAL.]
JOSEPHINE A. BLAIR. [SEAL.]

VIRGINIA,
Ritchie County, ss:

Personally appeared before me, A. S. Coxe, one of the Commonwealth's justices of the peace for the county of Ritchie aforesaid, J. B. Blair, one of the parties to the annexed deed bearing date on the 2nd day
177 of October, 1854, who acknowledged the said deed to be his act and deed.

Given under my hand and seal this 2nd day of October, 1854.

A. S. COXE, *J. P.*

VIRGINIA,
Ritchie County, to wit:

We, A. S. Coxe and David McGregor, two of the Commonwealth's justices of the peace for the county of Ritchie, in the State of Virginia, do certify that Josephine Ann Blair, wife of J. B. Blair, parties to the annexed deed bearing date on the 2nd day of October, 1854, personally appeared before us in our county aforesaid, and being examined by us, privily and apart from her said husband, and having the contents of said deed fully explained to her, she, the said Josephine Ann, declared that she had willingly signed and executed the same and did not wish to retract it.

Given under our hands this 4th day of October, 1854.

A. S. COXE, *J. P.*
D. McGREGOR, *J. P.*

VIRGINIA:

I, James McKinney, clerk of the county court of Ritchie County,

hereby certify that the foregoing is a true copy of a deed from
178 Blair & wife to the heirs of D. W. Sleeth, dec'd, for 1,001 acres of
land lying on Leather Bark Creek, as presented in my office on the 4th day of October, 1854, & admitted to record.

Teste:

JAMES McKINNEY, *Clerk.*

A copy from the record.

Teste:

G. W. AMOS, *Clerk.*

Also a copy of a deed of Thomas Stinchcomb & wife to James Malone, in these words:

Deed.

This deed made the 24th day of May, in the year of our Lord 1854, between Thomas Stinchcomb and Harriett B., his wife, of the one part, and James Malone of the other part, all of the county of Ritchie and State of Virginia, witnesseth:

That for and in consideration of the sum of five dollars good and lawful money in hand paid by the said James Malone, the receipt whereof is hereby acknowledged, the said Thos. Stinchcomb and wife do grant unto the said James Malone all that tract of land lying and being in the county of Ritchie, on tributaries of Spruce Creek,
179 being a part of a tract of land entered by said Stinchcombe of
1,120 acres; which before-mentioned tract is bounded as follows: Beginning at a white oak, corner to John Dougherty, standing on the ridge between Dry Run and Rock Run; thence S. 19° E. 300 poles to a stake and pointers in the original line of said 1,120 acres; thence with said line S. 84° E. 290 poles to a white oak on a line of a survey of 390 acres patented to James Malone; thence with a line of the same N. 20° E. 264 to a chestnut oak on a ridge; thence N. 48 W. 230 poles to an ash; thence S. 87° W. 86 poles to a stake in a line of land patented to A. Lowther, jr.; thence with a line of the same S. 16° W. 16 poles to a white oak; thence S. 67° W. 184 poles, crossing Dry Run, to a stake in said Dougherty's line; thence with a line thereof S. 14° W. 18 poles to the beginning; said tract, part of the aforesaid 1,120 acres, contains 800 acres; to have and to hold the same to the said James Malone & his heirs forever. And the said T. Stinchcomb and Harriet B., his wife, do forever release and quitclaim the said tract of 800
180 acres of land free from the claims of themselves or their heirs,
but they do not warrant or defend the title to the said land further than against the claim of themselves or their heirs.

Witness the following signatures and seals.

T. STINCHCOMB. [SEAL.]
H. B. STINCHCOMB. [SEAL.]

RITCHIE COUNTY, *to wit:*

I, James McK'nney, clerk of the county court of the county aforesaid, in the State of Virginia, hereby certify that Thos. Stinchcomb, whose name is signed to the writing above, bearing date on the 24th day of May, 1854, has acknowledged the same before me in my office, in the county aforesaid.

Given under my hand and seal this 22d day of August, 1854.

JAMES McKINNEY, *Clerk.* [SEAL.]

RITCHIE COUNTY, *to wit:*

I, James McKinney, clerk of the county court of the county aforesaid, in the State of Virginia, hereby certify that H. B. Stinchcomb, wife of T. Stinchcomb, parties to the foregoing deed dated the 24th day of May, 1854, personally appeared before me, in my office,
181 and after being examined by me privily and apart from her husband, and having the same fully explained to her, she, the said H. B. Stinchcomb, acknowledged the same to be her act, and declared that she had willingly signed, sealed and delivered the same, and that she does not wish to retract it. Given under my hand and seal this 22d day of August, 1854.

JAMES McKINNEY, *Clerk.* [SEAL.]

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, hereby certify that the foregoing is a true copy of a deed from Stinchcomb & wife to Malone, for 800 acres lying on the waters of Spruce Creek, as presented in my office on the 22d day of August, 1854, and admitted of record.

Teste: JAMES McKINNEY *Clerk.*

A true copy of the record. Teste:

G. W. AMOS,
Clerk Co. Court, Ritchie Co., W. Va.

Also a copy of a deed of Robert Tebbs & wife to John B. Groves in these words:

Deed.

This indenture, made this 23rd day of July, in the year 1853, between Robert Tibbs and Susan, his wife, of the one part, and John B.
182 Groves of the other part, all of the county of Ritchie and State of Virginia, witnesseth that the said Robert Tibbs and Susan, his wife, for and in consideration of the sum of eight hundred dollars, five hundred to them in hand paid and one hundred a year for three years, granted, bargained, and sold, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm unto the said John B. Groves, his heirs and assigns forever, all a certain tract or parcel of land situated, lying, and being in the county of Ritchie and State of Virginia, lying and being on Grass Run, in the county aforesaid, and bounded as follows, to wit: Beginning at an oak on the top of the ridge on the south side of Grass Run, and running thence so a' to include one hundred acres, more or less, *acres* in a square, with paral'el lines of equal le*an*'th, having the forks of said run in and as the center where the run forks, near the house built on said land, which land is known as the tract which D. W. Sleeth sold to Nicholas Sleath, and Nicholas Sleath sold to George Goff, and George
183 Goff sold to John Harris, and John Harris to Wm. Harris, and with Wm. Harris and wife, by a deed of bargain and sale dated the 29th day of Nov., 1847, sold and conveyed to Wm. Hall, who by a deed dated the first day of Nov., 1848, conveyed the same to Henry I. Fisher, the present grantor, together with all and singular the buildings, lands, and tenements; to have and to hold the above *above* described premises, with the appurtenances to the same belonging or in any wise appertaining, to the only proper use, benefit, and behoof of

him the said John B. Groves, his heirs and assigns forever. And the said Robert Tebbs and Susan, his wife, for themselves and their heirs do covenant to and with the said John B. Groves, his heirs and assigns, that at the time of sealing and delivering these presents they were seized of a good, sure, perfect, and indefeasible estate of inheritance in fee-simple in the above-described premises, free from all claims, leans, incumbrances, and that they have *ha* good right and authority to convey the same, in manner and form aforesaid; and that they
184 will warrant, secure, and forever defend the said premises to the said John B. Groves, his heirs and assigns, free from the claim or claims of all persons whatsoever.

In testimony whereof the said Robert Tebbs & Susan, his wife, hereunto signed their names and affixed their seal the day and year above written.

ROBERT TIBBS. [SEAL.]
her
SUSAN + TIBBS. [SEAL.]
mark.

RITCHIE COUNTY, *to wit:*

We, the subscribers, justices of the peace in and for said county in the State of Virginia, do hereby certify that Robert Tibbs, a party to the within deed, personally appeared before us in our said county and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgment to the clerk of the county court of Ritchie in order that the said deed may be recorded

At the same time and place personally appeared before us in our said county Susan Tebbs, the wife of the said Robert, parties to the within deed, and, being examined by us privily and apart from her said
185 husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this 23rd day of July, 1853.

BENJ. WEBB, *J. P.*
GRANVILLE W. SLEETH, *J. P.*

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court, of Ritchie County, certify that the foregoing is a true copy of a deed of sale from Robert Tibbs and wife to John B. Groves for 100 acres of land, lying on Grass Run, was presented in my office on the 2nd day of August, 1853, and admitted to record.

Teste: JAMES McKINNEY, *Cl'k.*

A copy from the record.

Teste: G. W. AMOS, *Clerk.*

Also a copy of a deed of John B. Grove & wife to Susan Tibbs in these words:

Deed.

This deed, made the 10th day of November, in the year 1855,
186 between John B. Grove and Kizziah S., his wife, of the county of Augusta and State of Virginia, of the one part, and Susan Tibbs, of the county of Ritchie and State aforesaid, of the other part, witnesseth that in consideration of eight hundred dollars in hand paid,

or secured to be paid, the said John B. Groves and wife do grant unto the said Susan Tibbs all that tract or parcel of land lying in the county of Ritchie in the State of Virginia, on Grass Run, containing one hundred acres, be the same more or less, and bounded as follows, to wit: Beginning at an oak on the top of the ridge, on the south side of Grass Run, and running thence so as to include one hundred acres in a square, with paral'el lines of equal length, having the forks of said run in and as the center, whence the forks near the house built on said land (which land is known of late as the tract of Henry I. Fisher). And the said John B. Grove & Kizziah S., his wife, do covenant that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals:

JOHN B. GROVE. [SEAL.]
KIZZIAH S. GROVE. [SEAL.]

187 STATE OF VIRGINIA,
Augusta County, to wit:

I, H. M. Darnall, a notary public for the county aforesaid, in the State of Virginia, do certify that Kizziah S. Grove, the wife of John Grove, whose names are signed to the writing hereto annexed, bearing date on the *on the* 10th day of November, 1855, personally appeared before me in the county aforesaid, and, being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Kizziah S. Grove, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 16th day of Nov'r, 1855.

H. M. DARNALL, *N. P.*

STATE OF VIRGINIA,
Augusta County, to wit:

I, Joseph Morrison, a justice of the peace for the county aforesaid, in the State of Virginia, do certify that John B. Grove, whose name is signed to the writing hereto annexed, bearing date on the 10th
188 day of November, 1855, hath acknowledged the same before me in my county aforesaid.

Given under my hand this 16th day of November, 1855.

JOSEPH MORRISON, *J. P.*

VIRGINIA, *ss:*

I, James McKinney, clerk of the county court of Ritchie County, do certify that the foregoing is a true copy of a deed for 100 acres of land lying on Grass Run, together with the certificates thereto annexed, as presented in my office on the 22nd day of Dec'r, 1855, and admitted to record.

JAMES McKINNY, *Clerk.*

A copy from the record.
Teste:

G. W. AMOS, *Clerk.*

Also copies of orders and decrees of the circuit court of Lewis Co. in the chancery cause of John Sleeth, &c., vs. Benjamin Taylor, &c., as follows:

VIRGINIA, *ss:*

At a circuit superior court of law and chancery for the county of Lewis,

at the court-house thereof on Wednesday the 13th day of April, 1836, and in the 60th year of the Commonwealth.

189 JOHN SLEETH AND DAVID W. SLEETH, JR., *vs.* BENJAMIN TAYLOR, &c. } In chancery.

The plaintiff having filed his bill and amended bill, and the su'pœna having been duly executed on the defendant Taylor more than four months, and he having failed to file his answer, the bill as to him is taken as for confessed, and this cause coming on now to be heard on the bill taken as for confessed as aforesaid, answer of the defendant Powers and exhibits, on consideration whereof it is adjudged, ordered, and decreed, that the plaintiff David W. Sleeth, jr., recover of the said defendant Benjamin Taylor, $273 50 cents, with interest thereon from the 17th day of November, 1821, until paid, and his costs by him about his suit in this behalf expended; and it is further adjudged, ordered, and decreed, that unless the said defendant Taylor pay to the said David W. Sleeth, jr., the above sum of $273 50 cents with the inter-
190 est and costs within sixty days, that David Bennett, who is hereby appointed a commissioner for the purpose, after having advertised the time and place of sale at the court-house of this county for at least six weeks previous thereto, before the front door of the said court-house of said county on some court day make sale of the land in the bill and proceedings mentioned, or so much as may be necessary, to the highest bidder, upon a credit of 1, 2, & 3 years, the purchaser giving bond with approved security for the payment of the purchase, money, and a lien upon the land for the payment of said money, and that he make report thereof to the next term.

A copy. Teste.

WM. W. BRANNON,
Dep. Clk Cir. Court, Lewis County.

Fee for copy, .35.

VIRGINIA, *ss:*

At a circuit superior court of law and chancery for the county of Lewis, at the court-house of said county on the 17th day of September, 1836, and in the 61st year of the Commonwealth.

191 JOHN SLEETH, &c., *vs.* BENJAMIN TAYLOR. }

Upon a motion to correct a decree, it appearing to the court by the deeds of John Murphey and wife to Benjamin Taylor, bearing date 20th March, 1820, copies of which are filed in this cause, that the tract of land described in the bill as lying on Grass Run contains 2,000 acres, and that the tract on Leather Bark contains 1,000 acres—

It is adjudged, ordered and decreed that the interlocutory decree entered in this cause at the last term of this court be so amended *so* as to require the commissioner named therein to sell the whole amount of said 2,000 acres on Grass Run, and 1,000 acres on Leather Bark, should the same be necessary to pay off the plaintiffs' decree.

A copy. Teste:

WM. W. BRANNON,
Dep. Clk Circuit Court, Lewis County.

Fee for copy, 35c.

VIRGINIA, *ss:*

At a circuit superior court of law and chancery, for the county of Lewis, at the court-house of said county on the 18th day of April,
192 1837, and in the 61st year of the Commonwealth.

DAVID W. SLEETH, JR., &C., *vs.* BENJAMIN TAYLOR. } In chancery.

David Bennett, the commissioner appointed to make sale of the land in the bill and proceedings mentioned, this day reported that he had sold the 2,000 acres of land on Grass Run for the sum of $285 to comp't David W. Sleeth, jr., and the 1,000 acres on Leather Bark for $30 to said David W. Sleeth, jr., and no exceptions being filed to said report, it is adjudged, ordered, and decreed that the said sale be confirmed, and that the said commissioner be allowed $15 30 cents for his services in making said sale, and that said commissioner upon receiving his said allowance do make to the said David W. Sleeth, jr., a conveyance for said two tracts of land, and it is further adjudged, ordered, and decreed that the decree in favor of the comp't David W. Sleeth, jr., against the said Benjamin Taylor be credited with $299.70, the amount of said sale after deducting the allowance to the commissioner.

193 A copy. Teste:

WM. W. BRANNON,
Dep. Clk Circuit Court of Lewis County.

(Fee for copy .35, postage .6.)

Appeal bond.

Know all men by these presents the we, Nicholas H. Frederick and Jacob Dougherty, are held and firmly bound unto W. W. Riley in the sum of five hundred dollars, to the true payment of which we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by thes' presents, sealed with our seals and dated this 10th day of April, A. D. 1878.

The condition of the above obligation is such, that whereas Felix Collins and others now obtain from the honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, a writ of error to a judgment of the said court rendered on the 8th day of April, 1878, in favor of the said W. W. Riley against the said Felix Collins and others, and the said judge now signs a citation upon the said writ.

Now if the said Felix Collins and others shall prosecute the said writ to effect and answer all damages and costs if they fail to
194 make their plea good, then this obligation to be void; otherwise to remain in full force.

NICHOLAS H. FREDERICK. [SEAL.]
JACOB DOUGHERTY. [SEAL.]

Taken, approved, and deemed sufficient by me, the judge in the foregoing bond mentioned, on the day of the date thereof, at the time of my signing thec itation therein mentioned.

J. J. JACKSON, *Judge.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the district court of the United States for the district of West Virginia, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea is in the said district court before you between W. W. Riley, plaintiff, and Felix Collins, John H. Beall, Charles Hicks, and Levi Fling, Nicholas H. Frederick, Samuel B. Frederick, Philander S. Austin, Henry Fling, and Wilson Cunningham, defendants, a manifest error hath happenned to the great damage of the said Felix Collins, John H. Beall, Charles Hicks, and Levi Fling, Nicholas H.
195 Frederick, Samuel B. Frederick, Philander S. Austin, Henry Fling, and Wilson Cunningham, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceeding' aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday in December next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 10th day of April, in the year of our Lord
196 one thousand eight hundred and seventy-eight.

[SEAL.] JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

Allowed by—

J. J. JACKSON,
Judge of the District Court of the United States for the District of West Virginia.

This writ of error was produced by Felix Collins and others named therein and deposited in the district court therein mentioned on the tenth day of April, in the year of our Lord 1878, and the said writ was served by a copy thereof being lodged for W. W. Riley, the adverse party, in the clerk's office of the said court, where the record of the case therein mentioned remains on the day last mentioned within ten days after rendering the judgment complained of.

Teste: JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

Citation.

UNITED STATES, *ss:*

To W. W. RILEY greeting:

You are hereby cited and admonished to be and appear at a
197 Supreme Court of the United States, to be holden at Washington on the first Monday in December, 1878, next, pursuant to a writ of error filed in the clerk's office of the district court of the United

States at Clarksburg, for the district of West Virginia, wherein Felix Collins, John H. Beall, Charles Hicks, and Levi Fling, Nicholas H. Frederick, Samuel B. Frederick, Philander S. Austin, Henry Fling, and Wilson Cunningham are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the *suit* of error mentined should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 10th day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] J. J. JACKSON,
Dist. Judge.

Endorsement: I accept due service of the within citation.
198 Given under my hand this 10th day of April, A. D. 1878.
G. D. CAMDEN,
Attorney for W. W. Riley.

UNITED STATES OF AMERICA,
District of West Virginia, set:

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing is a true transcript of the records and of all proceedings now remaining on file in my office in said cause of W. W. Riley against Felix Collins et al. in ejectment, lately depending in said district court of the United States for the district of West Virginia, at Clarksburg. In testimony whereof I have hereto set my hand and the seal of said district court, at Clarksburg, in said district, this 29th day of November, A. D. 1878, and in the 103rd year of the Independence of the United States of America.

[SEAL.] JASPER Y. MOORE,
D. C. U. S., D. W. Va.

(Indorsement on cover:) No. 152. Felix Collins, John H. Beall, Charles Hicks et al., plaintiffs in error, vs. W. W. Riley. West Virginia D. C. U. S. Filed 6th January, 1879.

O

SUPREME COURT OF THE UNITED STATES.

NO. 152.

FELIX COLLINS AND OTHERS,

Plaintiffs in Error,

vs.

W. W. RILEY,

Defendant in Error.

STATEMENT AND POINTS MADE FOR PLAINTIFFS IN ERROR.

R. S. BLAIR,
EDWIN MAXWELL,
Counsel for Pl'ffs in Error.

SUPREME COURT OF THE UNITED STATES.

NO. 152.

FELIX COLLINS AND OTHERS,
Plaintiffs in Error,

vs.

W. W. RILEY,
Defendant in Error.

STATEMENT AND POINTS MADE FOR PLAINTIFFS IN ERROR.

On the 27th and 28th days of March, 1868, Riley, the defendant in error, served copies of a declaration in ejectment on the plaintiffs in error, and on the first Monday in April, 1868, filed the said declaration in Clerk's office of the District Court of the United States for the District of West Virginia, at Clarksburg, and afterwards such proceedings were had in said cause in the said Court, that a jury found a general verdict for the defendants for two undivided third parts of the land claimed by them, included in the declaration, and the judgment of the Court was according to this verdict, but as to the remaining undivided third part of the lands claimed by the defendants the jury found the following special verdict:

"That Frederick Switzer died on the —— day of ——, 1823, possessed in fee of lot No. 4 and the lower half of No. 5, as hereinbefore found for the plaintiff, leaving three heirs at law, who inherited said property, one of whom, Polly, had prior to his death intermarried with Abraham Wagner; and that subsequent to his death, to-wit, On the —— day of January, 1868, the said Abraham Wagner and Polly, his wife, conveyed to the plaintiff in this cause all right and title in said lands, and that before the commencement of this suit Abraham Wagner died, on the —— day of February, 1868, and the said Polly Wagner died afterwards, on the —— day of March, 1868; and we further find that at the date of the deed executed by the said Abraham and Polly Wagoner to the plaintiff in this cause, the said Abraham Wagoner's right to recover against the said defendants was barred by the statute of limitations. Upon this state of the

facts as to the interest of Polly Wagoner, if the law be for the plaintiff, then we find for the plaintiff in fee the remaining one-third of the several tracts of land claimed as aforesaid by the defendants, and of which two-thirds have been found for them; if the law be for the defendants, then we find for the said defendants the one undivided third part of the said land conveyed by the said Abraham Wagoner and wife, of which we have herein found two undivided third parts for the defendants."

The defendants, by their attorneys, moved the Court to arrest judgment for the plaintiffs on this special verdict and to render judgment thereon for the defendants, but the Court, on the 8th day of April, 1878, overruled the said motions and rendered judgment for the plaintiff against the defendants for one undivided third part of the said lands, being for the supposed interest of Polly Wagoner therein.

[Page 10 printed record.]

Plaintiffs in error insist that this judgment is erroneous, because:

1st, The defendant in error, Riley, did not have the right, title and interest of Polly Wagoner in and to the land in dispute at the time of the institution of the suit.

2d, The right of the plaintiff below to recover against the defendants on the interest of the said Polly Wagoner, if he had acquired such interest, was barred by the statute of limitations at the commencement of the suit.

3d, The special verdict does not show that the defendants were in possession of, or claimed title to, the interest of Polly Wagoner in and to the lands in dispute at the time of the institution of the suit.

All the points made arise on the facts found in the special verdict, and if the facts therein contained are not sufficient to warrant the judgment for the plaintiff, such judgment must be reversed and judgment rendered for the defendants.

A special verdict must contain all the material facts from which the law is to arise, including both disputed and undisputed facts. Whatever is not found in a special verdict is to be considered as not existing; it cannot be aided by intendment or by extrinsic facts appearing on the record; it must be self-sustaining.

Barnes vs. Williams 11 Wheaton 415.

Stribling vs. Bank of the Valley 5 Randolph 159.

Vansyckel vs. Stewart 77 Penna. State 124.

The first point made is that the plaintiff below, Riley, did not have the right, title and interest of Polly Wagoner in and to the land in dispute at the time of the institution of the suit.

Special verdict after finding that legal title was vested in Polly Wagoner and finding that she was then the wife of Abraham Wagoner, finds that "on the —— day of February, 1868, the said Abraham Wagner and Polly his wife, conveyed to the plaintiff in this cause all right and title in said lands," and this is all that is found on this subject. Is this finding sufficient to pass the title of Polly Wagoner, a married woman, to the plaintiff, Riley? Clearly not.

The law in force at the time this married woman undertook to convey this land, was the following, found at page 571, sec. 7 Code of Va. 1860:

"When the privy examination, acknowledgment and declaration of a married woman shall have been so taken and recorded in Court, or in the Clerk's office, or when the same shall have been taken and certified as aforesaid, and the writing to which such certificate is annexed, or on which it is, shall have been delivered to the proper Clerk and admitted to record as to the husband as well as the wife, such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature, which at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were at the said date, an unmarried woman; and such writing shall not operate any further upon the wife or her representatives, by means of any covenant or warranty contained therein."

Sections referred to in this section have reference to mode of taking and certifying acknowledgments of deeds by married women, and it is not necessary to refer to them.

By the section above quoted it is indispensable that the conveyance of a married woman shall be "admitted to record as to the husband as well as the wife" before it can operate to convey from the wife her right of dower or other right, title or interest in real estate.

All the elementary Virginia books and all the cases on the subject are to the effect that a married woman can only convey in strict conformity to the statute, and that her deed only takes effect when it is recorded, until when, it is a nullity.

2 Minor pp. 580-1-2.
2 Tucker p. 260.
2 Lomax 359.
Elliott vs. Piersol 1 Peters 1.
Hepburn vs. Dubois 12 Peters 345.
Leftwich vs. Neal 7 W. Va. 576.

The special verdict does not contain the material fact that the conveyance of Polly Wagoner was recorded, therefore it was not recorded and is a nullity.

It cannot be contended that when the special verdict says that "Wagoner and Polly, his wife, conveyed," that these words import that Mrs. Wagoner caused her conveyance to be recorded after she executed, acknowledged and delivered it to her vendee, because the language bears no such construction and is not to be helped by intendment.

Besides, the fact or act of recording is no part of the fact or act of conveying, and it is not by the statute made the duty of the married woman to record her conveyance, but is necessarily the duty of the vendee to record.

To find that husband and wife conveyed the wife's land, is to find a legal impossibility—is to find what cannot be done either in law or fact. It is the recording of the instrument which conveys or passes the wife's title.

The second point made is that the right of the plaintiff below to recover against the defendants, on the interest of Polly Wagoner, if he had acquired her interest, was barred by the statute of limitations at the commencement of the suit.

The special verdict finds that Abraham Wagoner died in February, 1868, and that Polly, his wife, died in March, 1868, and then proceeds: "And we further find that at the date of the deed executed by the said Abraham and Polly Wagoner to the plaintiff in this cause, the said Abraham Wagoner's right to recover against the said defendants, was barred by the statute of limitation."

The right of the husband to recover at the date of the deed to the plaintiff was barred as against the defendants. So was the right of the husband and wife to bring a joint action barred. So was the right of the wife to bring a separate action barred at the date of the deed, because, though she had the right of property, her husband had the right of possession before he allowed that right to become barred. How long was the right of action of the husband barred before the date of this deed? The special verdict does not answer this question. It is clear as a matter of law and fact that the right of action of both the husband and wife was barred as against the defendants at the date of their deed to the plaintiff.

What right, if any thing, passed from the husband and wife to the plaintiff by their deed to him?

The section of the code of Virginia above copied provides that "such writing shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any estate conveyed thereby, as effectually as if she were, at the said date, an unmarried woman."

Only the right of property remaining in the wife, if any thing, passed to the plaintiff, Riley. No right of action passed by the deed, because no such right was then in either the husband or wife. How, when and where did the plaintiff get any right of action to recover the property of Mrs. Wagoner? He could not get such right on the death of Wagoner by operation of any warranty in the deed of Mrs. Wagoner, because no such warranty could, at common law, operate upon her, and the statute is express that it shall not.

The exception in the statute of limitations in favor of married women and persons claiming through them, in force when this suit was brought, is as follows, found at page 636 sec. 3 and part of section 4, code of Va. 1860:

"If, at the time at which the right of any person to make entry on, or bring an action to recover any land, shall have first accrued such person was an infant, married woman or insane, then such person, or the person claiming through him, may, notwithstanding the said period of fifteen years shall have expired, make an entry on, or bring an action to recover such land within ten years next after the time at which the person, to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened."

Part of sec. 4: "The preceding section is subject to these provisoes: that no such entry or action shall be made or brought by any person, who, at the time at which his right to make or bring the same, shall have first accrued, shall be under,any such disability, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person, under disability at such time, may have remained under the same during the whole of such thirty years, or although the term of ten years from the period at which he shall have ceased to be under any such disability, or have died, shall not have expired." There is, in addition to this time, between three and four years of "war time" given to a married woman by another statute, but that is not material under the special verdict.

Did the plaintiff, Riley, get any right of action from or under this statute, to recover the property of Mrs. Wagoner as her grantee? Is a grantee the person meant in the statute by the words "claiming through him"? The words used in the statute are not the usual words "from, through or under," but the significant word "through." Does the plaintiff claim "through" Mrs. Wagoner, or "from or under" her? If he does not claim through her, he cannot, under the statute, take her right of action.

Caperton vs. Gregory, 11 Gratt. 505.
Sharp and wife vs. Head, 11 B. Monroe 277.
Williams vs. Council, 4 Jones, Law N. C. 206.

But, does the special verdict show that Mrs. Wagoner was entitled to any time after the death of her husband for her own benefit in which to sue if she had not made a deed to the plaintiff? If so how is it shown and what time did she have? Mrs. Wagoner acquired her right to this property in 1823 as appears in special verdict, by the death of her father, and was at that time a married woman and continued to be until February, 1868, when her husband died. While she owned the property she was a married woman for about 45 years, as is shown by the special verdict. Her right of action to recover possession of the property might have accrued 45 years before the death of her husband. Ordinarily a married woman under this statute would have ten years after the death of her husband to bring suit, but not more than thirty years altogether after right of action accrued to her.

In this case she may have been entitled to some time after the death of her husband in which to sue or she may not have been entitled to any time, but the fact does not appear either way from the verdict. How is the difficulty to be solved? By the well settled rule of law that he who would claim the benefit of an exception in a statute must bring himself clearly within the exception. It is for the plaintiff to show clearly that Mrs. Wagoner was within the exception, which he has wholly failed to do and it is therefore conclusively presumed that she was not.

Angell on Limitations pp. 476, 485, 486, 195, 196.
Hall vs. Timmons 2 Rich. S. C. 120.
McIver vs. Ragon 2 Wheat. 25.
Williams vs. Council 4 Jones 206.

Third and last point made is that the special verdict does nots how that the defendants were in possession of or claimed title to the interest of Polly Wagoner in and to the lands in dispute at the time of the institution of the suit.

Before a plaintiff is entitled to a judgment against a defendant in an action of ejectment, he must show that he has the right to the possession of the property described in his declaration and must, moreover, prove that the defendant was in possession thereof, or claimed title thereto at the commencement of the action. If a special verdict or agreement of facts fails to show both these things, the judgment must be for the defendant.

The law on the subject is found in code of West Va. p. 520 sec. 23, as follows:

"If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof, or claimed title thereto, at the commencement of the action."

It has been held that a general verdict will do which, "upon the issue joined, finds that the defendant is guilty in manner and form as the plaintiff in his declaration hath claimed," but the Court took occasion to criticise the loose practice.

Hawley vs. Twyman, 24 Gratt. 516.

No instance is known where a special verdict or an agreement of facts has been held sufficient to support a judgment for a plaintiff unless distinctly found that defendant was in possession of property, or claimed title thereto, at commencement of action.

Southgate vs. Walker, 2. W. Va. 427.

There is no finding in the special verdict that the defendants were in possession of the property, or claimed title thereto, at the commencement of the action. There is some reference in the verdict to the lands "claimed, as aforesaid, by the defendants," but this is merely by way of identity and not intended to be a finding of any claim of title by the defendants at the time of the institution of the suit. Nor is it even stated by way of recital that the defendants claimed any thing at the time of the institution of the suit. A direct finding that the defendants claimed title at the time

of trial would not do, because the statute is, "claimed title thereto at the commencement of the action," and whatever is not found in a special verdict is to be considered as not existing.

Therefore, it is respectfully submitted that the judgment of the Court below must be reversed and judgment rendered for defendants.

R. S. BLAIR,
EDWIN MAXWELL,
Counsel for Plaintiffs in Error.

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BRIEF OF COUNSEL

—OF—

WILLIAM W. RILEY,

Defendant in Error.

Supreme Court of the United States,

No. 152.

FELIX COLLINS et. al. vs. W. W. RILEY.

CLARKSBURG NEWS JOB ROOM PRINT.

Supreme Court of the United States,

No. 152.

FELIX COLLINS et. al. vs. W. W. RILEY.

This was an action of ejectment instituted in March, 1878, in the District Court of the United States for the District of West Virginia, having Circuit Court jurisdiction, holden at Clarksburg; by the defendant in error, W. W. Riley, against the plaintiffs in error, Felix Collins, John H. Beall, Charles Hicks, *et. al.*, to recover of the plaintiffs in error, and Granville Tingler, Aaron Schoolcraft and John W. McGill, four thousand acres of land, situated in Ritchie county, within the said judicial district and described by metes and bounds as being the land granted by the Commonwealth of Virginia, on the 19th day of July, 1786, to Samuel Young, by two patents of two thousand acres each. [*See Declaration on first page of printed Record.*

The declaration and proceedings were according to the Act of the Legislature of Virginia to be found in chapter 135 of the Code of Virginia of 1860, page 609; being the law upon the subject in the State of West Virginia at that time.

The plea of the defendants was NOT GUILTY.

During the pendancy of the case, and before trial, some of the original defendants died and it was revived against their heirs. The case came on for trial as to all the defendants on the 11th day of October, 1877 (see page 6 of printed Record), and on the 23rd of the same month the jury rendered the following verdict:

"We the jury find for the plaintiff the lands described in the declaration filed in this cause, and laid down on the plat of Surveyor John R. Boggess filed in this cause, marked "A, Verdict Plat," and known and designated on said plat as Young's No. 4, and the lower half of Young's No. 5; and bounded as follows: Beginning at a dogwood, "B," aud running n. 3, w. 400 poles, s. 89, w. 400 poles to "I;" n. 3, w, 400 poles to beech at "D," s. 87, w. 400 poles to a hickory and dogwood at "E;" s. 3, e. 800 poles to a beech at "I," n. 87, e. 800 poles to the beginning—containing 3,000 acres. Except as to two undivided thirds of 136 acres claimed by Felix Collins, and bounded as described on said plat as follows, to-wit: Beginning at a gum at "I." and running s. 44 w. 134 poles to a white oak; s. 19 w. 40 poles to a red oak; n. 3 w. 40 to pointers; n. 15 e. 138 poles to pointers; s. 75 e. 175 poles to the beginning—containing one hundred and thirty-six acres. And except as to two undivided thirds of 278 acres claimed by John H. Beall, and bounded as follows, to wit: Beginning at a beech, corner to L. Maxwell, at "2," and running n. 5 w. 30 poles to a white oak; n. 19 e. 38 poles to a white oak; n. 44 e. 134 poles to a gum at "1;" s. 35 e. 356 poles to a stake; s. 50 poles to stake on the original lines; s. 87 w. 445 poles to the beginning. And except as to two undivided thirds of 95 acres and 23 acres claimed by Charles Hicks and Levi Fling, and bounded as follows, to wit: Beginning at a white oak at "3." and running n. 15 e. 126 poles to a beech; n. 75 w. 118 poles to a gum; s. 15 w. 131 poles to pointers; s. 75 e. 118 poles to the beginning. The other tract of 23 acres bounded as follows, viz: Beginning at the W. O. at Fig. 3, and running n. 15 e. 86 poles; n. 56 e. 14 poles to a beech; s. 21 e. 94 poles to a poplar; n. 72 e. 45 poles to the original line; then by 2 lines thereof s. 3 e. 15 poles to a dogwood at "B;" s. 88 w. 135 poles stake; n. 16 e. 6 poles; s. 75 e. 30 poles to the beginning. And except as to two undivid' thirds of 172 acres claimed by Nicholas H. Fredericks, and bounded as follows, to wit: Beginning at a white oak and pointers at "4," and running s. 15 w. 152 poles to a stake on original line; s. 3 e. 172 poles to a stake; s. 75 e. 35 poles to stake; n. 15 e. 130 poles to a dogwood; east 60 poles to a sycamore; n. 45 e. 11 poles to a stone; n. 29 e. 38½ poles to a buckeye; n. 1½ e. 118 poles to 2 dogwoods; n. 75 w. 155 poles to the beginning. And except as to two undivided thirds of 175 acres claimed by Samuel B. Fredericks, and bounded as follows, to wit: Beginning at a rock and beech at "5 X." and running n. 15 e. 168 poles to north line of Sleeth tract; n. 75 w. 178 poles to 2 dogwoods; s. 1½ w. 118 poles to a buckeye; s. 29½ w. 38

poles to a stone : s 55 e. 72 poles to a stake ; n. 15 e. 16 poles to a red oak : s. 75 e. 92 poles to the beginning. And except as to two undivided thirds of 711 acres claimed by Philander S. Austin, and bounded as follows, to wit : Beginning at a gum at "6," and running s. 75 e. 372 poles to pointers ; n, 15 e. 230 poles ; n. 75 w. 126½ poles ; n. 15 e. 126½ poles ; s. 75 w, 126½ poles ; n. 15 e. 35 poles to the original line ; and with same s. 87 w. 292 poles to "I ;" n. 3 w. 115 poles ; n. 75 w. 65 poles to S. B. Frederick's corner ; and then with his line s. 15 w. 400 poles to the beginning. And except as to two undivided thirds of one hundred acres claimed dy Henry Fling, and bounded as follows, to wit : Beginning at "7," a corner to Philander Austin, and then running by three of his lines n. 75 w. 126½ poles ; n. 15 e. 126½ poles ; s. 75 e. 126½ poles ; thence s. 15 w. 126½ poles to the beginning. And except as two undivided thirds of another tract of 105 acres claimed by Henry Fling, and bounded as follows, to wit : Beginning at a beech at "8." and running n. 15 e. 145 poles to pointers ; n. 75 w. 118 poles to a white oak ; s. 15 w. 140 poles to a gum ; s. 75 e. 118 poles to the beginning. And also as to two undivided thirds of 20 and 19 acres claimed by Wilson Cunningham, and bounded as follows, to wit : Beginning at a white at "9," and running n. 75½ w. 56 poles to a small sycamore ; s. 89 w. 30 poles R. O. S. 3 ; e. 37 poles to a beech at "F ;" n. 87 e. 85 poles to "2," a beech ; n. 5 w. 30 poles to the beginning, containing 20 acres. The other piece or lot beginning at pointers at "10," and running n. 15 e. 138 poles to a stake & pointers ; n. 75 w. 45 poles to a stake ; s. 3 e. 150 poles to the beginning ; containing 19 acres, being parts of the lands claimed by the defendants respectively. And as to the two-thirds of the lands hereinbefore described and excepted we find for the said defendants, and as to the remaining one-third of the lands hereinbefore excepted and claimed by the said defendants, we find the following facts : That Frederick Switzer died on the day of , 1823, possessed in fee of lot No. 4 and the lower half of No. 5, as hereinbefore found for plaintiff, leaving three heirs-at-law who inherited said property, one of whom, Polly, had prior to his death intermarried with Abraham Wagner ; and that subsequent to his death, to wit, on the day of January, 1868, the said Abraham Wagner and Polly, his wife, conveyed to the plaintiff in this cause all right and title in said lands, and that before the commencement of this suit Abraham Wagner died, on the day of February, 1868, and the said Polly Wagner died afterwards, on the day of March, 1868 ; and we further find that at the date of the deed executed by the said Abra-

ham and Polly Wagoner to the plaintiff in this cause, the said Abraham Wagoner's right to recover against the said defendants was barred by the statute of limitation. Upon this state of facts as to the interest of Polly Wagoner, if the law be for the plaintiff. then we find for the plaintiff in fee the remaining one-third of the several tracts of land claimed as aforesaid by the defendants, and of which two-thirds have been found for them; if the law be for the defendants, then we find for the said defendants the one undivided third part of the said land conveyed by the said Abraham Wagoner and wife, of which we have herein found two undivided third parts for the defendants.

And as to the def'ts Granville Tingler, Aaron Schoo'craft and John W. McGill, we find for them.

On the 8th of April, the plaintiffs in error moved the court to arrest judgment for the plaintiff, and to render judgment for the defendants upon the verdict, for various reasons appearing upon the face of the record; and the plaintiff moved the court to enter judgment for said plaintiff upon the verdict aforesaid. The court overruled the motion of the said plaintiffs in error, and rendered judgment for the defendant in error, as against the plaintiffs in error, Felix Collins, John H. Beall, Charles Hicks, Levi Fling, Nicholas H. Frederick, Samuel B. Frederick, Philander S. Austin, Henry Fling. and Wilson Cunningham, for one third of the lands claimed by the said plaintiffs in error, and gave judgment in favor of the defendants, Granville Tingler, Aaron Schoolcraft, and John W. McGill, and awarded to the plaintiffs in error a writ of error to this court. [*See pages* 8, 9 *and* 10 *of printed record.*]

The learned counsel for the plaintiffs in error assigned various causes of error in the proceedings of the court below; and the counsel for the defendant in error regrets that he had not an opportunity to examine and consider maturely the brief of the counsel of the plaintiffs in error before preparing this brief; only having hastily heard read the brief in favor of the plaintiffs in error; from such hasty and slight consideration of said brief it is respectfully conceived, that in said brief, there is an attempt to assign errors to the proceedings of the court not appearing upon the record; There is no Bill of Exceptions taken as to any of the rulings of the court, nor is there any special reason assigned for arresting the judgement of the court upon the verdict found by the jury; And it is contended upon the part of the defendant in error that if enough appears upon the face of the verdict to enable the court to render judgement according to right and justice, that the judgement should not be arrested. The counsel for the plaintiffs in error seems to regard the verdict as an ordinary special finding, in

which all the facts proven upon the trial are set forth. This it is conceived, is an erroneous view, and the opinion of the counsel for the defendant in error is, that the legal effect of the verdict is, a general finding for the plaintiff of one-third of the land claimed by the plaintiffs in error, and described severally by metes and bounds in the verdict, and laid down on the plat and report of the surveyor, and submits to the court certain facts found by them; and if those facts preclude a recovery of one-third of the various parcels of land referred to in the verdict, then as to said one-third they found for the said plaintiffs in error, but as said facts do not preclude such recovery, they found said one third for the defendant in error, and that in as much as their is a general finding for the defendant in error for said one-third, it shows that the defendant in error established all facts neccessary to a recovery on his part of said one-third, unless the facts found by the latte part of the verdict precludes such recovery, and it is conceived that sucl after-facts found by the jury raised the single question: Whether a *fem covert*, the owner of land, where there has been such adversary possession, as would bar the recovery by the husband or the husband and wife jointly, may convey the land to another, and after the death of the husband the alienee maintain an action of ejectment for the recovery of of it. It is contended on the part of the defendant in error; that under the statute of Virginia, referred to by the counsel of the plaintiffs in error, which was the law governing the case at the time of the trial, clearly shows such right, unless the special finding upon that subject shows that the right of the wife to recover was also barred. which does not appear by the finding. The finding that the husband was barred and omitting to find that the wife was, would if necessary warrant the presumption that the wife's right was not barred, but it is contended that such presumption is not necessary to sustain the judgment of the court, as it was necessary for the plaintiffs in error to show that such recovery was barred.

The brief for the counsel of the plaintiffs in error would seem to raise the question whether the saving to a *feme covert*, as provided for in the statute referred to, and copied from page 633, sec. 4, of the Code of 1860 of Virginia, was personal and could only be claimed by Polly Wagoner or her heirs, and not to her alienee, for the statute expressly provides "that the person claiming through the party laboring under the disability may assert the right within 30 years after the right accrued." Such, perhaps, would have been the construction of the statute upon the subject under the second section of the act, on page 488 of vol. 1, of the Code of Virginia, 1819. That gives the right to the party, or his or her heirs only, but the act in the Code of

1860 gives it to the party claiming through the person under disability. The reason, no doubt, of the act of 1819, giving the right only to the party or heirs, was, that at that time all conveyances made for lands in adverse possession were void. The act in the Code of 1819 was first changed in this respect by section 31, page 590, of the Code of Virginia of 1849. This section is the exact provision in the section referred to and copied from the Code of 1860. The Code of 1860 was not an enactment of itself but a compilation of the laws then in force. To give the statute in the Code of 1860 the construction contended for by the other side, there was no necessity of changing the law upon the subject, in the Code of 1819.

The question whether Polly Wagoner, under whom the defendant in error claims title to the land in controversy conveyed her right to the defendant in error according to the statute upon the subject, does not arise upon the record. The jury having found that she ~~made such con-~~ con-
veyed the land ~~veyance~~ is all that is necessary.

The objection that the jury did not find that the plaintiffs in error were in possession of the land at the time of the institution of the suit is answered by the general finding for the defendant in error and other parts of the verdict. To sustain the verdict the court is referred to 23d, 25th, 26th and 27th Sec. of the Code of 1868 of West Va. Ch. 90, pages 520 and 521 which are as follows:

"23 If the jury be of the opinion for the plaintfis, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the premises or any part thereof, and against such of the defendants as were in possession thereof, or claimed title thereto, at the commencement of the action.

"25. When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally as specified in the declaration; but if it be proved to only a part, or share of the premises the verdict shall specify such part particularly as the same is proven, and with the same certainty of description as is required in the description."

"26. If the verdict be for an undivided share or interest in the premises claimed, it shall specify the same, and if an undivided share or interest of a part of the premises, it shallspecity each share or interest, and describe each part as before required."

"27. The verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life or whether it be for a term of years, and specifying the duration of such term."

Also the cases cited by the plaintiffs in error of Caperton

et. al. vs. Gregory's leasee. 11 Gratt. page 505. Hawley vs. Twyman, Trustee, 24 Gratt. 516. And also, the case of Armstrong, &c., vs. Morrill 14 Wallace; page 120. The case of Southgate vs. Walker, 2 W. Va.. 427, cited by the plaintiff in error, is not applicable to the present case, as in that case the parties agreed the facts and omitted to state anything in relation to possession of the land in controversy, by the defendant at the time of the institution of the suit. Wholly unlike the present case, where there is a general finding for plaintiff, which implies that the defendant in error proved upon the trial all that was necessary upon his part to a recovery, unless the special facts found by the jury defeated such right.

GIDEON DRAPER CAMDEN,

Counsel for Defendant in Error.

Nov., 1881.

14-329

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 815.

WILLIAM H. WOOD, APPELLANT,

vs.

THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED MARCH 18, 1881.

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SUPREME COURT OF THE UNITED STATES.

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1 Pleas had in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, before the honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the term of January, 1881.

Be it remembered that heretofore, to wit, on the 8th day of October, 1880, William H. Wood filed in said circuit court his bill of complaint against the B. & M. R. R. Co.; which said bill is in words and figures following, to wit:

In the circuit court of the United States, district of Nebraska.

WILLIAM H. WOOD, COMPLAINANT,
vs.
THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY in Nebraska, respondents.

Bill in chancery.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Complainant, for cause of action, complains and says the respondent is a corporation duly organized under and by virtue of the laws of the State of Nebraska, and the matter in controversy in this suit, exclusive of costs, exceeds the sum or value of five thousand dollars *exclusive of costs.*

And complainant further says that Robert Beall, on or about the 1st day of February, 1866, duly obtained a pre-emption filing and entry upon the SW. ¼ of the NW. quarter and the NW. ¼ of the SW. ¼ of section thirteen (13), township No. eight (8), range seven (7)
2 in Lancaster County, Nebraska, and lived and resided upon said tract of land from the 1st day of Feb., 1866, up to June 27th, 1867, and made valuable improvements on said tract of land, and afterwards said Beall abandoned said tract of land.

And on or about the 24' day of May, 1871, complainant duly made a homestead entry on said tract of land under and by virtue of the laws of the United States and has ever since lived upon and cultivated said land, and has duly complied with law to entitle him to a patent had it not been for the grant to the Burlington and Missouri River Railroad Company by virtue of an act of Congress approved July 2nd, 1864, and on or about January 31st, 1877, complainant duly made final proof to entitle him to a patent under and by virtue of the homestead law of the United States, but the land department of the United States refused complainant a patent for the reason said tract of land had been approved to the Burlington and Missouri River Railroad Company by virtue of an act of Congress approved July 2nd, 1864.

That under and by virtue of an act of Congress approved July 2nd, 1864, said railroad company duly accepted the grant of land under and by virtue of said act, and filed the map with the Secretary of the Interior June 15th, 1865, showing the location of the road by survey on the ground, and duly built the road on the line thus fixed, and said land is within 20 miles of the road as fixed. And it was not until on or about the 8th day of April, 1875, that the said railroad company under the supervision of the Secretary of the Interior of the United States, *that*

said tract of land by mistake, and by an erroneous construction of the laws of the United States said land was unlawfully selected for and approved to said railroad company, *and afterwards by mistake and by an erroneous construction of the laws of the United States, approved*
3 *to said railroad company*, and afterwards by mistake and by an erroneous construction of the laws of the United States a patent was unlawfully made, executed, and delivered to said railroad company by virtue of an act of Congress, approved July 2nd, 1864, and amendments thereto.

Complainant prays the legal title to said landbe made in him, William H. Wood, and such other and further relief as he is entitled to.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issued out of and under the seal of this court, directed to the Burlington and Missouri River Railroad in Nebraska, respondent, commanding them on a certain day, therein to be named, and under a certain penalty to be and appear in this court then and there to answer all and singular the premises and to stand to perform and abide such further order, direction, and decree, as may be made against them; as your orator is in duty made and bound will ever pray.

H. H. BLODGETT,
Solicitor for Complainant.

CHAPIN & CROOKER,
Of Counsel.

Service of summons waived and will plead in twenty days. Oct. 7, 1880.

T. M. MARQUETT & J. W. DEWEESE,
Att'ys for Def't.

(Said bill is endorsed as follows:) No. 103 F. William H. Wood vs. B. and M. R. R. Company in Nebraska. Bill. Filed Oct. 8, 1880. Watson B. Smith, clerk. H. H. Blodgett, solicitor for complainant.

Thereupon afterwards, to wit, on the 8th day of November, 1880, a demurrer was filed in said case; which said demurrer is in words and figures following, to wit:

4 *Demurrer to complainant's bill.*

In the circuit court of the United States, district of Nebraska.

WILLIAM H. WOOD
vs.
THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

The respondent, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein set forth, does demur thereto, and for cause of such demurrer shows that said complainant has not by his bill made such a case as entitles him in a court of equity to any relief from or against this respondent, touching the matters contained in said bill or any of such matters.

And it appears by complainant's own showing, by his said bill of complaint, that said complainant is not entitled to the relief prayed for by said bill against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant demurs to all the matters contained therein, and humbly prays the judgment of this court whether the said respondent company shall be compelled to make any further answer to this said bill, and prays to be hence dismissed, with the reasonable costs in this behalf sustained.

T. M. MARQUETT,
Solicitor for Respondent.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

T. M. Marquett, being duly sworn, says that he is solicitor for
5 respondent herein, and which is a corporation, and he has read the foregoing demurrer to the bill of complaint in this suit, and that said demurrer is not interposed for the purpose of delaying said suit or any proceeding therein.

T. M. MARQUETT.

Sworn to before me and subscribed in my presence by T. M. Marquett this 8th day Nov'r, 1880.

WATSON B. SMITH, *Clerk.*

I hereby certify that in my opinion the foregoing demurrer to the said bill of complaint is well founded in law and proper to be filed in the above cause.

J. W. DEWEESE,
Solicitor and of Counsel for Respondent.

(Said demurrer is endorsed as follows:) No. 103 F. William H. Wood vs. The B. & M. R. R. Co. in Nebraska. Demurrer. Filed Nov. 8, 1880. Watson B. Smith, clerk. Marquett.

Thereupon afterwards, at the January term of said court, on the 5th day of February, 1881, the following proceedings were had in said case, as appears of record on folio 748, journal F, of said court.

WILLIAM H. WOOD *vs.* THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.	No. 103 F.

This cause being heard on demurrer to the bill, the court does, on consideration, sustain said demurrer.

Whereupon it is ordered that the bill of complaint of said complainant be and the said bill is hereby dismissed, and that said defendant recover from said complainant the costs of this suit, taxed at $26.45.

6 To which ruling and judgment of the court said complainant, by his counsel, excepts and prays an appeal to the Supreme Court of the United States, which said appeal is hereby allowed by the court.

Thereupon afterwards, to wit, on the 18th day of February, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

7 Know all men by these presents that we, J. C. Crooker, W.

F. Chapin, and H. H. Blodgett, are held and firmly bound unto The Burlington and Missouri River Railroad Company in Nebraska in the full and just sum of five hundred dollars, to be paid to the said Burlington and Missouri River Railroad Company in Nebraska, its certain attorney, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this day of , in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between William H. Wood, complainant, and the Burlington and Missouri River Railroad Company, defendant, a decree was rendered against the said William H. Wood, who prayed an appeal from said decree to the Supreme Court of the United States, which appeal has been allowed by the said circuit court:

Now the condition of the above obligation is such that if the said William H. Wood shall prosecute his said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

H. H. BLODGETT.
W. F. CHAPIN.
J. C. CROOKER.

Approved by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 103 F. United States circuit court, district of Nebraska. William H. Wood vs. Burlington and Mo. River R. R. Co. in Neb. Bond. Filed February 18, 1881. Watson B. Smith, clerk.

8 DISTRICT OF NEBRASKA, *ss:*

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to seven, contain a true and faithful transcript of all pleadings, process, and proceedings of record and on file in my office, as said clerk, in the case of William H. Wood, complainant, versus The Burlington and Missouri River Railroad Company in Nebraska, defendant.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 14th day of March, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsement on cover:) No. 815. William H. Wood, appellant, vs. The Burlington and Missouri River Railroad Company in Nebraska. Nebraska C. C. U. S. Filed 18th March, 1881.

In The Supreme Court.

Of the United States.

WILLIAM H. WOOD,
Appellant,

vs.

THE BURLINGTON & MISSOURI
RIVER R. R. CO. IN NEB.
Appellees.

BRIEF FOR APPELLANT.

IN THE

SUPREME COURT

OF THE

UNITED STATES

WILLIAM H. WOOD,
Appellant,

versus

THE BURLINGTON and MISSOURI RIVER RAILROAD CO. in NEBRASKA.
Appellees.

BRIEF FOR APPELLANT.

IN THE

SUPREME COURT

OF THE

UNITED STATES

WILLIAM H. WOOD,
Appellant,

versus

THE BURLINGTON and MISSOURI RIVER RAILROAD CO. in NEBRASKA.
Appellees.

BRIEF FOR APPELLANT.

This action was commenced by William H Wood

appellant, against the B. & M. R. R. Co. appellees, for the legal title to the N-W ¼ of the S-W ¼ and the S-W ¼ of the N-W ¼ of Sec. 13, Town 8, Range 7, in Lancaster County, Nebraska, Appellant Claims title under and by virtue of the homestead law of the United States, approved May. 20, 1862. The B. & M. R. R. Co, appellees have obtained a patent to said land under and by virtue of an act of Congress, approved July 2nd, 1864.

13 U. S. Statutes at large, p. 364, Sec. 19.

This action stands on demurrer to bill of complaint and the appellant in his bill sets forth the following facts:.

1st That the amount in controversy exceeds five thousand dollars, exclusive of costs.

2nd That on the 1st day of February, 1866, Robbert Beall duly obtained a pre-emption filing and entry upon the land in question and lived upon and cultivated the same until the 27th day of June, 1867, and made valuable improvements on said land and then abandoned said land.

3d That on the 24th day of June, 1871, Complainant duly made a homestead entry on said tract of land under and by virtue of the laws of the United States, and has ever since lived upon and cultivated said land and made the following improvements: built a good frame house; orchard, vinyard, barn, forest of 5 acres, and has fulfilled the law to entitle him to a patent.

4th And on the 31st day of June, '77, appellant made final proof at the United States Land Office at Lincoln, Nebraska, to entitle him to a patent, but was refused on the ground the tract of land in question had been approved to the B. & M. R. R. Co. on the 8th day of April, 1875, by virtue of act of Congress approved July 2d, 1864.

5th That under and by virtue of an act of Congress approved, July 2d, 1864, said railroad company duly accepted the grant of land under and by virtue of said act and filed the map with the Secretary of the interior June 15th, 1865, showing the location of the road by survey on the ground, and duly built the road on the line thus fixed, and said land is within 20 miles of the road as fixed.

6th And it was not until on or about the 8th day of April, 1875, that the said railroad company, under the supervision of the Secretary of the Interior of the United States that said tract of land, by mistake and by an erroneous construction of the laws of the United States, said land was unlawfully selected for, approved and patented to said railroad company, under and by virtue of an act of Congress, approved July 2nd, 1864.

To which respondent, the railroad company filed a general demurrer, which was sustained by the court and complainant came to this court on appeal.

POINTS AND AUTHORITIES.

The construction to be placed on an act of congress approved July 2d, 1864 13 U. S. Statutes at large, p 364, sec. 19 as to when the right of the B. & M. R. R. Co., attached to the tract of land in question, must determine this case. The following is a copy of the granting act.

"That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the the said Burlington & Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile, on each side of said road, and the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Provided, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior, and shall also establish the line of said road, and file a map thereof with the secretary of the interior within one year of the date of said acceptance, when the said secretary shall withdraw the lands embraced in this grant from the market.

In the case of the United States vs the B. & M. R. R. Co. 8 Otto 339.

The Supreme Court in placing a construction on said act, which was concurred in by a full court, and which involved one million five hundred thousand acres of land out side of twenty miles from the road, as defin-

itley fixed, and in the language of the high and learned court.

"Field J. Says. The position that the grant to the company was only of land situated within twenty miles of the road, finds no support in the language of the act that simply declares that a grant is made of land to the amount of ten sections per mile, on each side of the road. The grant is one of quantity, and the land must be taken by odd sections in equal quantities on each side of the road, and must be on the line of the rord. There is here no limitation of the distance from the road, within which the selection is to be made, and the court can make none. The objection undoubtedly has its suggestion from the fact that nearly all, perhaps all other grants of land in aid of the construction of railroads, prescribe a lateral limit within which the land is to be selected, and provides for the selection of land elsewhere to make up any deficiency. The reason for the omission in this case is obvious.

The road was to run through a country already partially settled, and the Union Pacific precluded a selection of land by defendants; if the latter grant were confined within a certain lateral limit, congress gave no government bond to the company. Its aid consisted merely in the grant of land, and that this might not fail, it allowed the land to be taken along the line of the road wherever it could be found. They certainly did not require the land to be contiguous to the road, and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line. It was not required to take it as each section of twenty miles was finished it was optional to take then, or wait until the entire road was completed, and then the land could be selected along

the whole line of the road, without reference to any particular section, where lateral limits are assigned to a grant, the land within them must be exhausted before land for any deficiency can be taken elsewhere, and where no lateral limits are assigned to a grant, the land department of the government is supervising the execution of the act of congress, in selecting the land." The foregoing is the language of Field J. concurred in by a full court.

8 Otto Supra.

The court here decides and declares that this grant is unlike all other grants. It has no lateral limits, that it is a grant of a quantity of land on each side of the road, to the amount of ten sections per mile, along the line thereof, regardless of distance. The railroad company can select their land any where on each side of the road, under the supervision of the secretary of the interior, without regard to distance from the line of the road as definitely fixed, or in other words the granting act did not make the grant definite and explicit, by definitely fiixing the line of the road and the court can not legislate on the subject, it can be taken in Dakota County, and in the south or north part of the state, one hundred miles from the road as definitely fixed, as well as the section of land adjoining the road bed.

That the railroad company had as much right to land one hundred miles away, as to the section adjoining thereto, definitely fixing the line of the road was the first step toward making the grant definite and certain to the extent that the selection of land afterwards to be made must be an equal amount of land on each side of the road,and along the line therof, as definitely fixed

without regard to distance from the road bed, and afterwards a selection makes the land definite and certain, and in the language of Field J:–

8 Otto Supra.

There is no limitation of distance from the road, within which the selection can be made, and the court can make none. They certainly do not require the land to be contiguous to the road, and if not contiguous it is not easy to say at what distance the land to be selected, would cease to be along its line. Such is the language of Field J.

8 Otto Supra.

Therefore definitely fixing the line of road did not attach it to any particular tract of land, if it attached to the contiguous it attached equaly to the tract one hundred miles from the road bed. In other words if it attached to the tract of land in the case at bar, it attached as well to all odd sections in Dakota, Dixon and Cedar Counties more than one hundred miles away from the road bed, as definitely fixed. *Therefore as as inevitable sequence to give certainty and precission to each tract required a selection to be made under the supervission of the secretary of the interior; which amounts to a withdrawal under the granting act.*

8 Otto Supra.

The learned Circuit Court proceeded upon the grounds of the decision before made in the case of Taboreck vs B. & M. R. R. Co. a written opinion of the learned judge involving, the same points and in the language of the Circuit Judge, he says: "the grant

seems to be a definite and explicit grant of all the land within the ten alternate sections on each side of the line. Nothing is wanted to make the grant definite and absolute, except the definite location and fixing of the line.

The fact that congress in the grant did not prescribe any limitation upon the distance from the road, within which the company may make selections in lieu of lands, previously sold, or disposed of, by the government, can make no difference under the act of 1864. The foregoing is the language of the Circuit Judge.

That the Circuit Judge wholly disregarded the decision of the Supreme Court 8 Otto, supra, is very obvious.

The decision of the circuit Judge is not sound only requires an examination of the granting act which grants to the amount of ten sections per mile, on each side of the road, said granting act gives no deficiency on lieu lands, therefore the learned circuit judge was mistaken, when he said tae one million five hundred thousand acres of land outside of the twenty mile limit lieu lands, when lieu land or deficiency land is unknown to the granting act.

Says Davis J, 2 Otto, supra; 740—All grants of this description are strictly construed against the grantee, nothing passes but what is conveyed in clear and explicit language, if not expressed in the statutes it cannot be implied.

The only construction which would give the B. & M. R. R. Co. this vast domain of land is the construction placed upon it by Field J. 8 Otto, supra:

"That this is a grant of a quantity of land, ten sections on each side of the road and can be taken without regard to distance, only so it is taken in equal amounts on each side of the road." It attaches equally to land one hundred miles away as if contiguous to the road-bed.

The learned Circuit J. says.

"This is a definite and explicit grant of all the land within the ten sections, and only requires definitely fixing the line of the road to give precission and attach it to each particular tract is untenable.

For if this is a definite and explicit grant of the land in odd sections, the B. & M. R. R. Co. is not entitled by the granting act to any land outside of the twenty mile limit, they are strictly confined to the granting act (2 Otto 710) which gives them no lieu lands, and the one million five hundred thousand acres of land declared to belong to the B. & M. R. R. Co. in 8 Otto. supra would have vested in the United States under the decision in the court below, for the learned J. says this is a definite and explicit grant adjoining the road bed.

In the Taboreck case Supra the learned court was mistaken in the language of the granting act, and became confused with other land grants. The Union Pacific land grant is definite and certain by fixing the line of the road, it has limits and no lieu lands. Well might the Union Pacific claim lieu lands under the decission in the Taboreck case. The Central Pacific land grant has limits and lieu lands. Examine Ryan vs Railroad Co. 9 Otto 382. The B. & M. land grant is ten sections on each side of the road, no limits, no lieu lands. 8 Otto Supra. In the case of T abereck

Supra, the court says the road having no limits, it attaches all the same to every tract of land north and south along the line of the road, irrespective of distance, the court admits there is no limit, but founds his decision upon the ground that the road has limits, and lieu lands, thus legislating lieu lands in the grantiug act, and wholly disregarding the decision in 8 Otto Supra.

That either the Supreme Court or Circuit must be wrong, they cannot both stand.

The rule of law is settled that this is a grant in *presenti*, it creates an immediate interest and does not indicate to give in the future.

Leavenworth etc. R. R. Co. vs U. S. 2 Otto 741-749.

And the law is settled, it does not attach to any particular tract of land nor does the title vest in any particular tract of land until the grant becomes definite and certain.

Railroad Co, vs Fremont Co. 9 Wall. 94.

Leavenworth etc, R. R. Co. vs U S 2 Otto 741-749

Ryan vs Railroad Co. 9 Otto. 388.

Where lateral limits are prescribed definitely fixing the line of the road by survey on the ground gives precision and attaches it to each particular tract.

2 Otto. supra.

Definitely fixing the line of the road does not give precision or attach it to any particular tract of land in the B. & M. grant, for if it attached to the tract at

bar, it attached to the tract fifty miles away, but when a selection is made under the supervision of the secretary of the interior, each tract of land becomes certain and definite, and until that time it is afloat.

The rule of law is too well settled to be shaken under the many decissions that the part of the act which gives precision, and attaches it to each particular tract, is the part of the act which withdraws the land from homestead and pre-emption settlement, and until that time, the land is a part of the public domain, and subject to homestead and pre-emption.

2 Otto Leavenworth R. R. Co. vs. U. S. 741.

9 Otto Ryan vs. R. R. Co. 387.

9 Wall. Railroad Co. vs. Fremont Co. 94.

7 Otto M. K. & T. R. R. Co. vs. K. P. 498.

Says Field J. 7 Otto 498 M. K. & T. R. R. Co. vs. Kansas Pacific.

The grant is in the nature of afloat until the sections granted can be ascertained, and the government did not intend to hold the land in the meantime from occupation and sale, and thus retard the settlement of the country. 7 Otto Supra.

Therefore the granting act provides the secretary of the interior shall withdraw the land from market. The Union Pacific of the same act is not required to withdraw its lands from market; the Union Pacific has limits, and the survey of the road and filing of the maps withdraws the land from market says Davis J. 2 Otto Supra.

It is not dificult to get at the intent of congress in the granting act, requiring the land to be withdrawn from market in this particular act, it means simply until withdrawn from market, it is subject to homestead and pre-emption.

Any other construction would leave the following language meaningless in the act "*when the Secretary shall withdraw the land from market*, The whole act taken together and construed under the rule laid down in U S vs Freeman 3 How 552, would be; definitely fixing the line of the road gave certainty to the amount of land to be selected on each side of the road and along the line thereof, without regard to distance from the line as definitely fixed *afterwards, a selection of the land under the supervision of the Secretary of the Interior gave precision and certainty to each particular tract of land*; thus having found out the intent of Congress the following rules of construction are settled, says Wayne J. in U S vs Freeman, 3 How 552, a thing which is within the intention of the maker of the Statute is as much within the statutes as if it were within the letter. The intention of congress must prevail over any other constructions, and every part of an act is to be taken in view, and the intention of the legislature extracted from the whole. Every technical rule of construction must yield to the paramount will of the legislature. The foregoing rules of construction are settled by the Supreme Court of the United States.

United States vs. Freeman. 3 How. 552.

Congress has further declared, 10 U. S. statutes at large p. 269, approved March 27, 1854:

"That every settler on public land which have

been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption,"etc., had the effect to "reserve" this land from the operation of the grant for the purpose of pre-emption and homestead settlement until actual withdrawal, and excludes it from the operation of the grant, although no exception may be made expressly for such purpose in the granting act.

Leav., Law, & Gal. R. R. vs. U. S., 2 Otto, 733.

Wilcox vs. Jackson, 13 Pet. 498.

The argument of the Railroad Company is somewhat ingenious but not sound. They say they filed the map, and surveyed the line of road, and had done all that they could do. If the Railroad Co. was dissatisfied with the granting act, the place for legislation is in congress. Sec. 22 of the granting act provides that congress may at any time alter or amend this act. The grant is in *presenti*, and if the land department of the government would not withdraw the land from market to give precision, and attach it to each tract, a mandamus would compel the performance of this ministerial duty of the department. United States vs. Schurz 12 Otto, the railroad might with equal propriety say if the government would not issue a patent, they would lose their land. But not so. 12 Otto Supra. But whether it would or not is immaterial, the railroad accepted the grant as it is, and if they want legislation, apply to congress for relief.

On the 20th day of Feb. 1866, was the first notic received at the local land office Lincoln, Nebraska, for the withdrawal of any of the B. & M. R. R. lands

each section and part of section was described in the withdrawal, it having been selected by the railroad company, under the supervision of the secretary. The tract in question at the time, had been, and was a lawful pre-emption, it was not selected, neither was it approved to the railroad, but it had been severed from the public domain at the time of said selection, and could not be taken at that time, 2 Otto Supra 733. and afterwards it became the public domain, and had not been selected and withdrawn from market and not until 4 years after the homestead right had attached, and appellant made more than one thousand dollars worth of improvements, did the company through the secretary of the interior claim any rights in or to the land in question. Appelant being first in time is fiirst in right. 1 Otto.

Shepley vs Cowan, 331.

For the foregoing reasons the legal title to the land should be declared to be in appellant.

John I Redick
W J Cornell
Solicitors for
Appellant Wood

E E Brown
Counsel

Brief prepared by
H H Dempsey of
Counsel

14-333

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~335.~~ 89

FRANCES LEE EGBERT, EXECUTRIX OF SAMUEL H. BARNES, DECEASED, APPELLANT,

vs.

PHILLIPP LIPPMANN AND AUGUST SELIGMANN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 12, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 335.

FRANCES LEE EGBERT, EXECUTRIX OF SAMUEL H. BARNES, DECEASED, APPELLANT,

vs.

PHILLIPP LIPPMANN AND AUGUST SELIGMANN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 In the circuit court of the United States. In equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Frances Lee Egbert, as executrix of the last will and testament of Samuel H. Barnes, deceased, brings this her bill of complaint against Phillipp Lippmann and August Seligmann, copartners, doing business in the city of New York, under the firm name of P. Lippmann & Co.

And thereupon your oratrix complains and says:

That she is informed and believes that said Samuel H. Barnes was the original and first inventor of new and useful improvements in corset springs, fully described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention, and which, at the time of his application for a patent as hereinafter mentioned, had not been for more than two years in public use, or on sale with his consent or allowance.

And your oratrix, on information and belief, further shows unto your honors that said Samuel H. Barnes, being so as aforesaid the first inventor and discoverer of said improvements, and being also a citi-
2 zen of the United States, did on the 17th day of July, 1866, upon due application therefor, obtain letters patent of the United States for said invention, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, whereby there was granted and secured to said Samuel H. Barnes, his heirs, administrators, or assigns, or intended so to be, for the term of seventeen years from and after the date of the said letters patent, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and improvements, as set forth in said letters patent, which are now remaining on record in the Patent Office of the United States; and by virtue whereof said Samuel H. Barnes became and was the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said letters patent.

And your oratrix further shows unto your honors that said Samuel H. Barnes having departed this life in the county of New York, she, under her then name of Frances Lee Barnes, was appointed his executrix by his last will and testament, and she duly qualified as such, and letters testamentary were issued to her upon the goods, chattels, and credits of said Samuel H. Barnes by Gideon J. Tucker, surrogate of said county, on the 20th day of September, 1866, and that she has discharged, and still discharges the duties of such executrix, as by said letters testamentary, or a duly autenticated copy thereof here in court to be produced, will more fully and at large appear.

And your oratrix further shows unto your honors that she, under her then name of Frances Lee Barnes, having for good and lawful cause surrendered said letters patent to the Commissioner of Patents, and having made due application therefor, and having in all things
3 complied with the acts of Congress in such case made and provided, did, on the 12th day of May, 1868, obtain new letters patent, being for the same invention, for the residue of said term, and which were marked Reissue No. 2929, and were issued in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commis-

sioner of Patents, and bearing date the day and year last aforesaid, as by the said last-mentioned letters patent now remaining on record in the Patent Office will appear.

And your oratrix further shows unto your honors that she, under her then name of Frances Lee Barnes, having for good and lawful cause surrendered said last-mentioned letters patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the 29th day of June, 1869, obtain new letters patent for the same invention for the residue of said term of seventeen years, which said last-mentioned letters patent were issued in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the day and year last aforesaid, which letters patent are now remaining on record in the Patent Office.

And your oratrix further shows unto your honors that she, under her then name of Frances Lee Barnes, having for good and lawful cause surrendered said last-mentioned letters patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the 31st day of August, 1869, obtain new letters patent for the same invention, for the residue of said term of seventeen years; which said last-mentioned letters patent were issued in due form of law, under the seal of the Patent Office of the United States, signed
4 by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the day and year last aforesaid, which letters patent are now remaining on record in the Patent Office.

And your oratrix further shows unto your honors that in the fall of 1869 she, under her then name of Frances Lee Barnes, filed a bill of complaint in the circuit court of the United States for the southern district of New York, praying for an injunction and an account against Ferdinand Straus for infringement of said letters patent; that answer was put into said bill, setting up that said Samuel H. Barnes was not the first inventor of the invention claimed in said last-named reissued patent; that a replication was filed, and testimony taken on both sides, and the case brought to a hearing. That thereafter a decision was rendered by his honor Judge Blatchford, holding said court, overruling said alleged defense, declaring said reissue valid, and directing a decree to be made according to the prayer of said bill, as by the record and proceedings in said suit now remaining in the office of the clerk of said court, or a duly authenticated copy thereof, will appear.

And your oratrix further shows unto your honors that on the 2d day of Nov., 1870, she was married to Wesley Egbert, of the city of New York.

And your oratrix further shows unto your honors that she, under the said name of Frances Lee Barnes, having for good and lawful cause surrendered said last-mentioned letters patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the 4th day of November, 1872, obtain new letters patent for the same invention, for the residue of said term of seventeen years, which said last-mentioned letters patent were issued in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of

Patents, and bearing date the day and year last aforesaid, which
5 letters patent are now remaining on record in the Patent Office.

And your oratrix further shows unto your honors that said last mentioned reissued letters patent were, through mistake, issued to said executrix in the name of Frances Lee Barnes instead of Frances Lee Egbert.

And your oratrix further shows unto your honors that she, having for good and lawful cause surrendered said last-mentioned letters patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the 7th day of January, 1873, obtain new letters patent for the same invention, for the residue of said term of seventeen years, which said last mentioned letters patent were issued in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the day and year last aforesaid, as by the said last mentioned letters patent, or a duly authenticated copy thereof, in court to be produced, will appear.

And your oratrix further shows unto your honors that by virtue of the premises, she became, and now is, the sole and exclusive owner of said letters patent and invention, and of all the rights and privileges granted and secured, or intended to be granted and secured thereby. And that since she became the owner thereof as aforesaid, she has invested and expended large sums of money, and has been to great trouble in and about said invention, and for the purpose of carrying on the business, and manufacturing and selling said corset springs, and making the same profitable to herself and useful to the public; and that said invention has been and is of great benefit and advantage; and that corset springs were made according to said invention, and sold by said your oratrix,
to great advantage to the public; and that the public have gener-
6 ally acknowledged and aquiesced in the aforesaid rights of your
oratrix; and your oratrix believes that she will realize and receive large gains and profits therefrom if infringements by said defendants and their confederates shall be prevented.

Yet the said defendants, well knowing the premises and the rights secured to your oratrix aforesaid, but contriving to injure your oratrix and to deprive her of the benefits and advantages which might and otherwise would accrue unto her from said invention, after the issuing of the last mentioned reissued letters patent as aforesaid, and before the commencement of this suit, did, as your oratrix is informed and believes, within said southern district of New York and elsewhere, without the license or allowance and against the will of your oratrix, and in violation of her rights, and in infringement of the aforesaid letters patent, unlawfully and wrongfully, and in defiance of the rights of your oratrix, make and sell corset springs made according to and employing and containing said invention; and that they still continue so to do; and that they are threatening to make the aforesaid corset springs in large quantities, and to supply the market therewith, all in defiance of the rights acquired by and secured to your oratrix as aforesaid, and to her great and irreparable loss and injury, and by which she has been and still is being deprived of great gains and profits which she might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed, by the said defendants, by and through their aforesaid unlawful acts and doings.

And your oratrix further shows unto your honors, on information and belief, that said defendants have sold large quantities of said corset

springs, and has a large quantity on hand which they are offering for sale, and has made and realized large profits and advantages therefrom; but to what extent, and how much exactly, your oratrix does not
7 know, and prays a discovery thereof. And your oratrix says that the use of said invention by said defendants and their preparation for and avowed determination to continue the same, and their other aforesaid unlawful acts, in disregard and defiance of the rights of your oratrix, have the effect to encourage and induce others to venture to infringe said patent in disregard of your oratrix's rights.

And your orator further shows unto your honors that she has caused notice to be given to said defendants of said infringements, and of the rights of your oratrix in the premises, and requested them to desist and refrain therefrom; but they have disregarded said notice, and refused to desist from said infringements, and still continue to make and sell said corset springs.

And your oratrix prays that said defendants, Phillipp Lippman and August Seligmann, and their and each of their servants, agents, attorneys, and workmen, and each and every of them, may be restrained and enjoined by the order and injunction of this honorable court from directly or indirectly making, constructing, using, vending, delivering, working, or putting into practice, operation, or use, or in anywise counterfeiting or imitating the said invention, or any part thereof, or any corset springs made in accordance therewith, or like or similar to those which they have heretofore made; and that the said defendants may be decreed to pay the costs of this suit; and that your oratrix may have such further relief, or such other relief, as to this honorable court shall seem meet, and as shall be agreeable to equity.

May it please your honors to grant unto your oratrix the writ of injunction issuing out of and under the seal of this honorable court, commanding, enjoining, and restraining the said defendants, Phillipp Lippmann and August Seligmann, and their and each of their servants, agents, attorneys, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

8 And foreasmuch as your oratrix can have no adequate relief except in this court, to the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may, upon their and each of their corporal oaths, and according to their and each of their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your oratrix the profits by them acquired, and, in addition thereto, the damages suffered by your oratrix from the aforesaid unlawful acts; and that the court may assess said profits and damages, and may increase the damages to a sum not exceeding three times the amount thereof.

May it please your honors to grant unto your oratrix the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants, Phillipp Lippmann and August Seligmann, commanding them by a certain day, and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises,

and to stand to and abide such order and decree as may be made against them.

And your oratrix will ever pray, &c.

FRANCES LEE EGBERT.

GEO. GIFFORD,
Comp't's Sol'r & of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 19th day of September, 1874, before me personally appeared Francis Lee Egbert, the complainant above named, who being by me duly sworn, deposes and says that she has read the foregoing bill of complaint subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true, and she further says she is the executrix of the last will and testament of S. H. Barnes, deceased.

[L. S.] WM. C. WITTER,
Notary Public, N. Y. Co.

9 Circuit court of the United States for southern district of New York. In equity.

To the honorable judges of the circuit court of the United States for the southern district of New York, sitting in equity:

The answer of Philip Lippmann and August Seligmann, defendants to the bill of complaint of Francis Lee Egbert, executrix of the last will and testament of Samuel H. Barnes, deceased, complainant.

These defendants, now and at all times saving and reserving to themselves all and all manner of benefit of exception to the many errors, uncertainties, and insufficiencies in the complainant's bill of complaint contained, for answer thereto, or so much thereof as they are advised is material or necessary for them to make answer unto, answering, say that they deny that Samuel H. Barnes, in the said bill of complaint mentioned, was the original or first inventor of new and useful improvements in corset clasps set forth in letters patent of the United States of 17 July, 1866, as mentioned in said bill. And these defendants deny that at the time of his, said Barnes, application for
10 such patent the said alleged invention had not been for more than two years in public use; and these defendants say, the said Lippmann of his own knowledge, and said Seligmann on information and belief, that before the alleged invention set forth in said letters patent by said Barnes, and more than two years before the said application for a patent therefor by the said Barnes, the said alleged invention was well known and in use, and on sale and was sold within the United States.

And these defendants, further answering, say that whether the
11 complainant was appointed executrix of the last will and testament of Samuel H. Barnes, deceased, or was duly qualified as such executrix, or such letters testamentary were issued to the complainant, or whether said complainant had or has authority to act as such executrix, these defendants have no other knowledge or information than such as is derived from the said bill of complaint, and they therefore do not admit the allegations in said bill in reference thereto, but leave the complainant to proof thereof.

And these defendants, further answering, say, as to the said several

alleged surrenders and reissues of the letters patent set forth n said complaint, these defendants are informed and believe that such surrenders and reissues were made as set forth in the bill of complaint; but these defendants, upon information and belief, deny that such surrenders or reissues were either of them valid reissues under the acts of Congress in such case made and provided; and they deny that such reissues were for the same invention as that set forth in the said original letters patent; and these defendants in like manner deny that any part of the alleged invention as set forth in said reissued letters patent, or either of them, was the invention of the said Barnes, or was, at the time of the alleged invention by said Barnes, or within two years before his application for said letters patent, new or original, or not known or used within the United States.

And these defendants submit to this honorable court that the said reissues are invalid and void by reason of the substitution of matter therein not set forth in the original specification of said letters patent, or the drawings or model thereof; and that the amendments and alterations in said reissues are not supported or warranted by the orig-
12 inal drawing and model, and are a departure therefrom, and that said last-mentioned reissue is therefore unlawful and void.

And these defendants, as to the last of the said surrenders and reissues set forth in the said bill of complaint, further say, upon information and belief, that the surrender and reissue last mentioned was not applied for or made or reissued upon the ground of said patent being inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, nor by reason of or on the ground of any error occurring by reason of inadvertence, accident, or mistake, whereby the specification of said patent was defective or insufficient, nor by reason of anything contained in the act of Congress in such case made and provided, which gives authority for or validity to a surrender or reissue of letters patent; but these defendants say, upon information and belief, that said surrender and reissue last mentioned was upon the sole ground of the reissue of November 5, 1872, having been applied for and made and issued to Frances Lee Barnes, executrix, instead of Frances Lee Egbert, executrix, and the said last-mentioned surrender and reissue is therefore illegal, inoperative, and void.

And these defendants, further answering, say, upon information and belief, that inasmuch as it appears by the said bill of complaint that the complainant was married on the 2d day of November, 1870, to Wesley Egbert, and that the surrender and reissue of the reissued patent of August 31, 1869, was made, and the papers therein and therefor were signed by Frances Lee Barnes; that by reason thereof the said surrender and reissue of the reissued patent of August 31, 1869, was invalid
13 and void, and that the present alleged surrender and reissue, upon which this action is brought, is therefore illegal and void.

And these defendants, further answering, say that they have been informed and believe, and therefore admit, that a suit was commenced in the name of Frances Lee Barnes, executrix, against Ferdinand Strauss, by filing a bill for injunction and account, in the circuit court of the United States for the southern district of New York, upon the reissue of said letters patent of August 31, 1869; but at what date such suit was commenced, the defendants are ignorant, except as stated in said bill, and these defendants do not therefore admit the correctness of the date of the commencement of said suit, as set forth in the bill of com-

plaint, but leave the complainant to such proof thereof as she may be advised or able to make.

These defendants are informed and believe, and therefore admit, that an answer was put in to said bill, setting up that said Samuel H. Barnes was not the first inventor of the invention claimed in said reissued patent of August 31, 1869; that a replication was filed and testimony was taken on both sides, and the case brought to a hearing; that thereafter a decree was rendered by his honor, Judge Blatchford, holding said court, overruling said alleged defence, declaring said reissue valid, and directing a decree to be entered according to the prayer of said bill. But these defendants say, upon information and belief, that no evidence was taken in said action showing or tending to show a want of novelty, or prior use and knowledge of said alleged invention, excepting only the reference to the carriage springs composed of a series of plates, and also a French corset spring; and these defendants say, upon information and belief, that the defendant in the last mentioned action was,
14 during the pendency of said action, informed and put in possession of knowledge of facts and evidence, and of the names of witnesses, sufficient to have proved a want of novelty in the said alleged invention, and a prior knowledge, sale, and use of the same, and which would have defeated the said action had such testimony been introduced; but that said defendant Strauss, in such action, neglected and refused to avail himself of such testimony, or put the same in evidence in said action. And these defendants are informed and believe that no final decree has ever been entered up in said action, and no account taken, and that said action has never been prosecuted further than the decision of Judge Blatchford aforesaid, rendered in May, 1872; and that said Strauss, about the time of rendering such decision, received from the complainant a gratuitous license, and has ever since been making and selling corset springs according to such alleged invention under such license.

And these defendants are informed and believe that the said interlocutory decree in such action, and the other proceedings in such suit, have been published and held out to the trade as establishing the validity of said invention and said reissued letters patent, by arrangement and understanding between the complainant and said Strauss, while both said complainant and said Strauss had been informed of testimony and witnesses, and had knowledge and notice of the same, which would have established the want of novelty of invention, and prior use of said alleged invention.

And these defendants further say, upon information and belief, that in a suit commenced upon the reissued patent aforesaid, No. 5216, in the circuit court of the United States for the southern district of New York, in equity, wherein the present complainant was com-
15 plainant, and Samuel A. Castle, Rufus E. Hitchcock, and Henry S. Magrane were defendants, the testimony of a number of witnesses was taken on the part of the defendants as to the fact of want of novelty of said invention, and a prior knowledge, use, and sale thereof, and that such testimony was reduced to writing, and that the witnesses were duly sworn to said depositions, and signed the same before R. E. Stillwell, esq., a commissioner duly authorized to take such testimony; and that such testimony was printed for use upon the argument and trial of said cause; and that said cause, in some manner and by some arrangement not understood by these defendants, was, after having been placed upon the calendar for trial at the May term of said court, in the year 1874, suffered to pass to an interlocutory decree for

the complainant, by default and without opposition on the part of the defendants' attorney and counsel; and that said testimony so taken on the part of the defendants in that action was not used, but was suppressed, and has not been put upon the files of said court; and that thereupon, on the 15th day of May, 1874, an interlocutory decree in favor of the plaintiff was entered by consent, and without opposition, for an injunction and account; and the complainant has since published the said interlocutory decree, and held the same out to the public and the trade as further establishing the validity of the said reissued patent.

And these defendants further say, upon information and belief, that said last mentioned action has not been prosecuted to a final decree, nor has any accounting been had therein for damages or profits, and that the defendants in said action, who were the agents of certain manufacturers, have continued to sell said corset steels, made according to said invention, with the knowledge and consent of the complainant.

16 And these defendants, upon information and belief, say that the invalidity of the said invention and of the said original letters patent and reissues thereof, for want of novelty and by reason of prior manufacture, sale, and use thereof, was, at and before the commencement of this present action, well known to the complainant, as well from the evidence taken as hereinbefore mentioned as from other sources, and express notice and information communicated to the complainant by these defendants and others.

And these defendants, further answering, say, the said defendant Lippmann of his own knowledge, and the said Seligmann from information which he believes to be true, that the said defendant Lippmann commenced the making and selling of corset steels in the city of New York in the year 1859 or 1860, the same as those now made by him, and has during the last five years carried on the business of making and selling the same publicly at his various places of business in said city; and that said defendant Lippmann has always, since the issuing of said letters patent, given out and stated that the said alleged invention was not new or original, or first invented by said Samuel H. Barnes, and that the letters patent therefor were void for want of novelty and by reason of the prior knowledge, manufacture, sale, and use of the same by said Lippman and by various parties in said city of New York, and has expressly notified said Barnes in his lifetime, and his agents and said complainant, to that effect; and that until this present action no action has been commenced upon said letters patent or reissue against said defendant Lippmann, or those with whom he has been engaged in business.

17 And these defendants, further answering, say that the following are the names and the residences of persons who have had a prior knowledge of the said alleged invention set forth in the said letters patent, and the places where and by whom the said alleged invention was used, as these defendants are informed and believe, and of which evidence will be given on the trial of this action:

Phillip Lippman, skirt and corset steel manufacturer, whose residence is in the city of New York, No. 318 West 39th street, made and sold said alleged invention himself at 35 Jane street, in said city, and at other places in said city of New York.

Hannah Rosenberg, now deceased, formerly of the city of New York, had knowledge of the use of said alleged invention at 35 Jane street, in said city, by said Lippmann and others.

Hannah Rosenberg, niece of Hannah Rosenberg, deceased, of 242 West 47th street, New York, at same place as above, and by the same.

James Earwicker, corset manufacturer, of No. 5 Hall Place, in the city of New York, made, used, and sold said alleged invention at No. 8 Stuyvesant street and 5 Hall Place, and other places in said city.

Eliza Earwicker, of same place, at same place as above.

Charles Earwicker, corset maker, of 5 Hall Place, New York City, knew of the same at the places last above mentioned, by said James Earwicker.

Catharine Redmond, corset maker, of 110 West 30th street, New York, knew of the manufacture and sale at Earwicker's af'resaid, and sold the same herself at 705 Broadway, New York, and other places in said city.

Thomas Love, corset maker, of Rutherford Park, New Jersey, having a place of business in New York City, at his place of business No.
street, in the city of New York.

18 George H. Barnes, corset maker, of 302 Henry street, New York, at his place of business, 302 Henry street, and other places in the city of New York.

Mrs. Eliza Jacobs, of No. 70 West 48th street, in the city of New York, at the place of business of Mrs. Redmond above named.

Henry Ten Broeck, of 291 Greenwich street, New York, at the place of P. Lippmann, 35 Jane street, New York, above named, and by said Lippmann.

Jeannette Cargill, of Waterbury, Connecticut, at the residence of said Cargill, in Waterbury; knew of the use of said alleged invention by Miss Emma Doolittle in said Waterbury.

Mary L. Hamilton, of West Cheshire, Connecticut, knew of such prior use at Waterbury, Connecticut, by Edward E. Cargill, Emma Doolittle, and others at Waterbury aforesaid.

William B. Cargill, of Waterbury, Connecticut, corset steel maker, at Waterbury, Connecticut, by himself, Edward E. Cargill, Emma Doolittle, Charles W. Gillett, Delia F. Hine, and others.

Edward E. Cargill, of Waterbury, Connecticut, engineer, made and knew said alleged invention at Waterbury aforesaid, and of the use of the same by Miss Doolittle and others.

John L. Fitzpatrick, of Waterbury, Connecticut, steel temperer, made said alleged invention himself at that place, and at New Haven, Connecticut, knew of the use of them there by Miss Jennie McNulty, of said New Haven, at that place and elsewhere at Waterbury.

Joseph Myers, of New Haven, Connecticut, knew of such making and use at New Haven by John L. Fitzpatrick.

Jennie E. Fitzpatrick, of New Haven, Connecticut, formerly
19 Miss Hamilton above named, used said alleged invention herself, and knew of their being made by I. L. Fitzpatrick aforesaid at New Haven.

Mrs. Mary A. Sherman, of 305 Cumberland street, Brooklyn, New York, manufacturer of corsets, knew of the making and use of said invention by herself and others in Brooklyn and in the city of New York.

Sarah E. Gilchrist, of 109 Bergen street, Brooklyn, New York, at Brooklyn aforesaid, by Mrs. Sherman aforesaid and by herself and others.

Kate O'Donnell, corset maker, of 103 William street, South Brooklyn, New York, knew of the making and use of said alleged invention by Mrs. Sherman aforesaid, at corner of Grand and Crosby streets, New York, and at Brooklyn and other places.

Josephine White, corset maker, of 731 Fulton avenue, Brooklyn

aforesaid, at same place and by same persons as last mentioned, and at 202 Broadway, New York.

Julius F. Seder, corset cutter, of 161 Myrtle avenue, Brooklyn aforesaid, by Mrs. Sherman aforesaid, at Crosby street, corner of Grand, New York City.

Charles Schneller, of Williamsbridge, New York, corset-spring maker, at 145 Elm street, New York, by himself, and sold to others in said city.

Joseph Seymour, brass moulder, of 73 West Houston street, New York City, at New York, by Charles Schneller and by himself, and sold to others.

Jacob Geering, corset maker, of 184 Spring street, New York, at New York, by Charles Schneller, and by himself, and sold to others.

Mrs. Mina Sebille, of 854 Broadway, New York, corset maker, by Charles Schneller aforesaid and by herself.

And these defendants will further give in evidence, pursuant to the act of Congress in such case made and provided, upon the trial of this action, that the said alleged invention set forth in complainant's
20 said letters patent, is set forth and described in the provisional specification of John Harris Elvans, of No. 7 Guilford Place, Lower Kensington Lane, in the county of Surrey, England, in his application for English letters patent, being for "an improved steel busk or stay fastening," dated 13th August, 1861, and numbered 2,006, duly filed with his petition at the office of the Commissioner of Patents of Great Britain, on the day and year last mentioned; and which said provisional specification and description are printed and published in the volume of publication of English patents, printed in London for the year 1861, and in that year as No. 2,006 of patents.

Also in letters patent of Great Britain, granted to George Twigg of Birmingham, for "improvements in fastenings for stay-busks, leggings, gaiters, and other similar articles," said letters patent being dated February 7th, 1865, and numbered 349; the complete specification whereof was filed in the great seal patent office in London on the 5th of August, 1865; and which said letters patent and specification are printed and published in the volume of English patents, printed and published in London for that year, 1865, at and as No. 345.

Also in letters patent (brevet d' invention) granted in France under date of January 22, 1845, to Pierre Laporte and Marguerite Laporte for a busk; which said letters patent and the specification and description of the said invention was printed and published in Paris in the year 1850, at page 130, in a work entitled as follows: "Description des machines et procédés pour lesquels des brevets d' invention *ou* été pris sous le régime de la loi du 5 juellet, 1844, publiés par les ordres de M. le ministre de l'agriculture et du commerce. Tome premier. * * *
Paris. Imprimerie nationale MDCCCL, p. 130.

21 And these defendants further answering, say that they have not made, or sold, or used, corset steels, other than such as were made and constructed like those manufactured and sold by said defendant Lippman, in the year 1859 or 1860, as aforesaid, and they deny that they have unlawfully or wrongfully infringed the said letters patent or alleged invention set forth in said bill of complaint; and they deny each and every allegation in that behalf in the complainant's bill of complaint contained.

And these defendants, further answering, deny, upon information and belief, that the letters patent and invention set forth in the bill of complaint, have been acquiesced in by the public; on the contrary, these

defendants are informed and believe that said letters patent and alleged invention have been and are generally regarded by the trade and the public having knowledge of the same as invalid, and the said Barnes has not been regarded or believed to be the first and original inventor of the said alleged invention; and these defendants are informed and believe that when actions brought on said patent have been vigorously resisted and defended, such actions have been abandoned or compromised by the complainant.

And these defendants deny all and all manner of unlawful and wrongful acts and doings with which in said bill of complaint they are charged; and they deny that the complainant has any right to the relief sought by said bill by injunction and an account of profits or assessment of damages against these defendants.

And these defendants humbly pray this honorable court that they may have the same benefit of any of the matters and things hereinabove in this their answer set forth, as if they had pleaded the same specially by way of special plea, or had pleaded by way of demurrer to the said bill.

22 And these defendants humbly pray for a decree in this action in their favor, and for dismissal of the bill of complaint in this action, and that these defendants may be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

PHILLIP LIPPMANN.
AUGUST SELIGMANN.

J. B. STAPLES,
Def'ts' Sol. & Counsel.

SOUTHERN DISTRICT OF NEW YORK,
City and Count'yof New York, ss:

Phillipp Lippmann and August Seligmann, the defendants above named, being each duly and severally sworn, do depose and say they have read the foregoing answer by them signed, and that the same is true of their own knowledge, excepting as to the matters therein stated on information and belief, and as to those matters they believe it to be true.

PHILLIP LIPPMANN.
AUGUST SELIGMANN.

Sworn and subscribed before me, this 1st day of Dec., 1874.
[SEAL OF NOTARY.] FRANKLIN BIEN,
Notary Public, New York County.

23 U. S. circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT
vs.
PHILLIPP LIPPMANN AND AUGUST SELIGMANN.

The replication of Frances Lee Egbert, complainant, to the answer of Phillipp Lippmann and August Seligmann, defendants:

This repliant, saving and reserving to herself, now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says, that she will aver, maintain and prove her bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant

without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by her said bill she has already prayed.

GEO. GIFFORD,
Sol'r & of Counsel for Complainant.

24 Circuit court of the United States for the southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX, &c.,
vs.
PHILLIPP LIPPMANN AND AUGUST SELIGMANN.

Proofs for final hearing taken on the part of the complainant in the above cause, under and pursuant to the 67th rule in equity as amended, before Joseph Gutman, jr., examiner.

NEW YORK, *February* 20, 1875.—11 a. m.

Present, Geo. Gifford, esq., counsel for complainant, and J. B. Staples, esq., counsel for defendants.

Complainant's counsel puts in evidence certified copy of letters patent of the United States to Frances Lee Egbert, executrix, dated January 7, 1873, No, 5216, which is marked Complainant's Exhibit A.

Examination adjourned until Saturday, February 27th, at 11 a. m.

25 NEW YORK, *February* 27, 1875—11 a. m.

Present: Counsel for the respective parties as before.

EDWARD C. LE SEUR, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. GIFFORD, counsel for complainant, deposes and says as follows:

1. Q. What is your name, age residence, and occupation?

A. My name is Edward C. Le Seur; I am 35 years old; I reside at No. 470 Sixth avenue, in the city of New York; I am a clerk.

2. Q. State whether or not you have ever purchased articles from the firm of P. Lippmann & Co., of this city.

A. I have.

3. Q. State when and what you then bought.

A. I bought corset steels in July last.

4. Q. Please produce a pair of the corset steels you so purchased at that time and have it marked as an exhibit.

(Witness produces a pair of corset steels, which is marked Exhibit B.)

5. Q. State whether or not you received a bill for said corset steels at the time you purchased them. If yea, please produce it and have it marked as an exhibit.

A. I did procure a bill. I have put it in evidence in the suit on the trade-mark. I produce a copy thereof to be hereto annexed.

(Copy bill produced and marked Exhibit C, J. G., jr.)

6. Q. State whether or not at the time of said purchase you saw
26 other corset steels in the store of P. Lippmann & Co., apparently the same as those you bought.

A. I did.

And being cross-examined by Mr. STAPLES, he says:

7. X Q. Where is your place of business?

A. My place of business is in the appraisers' department in the custom-house at the present time.

8. X Q. Where was it when the bill was purchased in July, 1874?

A. 1209 Broadway.

9. X Q. What business were you then engaged in, or on your account, or with whom?

A. On my own account—the stationery business.

10. X Q. Did you purchase these corset steels for your own use, or for some other person; and, if so, for whom?

A. I purchased them for some other person—for Wesley Egbert.

11. X Q. Where is Mr. Wesley Egbert's place of business, if anywhere?

A. I don't know.

12. X Q. Do you know what his business is?

A. I do not.

13. X Q. Did he state to you who he wanted them for, or do you know?

A. He asked me to purchase them for him.

14. X Q. Do you know who he wanted them for or what?

A. I do not.

15. X Q. Did he furnish the money to pay for the bill of those goods so purchased.

A. He did not.

16. X Q. Who did?

A. I paid for them myself.

17. X Q. Has anybody reimbursed you, or promised to reimburse you for so paying?

A. I was paid for them afterwards by Mr. Egbert.

27 18. X Q. Did you deliver these two dozen to Mr. Egbert when he paid for them, or before or after, or to whom did you deliver them, if to any one?

A. The steels have never been delivered. They are at the store, No. 1209 Broadway, still. I don't exactly understand what you mean by delivering—I did not personally hand them over; they are at the store now, part of them; they are his.

19. X Q. When you purchased these goods did you ask for any particular kind or quality or mark to designate what you wanted?

A. I did.

20. X Q. What did you ask for; what particular mark or kind or description?

A. I asked him for one dozen patent Cantbusttem corset steels; I also asked him for another kind, which I don't recollect now.

21. X Q. Do you know whether or not, on or about the 1st of July, 1874, Mr. Egbert was in the employ of Jacob Strauss & Co. on Franklin street?

(Objected to as immaterial and irrelevant.)

A. No, sir; I do not know.

And being further examined by complainant's counsel, he says:

22. Re-D. Q. Was the label pasted on the pair of corset steels (Exhibit B) "Trade mark, Cantbustem—made of the best watch steel, double

springs," on it at the time you purchased the pair, and on the other pairs you purchased?

A. It was.

EDWARD C. LE SEUR.

Subscribed and sworn to before me this 27th day of February, 1875.

JOSEPH GUTMAN, JR.,
Examiner.

Complainant's counsel puts in evidence the exhibits above referred to, Exhibits B and C.

JOSEPH GUTMAN, JR.,
Examiner.

28 *Exhibit C.—J. G., Jr.*

[Established 1858. No claims allowed unless made within five days after receipt of goods and no allowances credited unless mutually agreed upon. Infringements on any of our patents will be prosecuted to the full extent of the law. Goods shipped at purchaser's risk. Manufacturers of the Cantbustem double steel and patent adjustable double steel corset clasps. Phillipp Lippmnan, August Seligmann. Terms net cash; if not paid when due will draw for at sight with exchange on New York. All payments must be made direct to the house. No agents are allowed to collect.]

NEW YORK, *July* 1, 1874.

Mr. E. C. Le Seur, bought of P. Lippmann & Co., manufacturers of hoop-skirts, bustles, &c., and dealers in hoop-skirt materials, 486 Broadway, cor. Broome st.:

1 doz. 3 hook, plain d'ble steels	$1 12
1 " " pat. adjustable	2 00
	$3 12

Paid. P. L. & Co. H.

N. Y., *December* 3, 1875.—10.30 a. m.

Present: Mr. Witter, counsel for complainant, and Mr. Staples, counsel for defendants.

Examination adjourned to No. 116 East 23d street, New York, at 12 m.

JOSEPH GUTMAN, JR.,
Examiner.

29 N. Y., *No.* 116 *East* 23*d street*—12 m.

Present, counsel as before.

FRANCES LEE EGBERT, the complainant, of lawful age, produced as a witness on her own behalf, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, counsel for complainant, deposes and says:

1. Q. Are you the complainant in this suit?

A. I am.

2. Q. Were you the wife of Samuel H. Barnes, deceased, patentee of the original letters patent on which this suit is brought and are you the sole owner of said letters patent?

A. I was, and I am.

3. Q. When did said Samuel H. Barnes make the invention patented by said patent?

A. Some time between January and May 1st, 1855.

4. Q. How came he to make it?

A. Miss Cregier, a friend of mine, and myself were speaking about plain steels breaking so; that we could not keep a pair of plain steels in our corsets without breaking. Mr. Barnes was present, and, being a very intimate friend of mine, said he thought he could make me a pair that would not break. The next time he came he brought me a pair.

5. Q. Did he say where he got it or who made it.

A. He said he made it.

6. Q. Describe this pair of corset steels.

A. There were two members, one for each edge of the corset; each member had a plate—a double plate—fastened together in the centre, and at each end of the short piece was a slot and pin to keep it from sliding off sidewise and also to add to the elasticity of the steel. They were fastened together with hooks—three hooks.

7. Q. How many plates were there on each member?

A. Two.

30 8. Q. Were there two plates of the same length or how?

A. No; the outside plate was shorter.

9. Q. Look at the pair of corset steels marked Exhibit S. H. Barnes, and state whether the pair so brought you by Mr. Barnes was substantially like or substantially different from said exhibit?

A. They were substantially the same in every particular.

10. Q. What did you do with the pair so made and brought you by Mr. Barnes and what was the result?

A. I wore them and they lasted me a long time.

11. Q. When, if at all, did he make you another pair?

A. In the early part of 1858.

12. Q. Did you see him at work on this pair?

A. Yes.

13. Q. What was the intention of Mr. Barnes about patenting this invention, if you know?

A. He always intended to patent it, but from the time that I knew him until the time he died he was always sick with consumption, poor, and low-spirited and in trouble.

14. Q. Did he finally nerve himself to patent it and why?

(Objected to as leading.)

A. He did, in the hope of leaving something, as he thought, for my support.

(Answer objected to as irrelevant.)

15. Q. Do you remember of his making a pair for anybody else.

A. I do.

16. Q. For whom, and what was his object?

A. For Mrs. Bower, to try the effect on a very stout lady.

17. Q. About when was that?

A. I think about 1863.

31 18. Q. Are you sick and unable to sit up at this examination?

A. I am.

19. Q. How long is it since you have been out, except for medical treatment?

A. Two months or more; about two months.

Q. 20. What does your doctor say of your trouble?

A. He was here yesterday, and he said unless I was very quiet and my mind kept perfectly at ease that I would not live thirty days.

And being cross-examined by Mr. STAPLES, she says:

21. X Q. How do you fix the date as between January and May, 1855,

as the time when Mr. Barnes made the corset steels, as stated in your answer to questions 3 and 4?

A. On account of my grandmother dying in January and of my moving on the 1st of May.

22. X Q. Where were you living at the time?

A. In Tenth street, New York.

23. X Q. Did you live in Tenth street in 1865?

A. No, sir.

24. X Q. Nor in 1863?

A. No.

25. X Q. When did you leave Tenth street and where did you go?

A. In May, 1855; I went to 10 Carroll Place.

26. X Q. How long did you stay there and where did you go from there?

(Objected to as utterly immaterial.)

A. Two years, and went from there to Eighteenth street.

27. X Q. Where did you reside in 1865.

(Same objection.)

A. In Jane street, New York.

28. X Q. Do you remember the number?

(Same objection.)

32 A. 42 Jane street.

29. X Q. Are you quite positive that you were living in Tenth street, New York, from January to May, 1855?

A. I am.

30. X Q. And it was there, was it, that Mr. Barnes first showed you a pair of double corset steels, such as you have described?

A. It was.

31. X Q. Were you married to Mr. Barnes in 1855; if not, when?

A. I was not married in 1855; I was married to Mr. Barnes in 1863.

32. X Q. Where was Mr. Barnes living in 1855, between January and May 1st, 1855, if you know?

A. On the east side of town, somewhere; I do not know where; the name of the parties that he lived with was something like Taffy or Tabb; I don't remember exactly.

33. X Q. Do you know where Miss Cregier is, whom you have previously mentioned? If so, state.

A. She is dead.

34. X Q. Do you know where Mrs. Bower, previously mentioned, is? If so, state.

A. In New York, in West Twelfth street; I think it is No. 299 West Twelfth street, near Eighth avenue.

35. X Q. After the pair that you have stated were made for Mrs. Bower was made, when did Mr. Barnes, to your knowledge, make another pair of the same kind?

A. In 1866.

36. X Q. Then, between 1863, when he made the pair for Mrs. Bower, and 1866, you do not know that Mr. Barnes made any other double corset steels such as you have described?

A. He didn't make any, only what he made for me.

37. X Q. Did he make any other for you than the pair you have referred to as made in 1855?

33 A. I believe I have already stated that he made another pair for me in 1858. He also made another pair for me while I was at Mrs. Bower's; I cannot state exactly the time.

38. X Q. Have you preserved and can you produce any of the corset-

steels which you have mentioned as having been made by Mr. Barnes for you?

A. No; I have not.

30. X Q. And you are not able, I suppose, to state what has become of them?

A. No; I do not know.

40. X Q. Has any other person than yourself and Miss Cregier and Mrs. Bower any knowledge of the making of these corset steels by Mr. Barnes?

A. I don't understand that question.

41. X Q. Question repeated.

A. Do you mean the making of the first pair?

42. X Q. Yes.

A. No; I don't know that there is.

43. X Q. Now, with regard to the second pair—the pair made for Mrs. Bower, and the pair made for yourself in 1858. Has any person than yourself any knowledge of those, so far as you know?

A. No; I think not.

44. X Q. What was Mr. Barnes' business in 1855, and from that time down to 1866?

A. He was sick. He did not attend to any active business. I believe he had some interest in something in California; I don't know what it was.

45. X Q. How long did you wear the corset steels that Mr. Barnes made for you—the first pair in 1855, and the second pair in 1858?

A. I can't say the exact time; I know I wore them a long time.

46. X Q. When did Mr. Barnes first speak to you about patenting this double-corset steel?

A. From the first he frequently spoke of doing it whenever he was able and could have the means.

47. X Q. Have you any knowledge at what place—what house—he made these corset steels that you have referred to; what house or shop?

34 A. I do not know where he made the first pair. The second pair he made in 18th street, No. 199, I believe.

48. X Q. And the third pair?

A. In West Twelfth street.

49. X Q. Do you know where he got the steel of which either of those pairs of corset steels was made?

A. I do not know where he got the steel.

50. X Q. Did he not tell you?

A. He did not.

51. X Q. What did you do with the corset steels made by Mr. Barnes for you in 1855 and 1858, as you have stated, after you had done wearing them?

A. I don't know what became of them after I had done wearing them.

52. X Q. Did these corset steels so made remain in the corsets all the time that you wore them, or were they taken out at any time, or from time to time?

A. I ripped them from one corset and put them into other pairs of corsets, and wore them.

53. X Q. Did Mr. Barnes frequently, between 1858 and 1866, speak to you, or in your presence, about patenting these corset steels?

A. He frequently spoke about doing so as soon as his health would permit and he could get the means for doing so.

54. X Q. Do you know if anybody else heard him speak of any such intention in 1855, or between the years 1855 and 1858? If so, state.

A. I don't know.

55. X Q. Did you throw away, or give away, the corsets which had these double steels in, as you have stated?

A. I can't say what became of the corsets; I don't think I gave them away; I guess I wore them out and threw them away.

56. X Q. About how long do you think that you wore those corsets that had those double steels in, made in 1858, as you have stated?

35 A. I could not say how long I wore those corsets; I wore the steels a good deal longer than I did the corsets; I put the steels into other corsets.

57. X Q. But you do not know how long you wore them in the other corsets?

A. No; I could not say positively.

58. X Q. Have you been ill so as not to be able to go out during the months of October and November?

A. Only for medical treatment.

59. X Q. When did you first state to your counsel that your husband made these double steels that you have mentioned?

A. It was some time ago. I can't tell exactly.

60. X Q. Was it during or before the continuance of the suit brought by you against Bardwell, Castle & Co., and others?

A. Before.

61. X Q. Were you examined in that suit as a witness?

A. No, sir.

62. X Q. Have you ever given testimony as a witness, as to the corset steels, above herein referred to until now?

A. No; never until now.

And being further examined by Mr. WITTER she says:

63. Re D. Q. Did Mr. Barnes ever make models of other things which he hoped to be able to patent, but never did?

A. He did.

(Question and answer objected to as wholly irrelevant.)

64. Re D. Q. Let me try to refresh your recollection a moment, and ask you if you did not have a part of a pair of corset steels made by Mr. Barnes, at some time before his death, but which was lost at the time you moved into this house?

(Objected to as leading, and suggestive of the answer to be given by the witness.)

36 Question withdrawn.

(Signed) FRANCES LEE EGBERT.

By me at her request, JOSEPH GUTMAN, JR.,
Examiner.

Sworn to before me this 3d day of Dec., 1875.

JOSEPH GUTMAN, JR.,
Examiner.

Adjourned to same day at 3.30 p. m., at No. 34 Beach st.

NEW YORK, *December* 3, 1875—3.30 p. m.

Present, counsel as before.

ALEXANDER H. MAYER, a witness of lawful age, produced on the part

of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Alexander J. Mayer; I am 34 years old; I reside at 26 East 74th street, New York; I am in the employ of Jacobs, Strouse & Co.

2. Q. Did you and Mr. Marston, of Philadelphia, under the counsel of Messrs. Keller & Blake, and Thomas P. How, prepare and manage the defense in the suit of this complainant against Bardwell, Castle, and others?

A. Yes, sir.

3. Q. How thoroughly did you and he prosecute that investigation—at what expense of time and money, generally speaking?

A. We devoted months of time, and thousands of dollars, to procure all the evidence that could be got.

37 4. Q. Have you heard or read the testimony of the complainant given this morning?

A. I heard part and read the balance.

5. Q. When did you first learn, if at all, that the defending testimony in said Bardwell & Castle suit was not of old enough date to anticipate the date of the Barnes invention?

A. Before the conclusion of the case.

6. Q. About the time of conclusion of your defense, was it?

A. Yes, sir; about that time.

7. Q. What did that information lead you to do?

A. I advised my firm and Mr. Marston to make the best settlement they could with the plaintiff in that case.

8. Q. Mr. Marston was the actual party in interest in the defense of that particular suit, was he not?

A. Yes, sir; so far as I know.

9. Q. And there was a suit against your firm, which, by an understanding between counsel, was to abide the issue of the result of the suit against Bardwell, Castle, et al., was there not?

A. That substantially was my understanding of that case.

10. Q. State whether those suits were settled in good faith, and in pursuance of the advice given, as you have stated.

A. Yes, sir.

11. Q. Was that advice the result of consultation with the counsel aforenamed?

A. Yes, sir.

And being cross-examined by Mr. STAPLES, defendant's counsel, he says:

12. X Q. Mr. Mayer, you answer to question 5 that you first learned what the question asked before the conclusion of the case referred to; please give the time, the year, and the month when you learned what you there stated.

A. I can't tell definitely without referring to the record.

38 13. X Q. Can't you state the year from your memory and knowledge?

A. I think it was 1873.

14. X Q. You say you advised your firm and Mr. Marston to make the best settlement they could; what was your firm at that time, and who composed it?

A. The firm was Jacobs, Strouse & Co., and was composed of S. L. Jacobs, R. Mayer, A. Strouse, and M. Adler.

15. X Q. Do you know what sort of a settlement Marston did make, of your own knowledge?

A. Mr. Marston's settlement was similar to the settlement made by Jacobs, Strouse & Co., whose private business I do not feel at liberty to disclose.

16. X Q. How do you know that the settlement by Mr. Marston was the same as that of Jacobs, Strouse & Co.?

A. I know it because it was made at the same time and at the same terms.

17. X Q. At the time of this settlement, whenever it was, had an interlocutory decree in behalf of the plaintiff been entered in the cause against Marston & Co.?

(Objected to, as probably the words "interlocutory decree" are incomprehensible to the layman under examination.)

A. I do not understand the meaning of interlocutory decree.

18. X Q. Do you understand what a decree or judgment in court means?

A. In the ordinary sense; yes, sir.

19. X Q. Well, in that sense, at the time of that settlement, had any judgment or decree been entered in the suit to which you refer?

A. I could not say; I am unable to say.

20. X Q. From whom did the information come that the testimony did not anticipate the invention of Mr. Barnes, referred to in your direct examination?

39 A. It came from Mr. Witter, the plaintiff's attorney.

21. X Q. Anybody else?

A. I do not know of anybody else.

22. X Q. What have you to do with the present suit in which you are giving your testimony?

A. Nothing at all.

23. X Q. Have you not attended several of the examinations of witnesses which have been taken in this cause?

A. I remember of attending three times before to-day.

24. X Q. Did you attend then as a witness for the purpose of being examined, or for some other purpose?

A. I did not attend as a witness, but did partly from curiosity, partly because my firm received invitations to do so from Lippmann.

25. X Q. Who was present at the settlement referred to in your answer to cross-question 16?

A. Mr. Marston, myself, and I think the counsel, Mr. Blake and Mr. Witter.

26. X Q. Anybody else?

A. I don't know of any one else.

27. X Q. Where did that interview or settlement take place—at whose office?

A. I think at this office—Mr. Gifford's.

28. X Q. You say, in answer to cross-q. 20, that the information that the testimony in the suits did not anticipate the invention of Mr. Barnes came from Mr. Witter, the plaintiff's attorney; was that communicated to you in writing or verbally?

A. It was communicated verbally.

29. X Q. Where?

A. I think at Mr. Witter's office, but am not sure of this.

30. X Q. Did he send to you to come to his office, or did you go to his office voluntarily?

(Objected to because the witness has said he is not sure that it was at Mr. Witter's office.)

40 A. Mr. Witter never sent for me while we were conducting that defense.

31. X Q. Then you went voluntarily to Mr. Witter, the plaintiff's attorney, as you call him, did you not?

A. I did not for this purpose, though I have often been there on other business.

32. X Q. When Mr. Witter gave you that information, as you say, what did he say to you?

A. I could not give you his exact language. I only remember that his language struck me with great force, as he spoke in a very serious tone; the purport, as I understood it, was that they had evidence in reserve dating back the invention.

33. X Q. Did he state to you what that evidence in reserve was?

A. He did not. He spoke generally.

34. X Q. Did you ask him what it was?

A. I did not; but I did ask him if he felt sure, and he told me he did.

35. X Q. When you got that information, what did you do about it; what was the next step that you took; where did you go?

A. As far as I can remember, I consulted with Mr. Marston, and expressed my feelings, that we could be ante dated. I also informed the firm's counsel to that effect.

36. X Q. How soon after that did you enter into the arrangement with the plaintiff in that case?

A. I could not tell you the exact time. The news of the arrangement of settlement came to me from Mr. Marston, who practically made it.

37. X Q. I now ask you what was the arrangement made with the plaintiff in that suit by your firm, and by Marston's firm, which you refer to?

A. I cannot answer about the private business of my firm.

38. X Q. Was that arrangement in writing with your firm—that settlement—in whole or in part?

A. I do not feel at liberty to give you anything of my firm's business.

41 (Counsel for complainant instructs the witness that he hopes he will answer these questions, unless he has some private or personal reason not known to complainant's counsel, and complainant's counsel does not by these remarks mean to in any manner intimate that he should not answer any and every question.)

WITNESS says: I cannot answer the question, for the reasons already given.

39. X Q. Did your firm pay anything—any money—in settlement of the suit of Mrs. Egbert against you, to which you have referred, at the time of the settlement?

A. I could not say whether we did or not.

40. X Q. Don't you know whether they did or not?

A. I do not care to give my firm's business away without their consent.

41. X Q. Is it likely that anything was paid without your having knowledge of it?

A. I do not say that it is.

42. X Q. Do you think it would injure the business of your firm, or its reputation in any way, to state the nature of that settlement?

A. I do not think that my firm does anything disreputable.

43. X Q. (Question repeated.)

A. I do not feel myself at liberty to give my firm's business away.

44. X Q. Is that your only answer to that question?

A. I do not know whether an answer to that question would or would not injure the business of my concern; all that I know is that I cannot consistently with my duty state my firm's business.

45. X Q. Would your disclosure at the present time of the terms of that settlement affect the value of the patent, or of your license, if you have one?

A. I do not think, as far as the consequences of any answer I might give to that question—I simply decline to answer, on behalf of my firm's business, any questions relating thereto.

42 46. X Q. Was there any agreement or understanding, verbal or in writing, as to that settlement with your firm, or with Marston & Co., that its terms should be kept secret and not disclosed by any of the parties thereto?

A. I know of no such agreement.

47. X Q. Do you positively refuse to answer as to whether the terms of the settlement were in writing?

A. I refuse to give any information of my firm's business.

48. X Q. Are you a licensee under the patent in question in this suit?

A. I am not; my firm is.

49. X Q. When did you take that license?

A. I could not say the date.

50. X Q. Was it taken as a part of the terms of settlement to which you have referred?

A. I again state that I am not at liberty to answer questions regarding my firm's business.

51. X Q. Is this refusal to answer made in pursuance of a consultation or determination with your partners, or is it only your individual resolve?

A. My actions are my own, and my answers are such as are dictated to me by my sense of right.

Examination adjourned to December 4, 1875, at 10.30 a. m.

JOSEPH GUTMAN, JR.,
Examiner.

N. Y., *December* 4, 1875.—10.30 a. m.

Present, counsel as before.

Cross-examination of the witness MAYER resumed by Mr. STAPLES:

52. X Q. You said yesterday that your firm were licensees under the patent mentioned in this suit: did Disston, Marston & Co., of Philadelphia, become licensees at the same time?

A. I don't think Disston, Marston & Co. became licensees at all.

43 53. X Q. Did Mr. Marston?

A. He did, I believe.

54. X Q. Do you know at what date he became a licensee? State as near as you can.

A. I believe it was the 8th of June, 1874.

55. X Q. Was the injunction in the suit of Egbert against Castle and others issued at that time when Mr. Marston took a license?

A. I do not remember the exact date of the issuing of the injunction, but believe it to have been about that time; I couldn't say whether it was before or afterwards.

X Q. Was that injunction entered by the consent of the defendants in that case?

A. If I remember aright, Mr. Blake appeared for Mr. Marston, but what instructions Mr. Marston gave him I do not know.

57. X Q. Don't you know that there was no opposition made to that decree, which embodied the order of injunction in the case of Egbert against Castle?

A. I think it is quite likely that that was the case.

58. X Q. Don't you know that the entering of that decree and the order for injunction was a part of or connected with their giving the license to your firm and to Marston?

A. I believe it was.

59. X Q. Why was an order of injunction issued and entered by consent, when, at the same time, as you say, licenses were to be given and were given to your firm and to Marston, the real parties in interest in that suit?

A. So far as our firm was concerned, they received and followed the advice of their counsel in this matter; so far as Mr. Marston is concerned, I do not know his motives, and do not care to guess at them.

60. X Q. Was or was not the object, as you understood it, of the defendant's counsel, as well as the parties interested in that suit, to make use of that interlocutory decree containing the injunction order
44 to deter manufacturers and sellers of double steels outside of the arrangement spoken of, by publishing that decree and order.

A. So far as the plaintiff was concerned, or Mr. Marston, they must answer for themselves, as I did not know their motives. So far as my firm was concerned, they followed the advice of their counsel, with the view undoubtedly of making a business arrangement whereby they would save expensive litigation and escape the dangers of a judgment against them.

61. X Q. Was not this arrangement also made with a view of enabling the complainant to escape a judgment against her?

A. I don't know anything about her.

62. X Q. Do you know what became of the exhibits that were used on the part of the defendants in the suit above referred to of Egbert against Castle and others?

A. The last time I saw them was, I believe, at the office of Thomas P. How during the continuance of the suit of Egbert against Castle. They may be there yet, though I doubt it, as I have asked to see them, and Mr. How stated that he did not know where they were.

63. X Q. When did you ask Mr. How for them?

A. Some time during this year—during last summer.

64. X Q. Had not Mr. How then been retained on the opposite side to which he had been before acting?

A. Perhaps he had. In fact I believe he was.

65. X Q. Who retained him; do you know?

A. The plaintiff, I suppose, in this case.

66. X Q. You knew that fact, did you not, when you went there to ask for those exhibits?

A. I did know the fact, but, at the time of asking for their exhibits, I am quite sure it was not in my mind. I went there with a different view altogether.

67. X Q. Do you know where those exhibits, or any of them, now are, or in whose possession or under whose control?

45 A. I haven't the faintest idea.

(Complainant's counsel here says that those exhibits, he has

every reason to believe, were filed in the clerk's office of this court; that that is the understanding of both Mr. Blake and Mr. How, as he has personally learned; that he has had careful search made at the clerk's office, and at some expense, to find them, and that if it was in his power to produce them he would willingly do so, especially as defendants' counsel seems to be endeavoring to make insinuations unjust to the plaintiff in this suit.

Defendants' counsel objects to the interpretation of the above remarks by the complainant's counsel, the more especially at this time, because the witness is under cross-examination, and also because what has been above stated should be matter of evidence and not of suggestions made in this manner.)

68. X Q. Do you know any way by which, or any person of whom, any of these exhibits can be obtained for use in the case?

A. I know nothing of the exhibits; do not know where they are other than I have stated; they never were under my control. I have taken no steps to hide them, and am absolutely unable to tell you any more than I have already done.

69. X Q. Will you please answer yes or no to the last question, which I desire to have read to you again?

A. I know nothing about them.

70. X Q. Have you not already stated that the defense in that case was under your charge?

A. I should like the counsel to show me such statement on my part.

(Counsel for defendants refers the witness to the second question of his direct examination, which he reads; also to the third.)

46 Counsel reads. (Counsel for defendants, after reading to the witness questions two and three, and the answers thereto, now desires him to answer the previous question.)

71. X Q. Question repeated.

(Question objected, because it plainly appears, by what has been read by defendants' counsel, that the insinuation of the 70th and 71st questions are misleading and unjust.)

A. I have stated that I aided Mr. Marston in the defense of that case, but that case was under the management of Mr. Marston.

72. X Q. Is that all the answer you have to make to that question?

A. If I knew of any other I should certainly make it.

73. X Q. Well, you never have seen yourself, since the settlement above referred to, any of those exhibits?

A. I have not.

74. X Q. What particular department do you have in your firm, as you call it, which you attend to?

A. The inner work—office work.

75. X Q. Do you attend to the financial part—draw cheques, &c., and keep the books?

A. I do attend to the financial part, draw cheques when there are any to be drawn, make entries in the books when it is necessary, but do not keep the books.

76. X Q. Do you sign cheques for the firm?

A. I sign cheques per power of attorney.

77. X Q. And you did so, and did the same part of the business for the firm in 1874, when the settlement was made, did you not?

A. I did.

78. X Q. Why do you call this firm your firm; you are not a partner, are you?

47 A. For the same reason that I call the house I rent my house; it is simply a convenient form of expression.

79. X Q. Who is R. Mayer, whom you mentioned as one of the members of that firm?

A. In what sense is the question asked?

80. X Q. What is the first name; what does R. represent, if you know?

A. R. represents Rebecca.

81. X Q. Where does Rebecca Mayer live?

A. At 26 East 74th street.

82. X Q. Is she a single woman, or married?

A. She is my wife.

83. X Q. Did she know of the settlement that was made, above referred to, either from her own personal knowledge or from information communicated by you?

A. Probably through me, as I attend to the business for her.

84. X Q. You act altogether in the business for her, do you not, as her agent or attorney?

A. I act as her attorney.

85. X Q. Has she been in the firm from its commencement?

A. Yes, sir.

86. X Q. When did the firm commence business?

A. In July, 1871.

87. X Q. Have you been with the firm from the commencement?

A. Yes, sir.

88. X Q. What was your business before the firm last named was formed, and where did you carry on such business?

A. I clerked for an umbrella frame company in New York.

89. X Q. How long were you in that business?

A. About two years.

90. X Q. Before that time what business, if any, were you in, and where?

A. For some years I was in no business; when last in business before that time I was a stockbroker in Wall street.

48 91. X Q. What was the firm there as such stockbroker?

A. A. J. Mayer & Co.

92. X Q. Who composed the Co.?

A. Nathan Mayer.

93. X Q. What year did you go out of the stock business referred to?

A. The year 1867.

94. X Q. Are you acquainted with Mrs. Egbert?

A. I am.

95. X Q. When did your acquaintance with her commence?

A. At some time during the suit against Castle; I do not know the exact time.

96. X Q. Can you state whether it was in 1873 or 1874?

A. I think it was 1873.

97. X Q. What part of 1873, as near as you can remember?

A. I could not state the exact time; I believe it to be some time in the middle or latter part of 1873, though it might have been earlier.

98. X Q. Did not your acquaintance with Mrs. Egbert begin at the time the settlement above referred to was talked about and begun?

A. It may have begun then, though I think I knew her before.

99. X Q. Where did you first see Mrs. Egbert; in what house—in what place?

A. I think I saw her first at her business office, corner of Worth street and Broadway, but am not sure.

100. X Q. What was the occasion of your first interview with her; what was the business?

A. I do not remember what called me there, but think it was on some business of the firm.

101. X Q. Was that before or after the interview you have spoken of between Mr. Witter and yourself, when he told you, as you have said, that there was testimony in reserve in the Castle suit which
49 the defendants' testimony in that suit did not anticipate?

A. I couldn't tell, as these two different dates have no separate memory in my recollection.

102. X Q. Have you ever talked with Mrs. Egbert about the testimony given, or to be given, in that case?

A. In the Castle case? I do not think I did.

103. X Q. Then, of course, you never heard her say that Barnes had made that invention in 1855 or 1858?

A. Of course I did hear her say so.

104. X Q. When?

A. Certainly in the early part of the year 1874.

105. X Q. Was not that some time after the closing of the testimony in that case?

A. It was after the closing of the testimony on the part of the defandants, but not before, as, I understand from my counsel, the case of the plaintiff was closed.

106. X Q. Was there any testimony taken on the part of the plantiff after the defendants' testimony had closed?

A. As there is an official record, I beg to refer you to that, rather than to take my impressions.

107. X Q. How do you know there is an official record?

A. I suppose all lawsuits in courts have offical records; I always understood so.

108. X Q. Don't you know that the original testimony, as taken in the Castle case by the examiner, has never been filed?

(Complainant's counsel reminds the defendants' counsel and the court that defendants' counsel has had a printed copy of the testimony furnished in part, if he is not mistaken, by complainant's counsel.

Defendants' counsel wishes to add that it is made testimony in this case by stipulation.)

50 A. I did not know it at the time you asked the question. My impression now is that it never was filed.

109. X Q. Do you know what has become of the original testimony for the defence in the Castle case as taken by the examiner?

A. I have seen it in print many a time and at different places. I have not seen the manuscript since it was first taken.

110. X Q. Do you know, or have you any information, as to whether the defendants' original testimony in the Castle case has been taken from the examiner who took it by anybody?

A. I have no knowledge whatever upon the subject. I have neither taken it myself nor do I know of anybody else taking it; nor have I seen it since it was originally taken, neither have I been informed by anybody what has been done with that testimony if anything.

111. X Q. Have you never asked of your counsel nor of the examiner, Mr. Stilwell, what has become of the original of that testimony?

A. I have no other thought about the matter except that I suppose that the testimony is where it belongs; that is, either in the counsel's or in Mr. Stilwell's hands. I have not asked as regards to that testimony so far as I know.

113. X Q. And you never have taken any trouble to find what has become of it?

A. If I have not answered that question already, it is because I lack understanding of the language used. I have certainly told you that I have not asked for it, and knew nothing about it whatever since it was first taken.

114. X Q. I do not think you have answered whether anybody has ever told you where that testimony was or what has become of it. Have you?

A. In my cross-q. 110 I have said "neither have I been informed by anybody what has been done with that testimony if anything."

115. X Q. You have stated that you attended the examina-
51 tions of the defendants in the present case now on trial two or three times, and that it was partly from curiosity and partly from a notice of Mr. Lippmann. What witnesses did you hear examined on the part of the defendants?

A. Mr. Earwicker, a Miss or Mrs. White, and either Mr. Seligman or Mr. Lippmann, I don't know which, but believe it was Mr. Seligman.

116. X Q. Were you not present when Mr. Castle was examined?

A. I was not.

117. X Q. Are you quite sure of that?

A. I believe I am; at any rate I have not the faintest recollection of ever seeing Mr. Castle at an examination of this case, nor did I until now know that Mr. Castle was so examined.

118. X Q. Do you recollect frequently speaking while these examinations were going on, and making suggestions to the counsel for the complainant?

A. I have no doubt of speaking to Mr. Witter during such examinations as I attended, but do not think that I have spoken often enough with the gentleman to merit the term frequently.

119. X Q. Did you not suggest questions and matters to the counsel which the witnesses were to be asked?

A. I do not know that I did, nor do I remember now what the subject was that I addressed to Mr. Witter.

120. X Q. Do you still say, after this, that it was mere curiosity and that notice of Mr. Lippmann's that led you to be present at these examinations?

A. I do not know of anything else, unless it was a desire to gain instruction on a patent which perhaps materially affected my firm's interest; perhaps also there was a desire to be instructed by the legal acumen counsel are wont to display.

121. X Q. Was it that which led you yesterday to be present in the sick room of Mrs. Egbert during her examination in 23d street?

A. I was there at the invitation of counsel.

122. X Q. Please name the counsel.

52 A. Mr. Witter informed me that he would take my testimony as soon as possible.

123. X Q. Look at the printed paper now shown to you, and state whether you have ever seen it before.

A. I have seen anumber like it before.

124. X Q. Did not that come from your firm or from their place of business; did not it emanate from them?

A. It may; it probably did.

125. X Q. Look at the han dwriting on the back of that and state if you know whose handwriting that is.

A. The handwriting on the back is mine.

(Paper offered in evidence and marked Exhibit No. 1, Dec. 4, 1875. Mayer.)

126. X Q. How many of these printed documents like the exhibit just shown you were sent out from the firm of Jacobs, Strouse & Co.?

A. Perhaps ten or twelve, but I cannot tell definitely the quantity.

127. X Q. They were sent to dealers and customers in the trade, I suppose?

A. They were sent to our customers.

128. X Q. Who had that printed?

A. Mrs. Egbert or her firm, I believe.

129. X Q. Do you know how many were printed, or have you heard?

A. I do not know how many were printed. I think I have heard once, but as it was a matter which didn't interest me very much, it did not remain fixed in my mind.

130. X Q. Please listen to the first printed clause of the paper after the title: "This cause having been brought to a hearing on the pleadings and poofs therein, George Gifford, esq., appearing for complainant, and Charles M. Keller, esq., appearing for defendants." Do you not know that that statement in that clause is wholly untrue?

53 A. If it is untrue, George Gifford and Charles M. Keller were and are guilty of it, and as I have every confidence in the integrity of these gentlemen, I have certainly never entertained any such idea.

131. X Q. Don't you know that the cause in this paper mentioned never was brought to a hearing, on the pleadings and proofs?

A. I do not know anything of the kind. I do not believe that these gentlemen, and especially my counsel, would do anything of the kind.

132. X Q. Did you ever hear or have any knowledge of that cause having been heard on pleadings and proofs, except what you now see in the clause referred to?

A. I have told you that the settlement of this question was left by Mr. Marston and my firm to their counsel, and that he represented their interest, and I believe that the exhibit shown me was the result of those instructions. My firm acted under the advice of counsel in this matter.

134. X Q. Will you please listen to the last preceding question again, and give me an answer directly responsive to it?

(Question repeated.)

A. I know nothing more than that my counsel appeared before his honor Judge Blatchford, in open court, and that then and there proceedings were taken with the results, as I understand and believe, as embodied in that exhibit.

135. X Q. Were you present when counsel so appeared in court?

A. I was in the court-room at the time.

136. X Q. That decree was taken then by consent, was it not, of the counsel of your firm?

A. I understood it so.

137. X Q. At the bottom of this exhibit it is stated that Jacobs, Strouse & Co. this day became licensees under the above patent, signed F. Lee Egbert, executrix; are you able now to state whether that date, June 8, 1874, was the date of your license?

A. I believe it was.

54 138. X Q. Were your firm manufacturers and sellers of double corset steels, such as are referred to in the patent mentioned in exhibit No. 1, just shown you?

A. Yes, sir.

139. X Q. From the time of the establishment of the firm?

A. They manufactured double steels originally under the patent is-

sued to Ferdinand Strouse, which patent, after considerable litigation, was declared to be an infringement by his honor Judge Blatchford. After the injunction was granted against Ferdinand Strouse they stopped manufacturing and selling until they acquired another patent, which was issued to Max Adler, Sept. 3, 1872, when they again commenced manufacturing and selling. With the exception of the period embraced between the date Sept. 3, 1872, and the previous date of the injunction, they were continually manufacturing and selling, except when stopped for repairs, or when their stock on hand was too large to warrant them in continuing such manufacture.

140. X Q. And you have been manufacturing and selling double corset steels ever since, have you not?

A. I have stated so.

141. X Q. Please look at the paper now shown you, and state by whom that paper was got up and who had it printed, if you know.

A. That paper was got up and issued by Jacobs, Strouse & Co.

(Defendants' counsel offers the paper in evidence. It is marked Exhibit No. 2, Dec. 4, 1875, Mayer.)

142. X Q. Were printed circulars of this kind circulated by the firm of Jacobs, Strouse & Co.?

A. They were sent to their customers.

143. X Q. About how many of those did you have printed?

A. I do not know the exact number, but am able to say that there were enough printed to supply a notice each to all the customers, and perhaps more.

55 144. X Q. In the exhibits Nos. 1 and 2 of to-day, just referred to, it is stated to be ordered and adjudged that the complainant recover of the defendants profits, and that it be referred to a master to ascertain and take an account of the profits, and also of the damages sustained. Now, was there ever any such account taken or any such reference had?

A. That is the business of Frances Lee Egbert and Castle & Co. I have never ascertained that there were any proceedings of that kind.

145. X Q. Did your firm ever render any such account of the profits and damages, as required in that decree?

A. My firm has paid Mrs. Egbert a great many hundred dollars during and since the 8th of June, 1874.

146. X Q. My question remains unanswered. Will you please hear it again, and give an answer directly responsive?

(Question repeated.)

A. I do not feel at liberty to disclose the details of my firm's business. I have substantially answered your question by saying that my firm has paid a great many hundred dollars to Mrs. Egbert.

147. X Q. Did your firm ever pay any damages for any making of the springs prior to June 8, 1874?

A. They have paid money for damages.

148. X Q. When and to whom?

A. To Mrs. Egbert. I do not know the date.

149. X Q. Do the books of the firm show any such payment?

A. The books of my firm are kept correctly to represent its transactions. I do not think it is necessary for me to say any more.

150. X Q. Do you refuse to answer the question in any other way than that you have stated?

A. I have stated that the firm paid damages; that it kept a correct set of books, which show the transactions of the firm, and I think I have answered the question fully.

56 151. X Q. Will you look at the books of your firm, and take from them a copy of any original entry or entries, with the dates and amounts of any damages which your firm have paid, as just stated, and produce it before the examiner in this cause before the close of your cross-examination?

A. I have no right to comply with your request without the consent of my firm.

152. X Q. Then you decline to produce any such copy?

A. Were the compliance with your request strictly an act of my own, I should not refuse, but as this requires the consent of other people, I cannot promise to comply with it. If you can construe that as a refusal on my part, you can do more than I intend.

153. X Q. Through what member of the firm, or what individual, were the payments, to which you allude, made to Mrs. Egbert?

A. I could not say what member of the firm made those payments. It may have been Mr. Jacobs, or Mr. Strouse, or by their joint order. I know such payments were made in the ordinary course of business, and in the regular way.

154. X Q. Were they paid by cheques?

A. I presume they were.

155. X Q. Were receipts taken by the firm?

A. Perhaps they were: I do not recollect any special instance?

Examination adjourned to December 6, 1875, at 2 p. m., by consent of both parties.

JOSEPH GUTMAN, JR.,
Examiner, &c.

57 NEW YORK, *December* 6, 1875.

Present, counsel as before.

The witness MAYER, being re-examined by Mr. WITTER, says:

156. Re D. Q. You have spoken of payments to Mrs. Egbert. State whether or not the payments were license fees under her patent and damages for infringement of the same.

(Objected to as leading and suggestive.)

(Question withdrawn.)

157. Re D. Q. You have spoken of payments to Mrs. Egbert in the course of your cross-examination; state what these payments were for.

A. They were for damages and license.

158. Re D. Q. How often do you pay license fees to Mrs. Egbert.

A. Twice a year.

159. Re D. Q. In the answer to the 102d cross question, which is as follows: "Have you ever talked with Mrs. Egbert about the testimony given or to be given in that case?" you say, "In the Castle case? I do not think I did." Please make any explanation you desire to, to make that answer more satisfactory to yourself.

A. My answer was a mistake on my part. The reverse of it is the truth. I have spoken to Mrs. Egbert as regards the testimony, and Mrs. Egbert has spoken to me to similar effect, as Mr. Witter did, to which I have already testified.

And being further cross-examined, he says:

160. Re X Q. When did you make the last payment to Mrs. Egbert?

A. On or about July 1, 1875.

161. Re X Q. When did you make the first payment, or when was the first payment made?

A. On or about the time of the granting of the licen'es.

58 162. Re X Q. To whom was that first payment made, on or about the 8th day of June, 1874, the date when that license was granted?

A. The payment was made to the attorney of Mrs. Egbert.

163. Re X Q. Did you make it in person, yourself?

A. The firm made it through me.

164. Re X Q. Did you take a receipt?

A. I do not remember whether I did or not, but think it likely that I did.

165. Re X Q. Will you produce a copy of that receipt, or produce the original, that I may see it and that a copy may be attached to your deposition, if such receipt exists?

A. The receipt, if any such exists, is the property of my firm, and, being such, I cannot promise to produce their papers without their consent.

166. Re X Q. Do you mean to testify now that you cannot produce that receipt, if it exists, if you choose to produce it?

A. I mean to say that I, like all other agents, must gain the consent of the owners of the paper to produce it.

167. Re X Q. Have you not power to act in the matter under your power of attorney from R. Mayer, your wife, one of the parties?

A. I have no power to act in any manner for the firm of Jacobs, Strouse & Co. without the consent of the members other than R. Mayer, neither has R. Mayer power to act for the firm without such consent.

168, Re X Q. Will you ask the partners of the firm to consent that the original receipt referred to may be produced, and a copy thereof taken, and if they consent, will you annex the copy to your deposition?

A. As I do not wish to go away under any misapprehension whatever of this examination, I will state to you that on the 3d and 4th of this month I asked the members of our firm whether they would con-

59 sent to a production of their papers in court, and they refused then and there to give such consent. I cannot therefore promise to do to-day what you ask of me.

ALEXANDER J. MAYER.

Sworn to before me this 6th December, 1875.

JOSEPH GUTMAN, JR.,
Examiner, &c.

WESLEY EGBERT, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversey herein, and being examined by Mr. WITTER, counsel for complainant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Wesley Egbert. I am 33 years old. I reside at 116 East 23d street. I am out of business at present.

2. Q. State whom you have called upon, what search you have made and had made to find the exhibits in the case of Bardwell, Castle, et al., at the suit of the complainant in the suit; and whether you are the husband of the said complainant.

A. I am the husband of the said complainant. In connection with Mr. Abbott, in the employ of Mr. Blake, we searched the office of Keller & Blake; not finding any of them there, Thomas P. How and myself searched his office and rooms; we found nothing there. We then

went to the clerk's office and got the services of a Mr. Keefe, whom I paid to make a search for them, which he assures me he did, but was unable to find anything.

3. Q. Do you know where they are?

A. I do not.

4. Q. Have you also inquired at the office of George Gifford, and had search made there?

A. I have, and with like result.

60 And being cross examined by Mr. STAPLES, he says:

5. X Q. When did you go to the office of Keller & Blake to make those inquiries?

A. It was at one of the meetings we had down there at the post-office; at the first or second meeting of the testimony for the defense.

6. X Q. Can't you tell what month it was in?

A. No, I cannot; I can tell what led to my making the search.

7. X Q. Tell as nearly as you can from your memory and circumstances connected with the case the month in which you made these inquiries you have spoken of?

A. I can't tell anything about it; it was the first or second meeting; it will be on the records.

8. X Q. Can't you tell whether it was January, June, or December, or about there?

A. I can't give any more decided answer than I have.

9. X Q. You mean to say, then, that it was after the defendants commenced taking their testimony for the defense in this case?

A. It was.

10. X Q. Did you ask Mr. Blake or Mr. Abbott what had become of the original depositions taken in the suit which was the subject of your inquiry?

A. I did.

11. X Q. What did he say?

A. He did not know; he supposed they were filed.

12. X Q. Did he say who he supposed had filed them?

A. I did not ask; he did not.

13. X Q. Don't you know that neither the depositions nor the exhibits ever were filed, from your own examination?

A. I know nothing more about them than I have stated.

61 14. X Q. Well, you had a search made in the clerk's office, and were informed that they were not there?

A. I was informed they could not find them.

15. X Q. Did you ask Mr. How, or did he tell you what he had done with the depositions and the exhibits on the part of the defendants in the case referred to?

A. I did ask him, and after making a search, as I before stated, he said he thought they must have been filed, as we were unable to find them.

16. X Q. After you had been to the clerk's office and had the search made, as you have stated, did you go back to Mr. How or to Keller & Blake, and tell them that the papers and exhibits could not be found in the clerk's office?

A. I did, and they told me to go to Mr. Gifford's office—that possibly it might be there.

17. X Q. Do you know who was the solicitor and counsel of the defendants at that time in the suit by Mrs. Egbert against Castle & Co.,

in which those depositions and exhibits were taken and produced on the part of the defendants in the case?

A. I do not know.

18. X Q. How came you to go to Mr. Thomas P. How to make enquiries, if you did not know?

A. Because I knew he was connected with the case.

19 X Q. For the defendants?

A. For the defendants in the one case or the other; I don't know which one.

20. X Q. How lately has Mr. Thomas P. How been retained as counsel or attorney in behalf of this patent?

A. I don't know.

21. X Q. Do you know or have you been informed that he has been retained on behalf of the patent?

A. I have. I know and have been informed.

22. X Q. By whom was he retained?

A. The complainant in this case.

23. X Q. When was that?

A. I don't know.

62 24. X Q. State as near as you can.

A. Last fall, some time, I think; the fall of 1874.

25. X Q. Do you know whether, at the time Mr. How was retained, he had or had not the depositions and exhibits referred to in his possession or under his control?

A. I do not.

26. X Q. Has Mr. How, since his retainer, taken any active part in any suits or legal proceedings in reference to this patent in this suit?

A. He has given advice.

27. X Q. To whom?

A. To me, for the complainant.

28. X Q. When was that?

A. This summer some time; I think it was in July or August.

29. X Q. That was about the time you went to him to get the depositions and exhibits, wasn't it?

A. It might have been.

30. X Q. Are you older or younger than your wife?

A. I am younger.

31. X Q. How many years?

A. I guess about 6 years.

32. X Q. What was the name of Mrs. Egbert before she married Mr. Barnes, if you know; what is her birth-place and her exact age?

A. Her native place is New York; her name was Willis; she is 39 years old. I think she is a little more than that probably, but I am not certain.

33. X Q. Do you speak from knowledge, or from what sources do you derive your information?

A. I do not. I derive my information from hearsay. It may have been Jersey City where she was born. I am not sure as to New York City.

WESLEY EGBERT.

Sworn to before me this 6th of December, 1875.

JOSEPH GUTMAN, Jr.,
Examiner.

63 (Complainant's counsel puts in evidence a certified copy of the

file wrapper and contents in the matter of the letters patent granted to Samuel H. Barnes, dated July 17, 1866, No. 56345, which is marked Complainant's Exhibit, Barnes' File-wrapper.

Defendants counsel asks for an early day to be named for an adjournment.

Complainant's counsel says that he is unable to name a day at present, and has been greatly discommoded by being obliged to devote last week, Friday, Saturday, and to-day to the case, in consequence of a letter received from defendants' counsel, which he here offers in evidence, and which is marked Exhibit Letter.)

Exhibit letter.

Circuit court U. S., S. D. N. Y. In equity.

FRANCES LEE EGBERT, EX.,
vs.
AUGUST SELIGMAN AND PHILLIPP LIPPMANN.

DEC. 1, 1875.

GEORGE GIFFORD, Esq.,
Comp'ts' Sol.:

I find it necessary, after conversation with my clients, Messrs. Seligmann & Lippman, to require that the testimony be closed this week on your part, and in default thereof that no further time can be given by me.

Yours, &c.,

J. B. STAPLES,
Def'ts' Sol.

64 *Another decree by Judge Blatchford.*

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the 15th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Present, the honorable Samuel Blatchford, district judge.

FRANCIS LEE EGBERT, AS EXECUTRIX OF THE last will and testament of Samuel H. Barnes, deceased,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK, and Henry S. Magrane.

This cause having been brought to a hearing on the pleadings and proofs therein, George Gifford, esq., appearing for complainant, and Charles M. Keller appearing for defendant; it is, on motion of Geo. Gifford, esq., for said complainant, ordered, adjudged, and decreed, as follows:

65 That the letters patent No. 5216, granted and issued on the 7th day of January, 1873, to the complainant, are good and valid; that Samuel H. Barnes was the original and first inventor and discoverer of the improvement in corset springs, as described and claimed in said letters patent, and that the said complainant is the exclusive owner of

said letters patent; that the said Samuel A. Castle, Rufus E. Hitchcock, and Henry S. Magrane, defendants herein, have infringed upon the said letters patent, and upon the exclusive rights of the complainant under the same.

And it is further ordered, adjudged, and decreed that the complainant do recover of the defendants the profits which the said defendants have received or made, or which have arisen or accrued to them from the said infringement since the 7th day of January, 1873, and also that the complainant recover from the defendants the damages sustained by her by reason of said infringement.

And it is further ordered, adjudged, and decreed that the said complainant do recover of the defendants her costs and charges and
66 disbursements in this suit to be taxed.

And it is further ordered, adjudged, and decreed that it be referred to Kenneth G. White, esq., one of the masters of this court, residing in the city of New York, to ascertain and take, and state and report to the court an account of the said profits, and also the amount of damages sustained by said complainant from said infringement.

And it is further ordered, adjudged, and decreed that the complainant, on such accounting, have the right to cause an examination of said defendants, ore tenus or otherwise, and also the production of the books, vouchers, and documents of the said defendants, and that the said defendants attend for such purpose before said master from time to time as said master shall direct.

And it is also further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, restraining them, their, and each of their agents, clerks, servants, and all
67 claiming or holding under or through them, from making or selling, or using or vending to others to be used, any corset-springs embracing the invention or improvement claimed in said letters patent, pursuant to the prayer of the said bill of complaint.

SAMUEL BLATCHFORD.

REMARKS.—We call the attention of all whom it may concern to the following points in this decree:

1st. That it establishes the validity of our patent.

2nd. That it establishes the validity of our claims, which cover all the forms of double corset-springs known to the trade.

3rd. The full penalty of the law will be enforced on all persons who, on and after this 10th day of June, A. D. 1874, are found to be making, selling, or using any corset-springs composed of two or more plates placed one upon another, unless obtained from the undersigned or those authorized by them. The undersigned are the sole proprietors and manufacturers of the double corset-steel known as the cant-break-ems.

EGBERT & LUM,
Successors to Barnes & Cruttenden.

68 NEW YORK, *June 8th*, 1874.

Frank W. Marston and Jacobs, Strouse & Co. have this day become licensees under the above patent.

F. LEE EGBERT,
Executrix.

Exhibit No. 1, *December* 4, 1875.—*Mayer, J. G. Jr., Ex.*

Official and only notice to you.

(Endorsed:) Ex. 1, Mayer, Dec. 4, 1875. Egbert v. Lippmann & Seligmann.

69 [Office of Jacobs, Strouse & Co., corset and corset clasps, 74 Franklin st.]

[Trade-mark: Columbia Works.]

NEW YORK, *June 22d*, 1874.

DEAR SIR: After a long and protracted struggle between Messrs. S. A. Castle & Co., of New York, defendants, and Frances Lee Egbert, also of this city, plaintiff, his honor, Judge Blatchford, sustained the validity of the Egbert patent and rendered a decree whereby all corset-clasps composed of two or more plates are an infringement upon said patent.

Our manufacture of corset-clasps (known as the everlasting clasp), though same is protected by three (3) distinct and different patents, one of which antedates the date of the Egbert patent, could be construed to be included within the scope of the decree of Judge Blatchford, hence we have applied to the owners of the said patent for a license; which application was granted under date of the 8th June, 1874; and said license covers fully and absolutely our manufacture of corset-clasps, known as the "everlasting."

70 The trade is respectfully solicited to buy our clasps; we offer them as the best and most complete corset steels in the market; their construction conforming to the best mechanical principles; they are double from end to end.

The greatest complaint (next to poor material) that ladies find to the corset clasps in use or for sale in the United States is that the said clasps work through or cut the cloth of the corset; to prevent this, we bought, a year ago, the patent issued to Thomas Wallace, esq., in 1863, and now use the same invention, which consists of a massive silvered shield upon the ends of our corset clasps. We alone are authorized to use this invention, and all corset-clasps other than ours provided with said shields are an infringement of our letters patent and a violation of the laws of the country.

We enclose a price-list of the everlasting corset-clasps per gross. Merchants desiring to buy them in less quantities than a gross of

71 each kind will please call upon the jobbers who have them for sale; each pair of clasps is guaranteed to outlast each corset into which it may be put, and for any pair of clasps that may break under ordinary wear within one (1) year from its first use, a new pair will be given upon application to us.

JACOBS, STROUSE & CO.

A final decree by Judge Blatchford. Here follows interlocutory decree as in Ex. 1, Mayer.

NEW YORK, *June 8th*, 1874.

Jacobs, Strouse & Co. have this day become licensees under the above patent.

F. LEE EGBERT,
Executrix.

Exhibit No. 2, Dec. 4, 1875, Mayer.

Comp't's record, p. 40. Mayer's deposition.

(Endorsed:) Ex. No. 2, Dec. 4, 1875. A. H. Mayer's deposition. Egbert vs. Seligmann & Lippman. Suit on patent.

72 United States circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX OF last will and testament of Samuel H. Barnes, deceased, complainants,
against
PHILLIP LIPPMANN AND AUGUST SELIGMANN, defendants.

Testimony taken on behalf of defendants for a final hearing under and pursuant to rule sixty-seven of the Supreme Court in equity, as amended, before John A. Shields, examiner:

NEW YORK, *June* 29, 1875—10½ a. m.

Present, John B Staples, esq., of the counsel for defendants, and Mr. Witter, for complainants.

JAMES EARWICKER, a witness called on behalf of defendants, being duly sworn, testified as follows:

Q. 1. What is your name, age, residence, and occupation?

A. James Earwicker; age, 61 years; residence, No. 5 Hall Place, New York City, and occupation, corset maker.

73 Q. 2. How long have you been engaged in the business of corset making?

A. Since 1827.

Q. 3. Have you manufactured corset springs, or used corset springs in the manufacture of corsets?

A. I have used them.

Q. 4. When and where first?

A. In England, about 1835.

Q. 5. State whether you have ever made or used corset springs consisting of double plates.

A. Often.

Q. 6. When and where first?

A. In England, for deformed persons, at various times.

Q. 7. When did you first use the double spring in the United States?

A. About 1861.

Q. 8. Where were you at that time?

A. No. 10 Stuyvesant street, New York City.

Q. 9. How long did you continue to use such double plates or springs after 1861?

A. Down to the present time.

Q. 10. Did you make and sell corsets having this kind of spring of double plates or springs, at No. 10 Stuyvesant street, in 1861?

A. Yes, sir.

Q. 11. About how many in that year do you think?

A. About one or two a week.

74 Q. 12. Do you recollect the names of any persons to whom you sold them?

A. There are so many, I cannot recollect; I remember Mrs. Cary, of Third avenue, Mrs. Allen Pierce, of Sixth avenue.

Q. 13. Did these persons, whose names you have just mentioned, buy them for use or to sell again?

A. For sale.

Q. 14. Please describe the manner in which these double springs were constructed; and in what part of she corsets they were placed.

A. By putting a plain spring under a button steel, winding a strip of cloth around both, and placing it in front of the corset.

Adjourned to 1 p. m. this day, June 29, 1875.

Q. 15. Was there any opening in the corset so made by you in front?

A. The usual opening for a button steel.

Q. 16. How were these steels that you have just described placed in the corset, in reference to these openings?

A. Sewed in by a needle.

Q. 17. Were they placed on each side of the opening?

(Objected to as leading.)

A. Both in the opening.

Q. 18. Look at the exhibit now shown you, and state what that is.

A. That is in the habit we are using them.

75 Q. 19. State more particularly what it is, and how it is made.

A. That is two steels placed together so that one will support the other.

Q. 20. How are the two steels held together in this exhibit?

A. By being bound together by a strip of cloth.

Q 21. How were the steel springs you used in corsets in 1861 as compared with this exhibit? State whether they were similar or different, and in what respects.

A. The same in every way.

Q. 22. By whom was this exhibit now shown you made, do you know?

A. By one of my workmen, at my present place of business, No. 5 Hall Place.

Q. 23. You have never made the steels yourself, I think you stated?

A. Never.

Q. 24. From whom did you procure the steels in 1861, if you can state?

A. From Monsieur Quilett, of Harlem.

Q. 25. Have you purchased the steels or springs from any one else since 1861; and, if so, from whom?

A. Bridgeport Brass Company and others.

Q. 26. In 1861, when you used corset steels similar to the one now exhibited, how many persons had you in your employment at that time, and who were they, as near as you can recollect?

76 A. From twenty to twenty-five persons, male and female. I recollect the names of Edward Grace, Patrick Reddington, Anna Gallagher, and my own family—my daughter Annette, sons Charles and Harry.

Q. 27. Have you continued to make and sell corsets having springs similar to this exhibit?

A. Yes, daily, down to the present time.

Q. 28. State what number you have made and sold of corsets having this particular kind of spring, per year, as near as you can?

A. Ten to twenty thousand—couldn't say exactly.

Q. 29. Did the springs so used by you, in the corsets made by you as testified, have clasps to unite and disunite them?

A. None.

Q. 30. Look at the exhibit just shown you, and state whether the springs so used by you in the corsets had any device for holding the two sets together, as shown in that exhibit, or otherwise?

A. Only the button and hook.

Q. 31. Then you call the devices shown here a button and hook?

A. Yes, sir.

(Exhibit above referred to offered in evidence, and is marked "Defendants' Exhibit No. 1, Earwicker Steel.—J. A. S., examiner.")

Q. 32. What led you first to use the two pieces of steel as shown in the exhibit last mentioned, as testified to by you?

77 A. The steels then in use were too slight, so we doubled them.

Cross-examined by Mr. WITTER:

X Q. 33. Have you from the first used these corset steels that you have been talking about in your direct examination, in corsets, or have you sold them separately from the corsets?

A. Same with the exception of sometimes a bone under. I never sold them separately from the corsets.

X Q. 34. Were the button and hook that you used, the same kind in the year 1861 as those upon the exhibit.

A. I believe they were, with the exception perhaps of the letters.

X Q. 35. From whom did you procure those buttons and hooks in the year 1861?

A. M. Quilett.

X Q. 36. How many did you use in that year on a single pair of steels?

A. Three and four of each; three mostly.

X Q. 37. Where is Mr. Quilett?

A. He is dead.

X Q. 38. You just stated that you have lots of his bills; with you produce one containing a memorandum of the sale to you of these hooks and buttons, of as early a date as you have one in your possession?

A. I will.

X Q. 39. And produce it before the examiner as part of your deposition?

A. I will.

78 X Q. 40. What is the material that is wrapped around the two parts of this corset steel, Exhibit No. 1?

A. Muslin—a cotton material.

X Q. 41. Was the material which you used in 1861, the same in kind as this upon the exhibit No. 1?

A. Sometimes drill—sometimes muslin.

X Q. 42. Where and of whom did you purchase the material which you used for this covering in 1861?

A. A. T. Stewart and Loder & Lockwood.

X Q. 43. Did you purchase it in your own name?

A. Yes.

X Q. 44. How was the wrapping fastened at the ends of the steels, in those which you made like No. 1?

A. Turned in at the one end and sewed at the other.

X Q. 45. In the manner shown in the exhibit?

A. Yes, sir.

X Q. 46. If there is any particular in which the corset steels, of which you have spoken as used in 1861, differs from the Exhibit No. 1, please mention it?

A. None, except old steels being sometimes put under instead of new ones.

X Q. 47. When did you come to the United States?

A. September, 1855.

X Q. 48. Whereabouts in Third avenue is Mrs. Cary, of whom you speak in your answer to question 12?

A. Corner of Eighteenth street and Third avenue.

79 X Q. 49. And Mrs. Allen Pierce?

A. Sixth avenue, between Fifteenth and Sixteenth, I believe.

X Q. 50. Do you mean to be understood as saying you sold corset springs similar to Exhibit No. 1 to these two ladies in 1861; if not, when first?

A. I don't sell springs; I sell corsets.

X Q. 51. Do you mean to be understood as saying you sold corsets containing corset-springs similar to Exhibit No. 1 to these two ladies in 1861; if not, when first?

A. It was near that time.

X Q. 52. Did you sell them to them as soon as to anybody?

A. As nearly as I can recollect.

X Q. 53. Do you remember having been a witness in a suit brought upon this corset steel patent in the year 1873?

A. Yes; I do.

X Q. 54. I will now read from your deposition, taken in that case, question 9, and the answer thereto:

(Counsel for defendant asks that complainants' counsel may produce the original deposition, as he now appears to be reading from a printed copy.)

"Q. 9. State whether or not the winding of the strip of cloth, shown in Exhibit 24, secured them from sliding off each other laterally?"

"A. Yes, when in the corset."

80 State whether the answer to that question is correct, substituting Exhibit No. 1 for Exhibit 24 in the question; and understanding the word "them" to mean the two plates of steel which composed one-half of the corset spring.

(Objected to, as original deposition is not produced, and the same not being on file in the clerk's office,)

A. I have known them to move.

(Answer objected to by complainants' counsel as not responsive, and—)

X Q. Question repeated.

A. It is correct.

X Q. 56. I also find in the printed copy of your former deposition the following question and answer, being question 17:

"Q. 17. For what purpose did you wind cloth around the two plates forming the double spring, as shown in Exhibit 24?

"A. To keep from wear of the corset."

Substituting Exhibit No. 1 for Exhibit 24 in this question, is that answer correct or incorrect?

(Same objection.)

A. Correct.

X Q. 57. You stated in the deposition that you were led to make these double steels because they were required for a child that was deformed and wanted more support; who was that child and where is it now, if you know?

(Same objection.)

A. I don't recollect.

81 X Q. 58. Is the statement that you were so led to the use of these steels correct?

A. Yes, sir.

X Q. 59. Will your books show who this child was?
A. No, they will not.
X Q. 60. Will they show that you used a dou ble corset steel for that purpose at that time?
A. No.
X Q. 61. How do you fix the date, then, as 1861 when you were led to the use of such articles by a deformed child?
A. By moving to Stuyvesant street.
X Q. 62. What is there in the fact that you moved to Stuyvesant street at a certain time which causes you to think that you used this particular kind of double steel at the time you have testified to?
A. I was making skeleton skirts for a short time, and went back to corsets.
X Q. 63. Where was it that you were making skeleton skirts a short time?
A. Ninth street, and No. 8 Stuycesant.
X Q. 64. Have you now stated all the association that exists in your mind between your moving and your commencing to use these steels?
A. To the best of my belief.
X Q. 65. When did you move to No. 8 Stuyvesant street?
A. I can't fix the date; about the time the war broke out.
82 X Q. 66. Are you sure it was some time in 1861?
A. 1859 or 1860.
X Q. 67. How many years did you do business exclusively at No. 8 Stuyvesant street?
A. Can't say positively.
X Q. 68. Say as near as you can.
A. It might be two years.
X Q. 69. Where did you do business next?
A. No. 5 Hall Place.
X Q. 70. How long were you at No. 5 Hall Place?
A. I believe this is my tenth year; I have been there ever since.

Re direct by Mr. STAPLES:

R. D. Q. 71. In 1861, did you own or lease the premises occupied by you No. 8 Stuyvesant street?
A. Rented it.
R. D. Q. 72. Of whom?
A. Carroll, I think his name was; I don't know the first name.
R. D. Q. 73. Do you own or lease the premi ses No. 5 Hall Place?
A. Lease them of F. Reichenbach.
R. D. Q. 74. Have you the leases in writing on both those places?
A. No, sir.
R. D. Q. 75. Have you receipts from the lessors for the rent from the time you went into them down to the present time?
A. I have some of them.
83 R. D. Q. 76. Will your books show the times of payment of rent?
A. I think not.
R. D. Q. 77. Have you the means of ascertaining with certainty the years of your going to Stuyvesant street and Hall Place?
A. I don't think I can.
(It is understood that the former deposition of this witness, referred to, was on part of defendants in the case of Frances Lee Egbert, executrix, against Samuel A. Castle, Rufus E. Hitchcock, and Henry S. Magrane, in this court.

Complainants' counsel here says that he has no information as to where the original deposition of Mr. Earwicker is, and that it is not, and has not been at any time, in his possession or under his control.

Complainants' counsel here excuses the witness from producing the bills called for in cross-questions 38 and 39.)

J. EARWICKER.

Subscribed and sworn before me, this 29th day of June, 1875.

JOHN A. SHIELDS,
Examiner, &c.

Adjourned to July 1, 1875, at 1 p. m.

The exhibits, by agreement of counsel, are to remain in the possession of defendants' counsel until testimony is closed.

84 NEW YORK, *July* 1, 1875—1 p. m.

Present: Counsel as before.

CHARLES EARWICKER, a witness called on behalf of defendants, being duly sworn, testified as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Charles Earwicker; age, 26; residence, 459 Third avenue, New York City, and occupation corset maker.

Q. 2. Where is your place of business?

A. At No. 5 Hall Place, New York, with my father.

Q. 3. How long have you been in the business of making corsets?

A. Since June, 1861.

Q. 4. Please state what kind of steels or springs were used in the corsets made by your father and yourself, at the time when you first went into business as above specified?

A. Both three and four button steels.

Q. 5. Did you use single steels in these corsets, or any other kind; if so, state?

A. We used single and double, that is one steel under the other; when a stout steel was required we put in two steels, one under the other.

Q. 6. State the earliest date within your collection, when these double steels were used to your knowledge in corsets?

A. In June, 1861.

Q. 7. At what place?

A. Eight or 10 Stuyvesant street, I ain't sure which; that was my father's place of business at that time.

85 Q. 8. State if you know of your own knowledge whether corsets having these double steels were sold by your father at that place.

A. They were sold there.

Q. 9. Please state the time.

A. June, 1861, and since.

Q. 10. Are you able to state the names of any persons to whom the corsets having the double steels, as aforesaid, were sold in 1861?

A. I name Mrs. Cary and Mrs. Allen Pierce; I think that was her name at that time.

Q. 11. State what your knowledge is of the numbers of such corsets sold from that time down to the present; I mean about how many a year.

A. There may have been five and there may have been a hundred, I can't tell positively the number.

Q. 12. In 1861 what was your position in your father's business at that place, 8 or 10 Stuyvesant street?

A. Whaleboning, and examiner of the work when finished.

Q. 13. Were you in the room or department where the sales took place?

A. I was.

Q. 14. In 1861 was your father a wholesale seller of corsets, or retail?

A. Both, and has continued to be so since.

Q. 15. Where double steels were used as you have described, how were the double steels held together in the corsets?

86 (Objected to as leading, and because it does not appear that they were held together in any way, in or out of the corset.

Question withdrawn.)

Q. 16. State the manner in which the double steels used in the corsets you have referred to, were arranged.

A. We placed one steel under the other, and bound them together with muslin.

Q. 17. When so put together and arranged, how were they placed and secured in the corset?

A. They were placed in the lap of the corset, and then sewed in on the edges.

Q. 18. Defendant's Exhibit No. 1, Earwicker steel, being shown witness, the question is asked: Do you know what that is?

A. This is a steel, the same as we put into our corsets.

Q. 19. Did the double steels of this kind, such as you have described, differ in their length and thickness, or were they alike?

A. They were of different lengths, but the same thickness.

Q. 20. Did the length in the same pair of steels differ, or did only the pairs differ?

A. They were of the same length and different lengths in the same corset.

Q. 21. I call your attention to the Exhibit No. 1, before shown you, to hooks and buttons thereon. Please state whether the steels you have referred to were provided with hooks and buttons; and, if so, whether they were like these, or how they were constructed.

(Objected to as leading.)

A. They were the same as those.

87 Q. 22. State, if you know, of whom your father procured these corset steels in the year 1861, and the following years.

A. Quilett, of Harlem, in 1861; and of later years, I can name a good many.

Q. 23. Of whom did your father procure the hooks and buttons, if you know; if so, state?

A. They were on the steels when we purchased them.

Q. 24. What kind of cloth were these double steels wrapped in?

A. Muslin.

Q. 25. Do you know of whom your father procured the muslin in 1861?

A. Of A. T. Stewart & Co., Loder & Lockwood, and H. B. Claflin.

Q. 26. Paper being shown witness, he is asked if he knows what it is?

A. It is a bill of goods purchased of A. T. Stewart by James Earwicker.

Q. 27. State whether you know that to be a bill rendered by A. T. Stewart, and paid by James Earwicker.

A. I do.

Q. 28. State the date of the bill?

A. December 9th, 1861.

(Bill offered in evidence and marked Defendant's Exhibit No. 2, Earwicker bill, J. A. S., Ex'r.)

88 *Defendant's Exhibits No. 2.—Earwicker bill, J. A. S., Ex'r.*

All correspondence relating to the business of the house to secure prompt attention should be directed to the firm and sent by mail.

No. 1358. Invoice. Sales, 40. Folio, 320.

Terms cash.—Payable in New York bankable money. No claims for damages, deficiencies, &c., will be allowed, unless made within ten days after the receipt of the goods, and insurance will only be effected upon written instructions.

NEW YORK,
December 9, 1861.

Mr. James Earwicker, city, bought of Alex. T. Stewart & Co., Broadway, Chambers, and Reade st's.

	42^3			
2 Amosk. Jean	41^3	84^2	12	1014
1 Sat. drill		36^3	13	479
				1493

Received payment for A. T. Stewart & Co.

J. RODING.

Q. 29. Look at the bill, and state whether any of the articles therein mentioned were such as at that time were used in covering these steels.

A. They are; one, the "jean."

Q. 30. In what part of the corset were the double steels so used by your father, placed?

A. In the front, at the opening.

Q. 31. Do you know of whom your father rented the premises, No. 8 or 10 Stuyvesant street, in 1861?

A. A party by the name of Carroll.

89 Q. 32. Witness being shown a paper, is asked if he knows the signature thereto.

A. I do; it is the signature of the party of whom we first rented the floor of 8 Stuyvesant street.

(Receipt offered in evidence, and marked "Defendant's Exhibit No. 3, Earwicker receipt, J. A. S,, ex'r," the same being a receipt for rent for June, 1860, signed James Cahill, and dated June 1, 1860.)

Defendant's Exhibit No. 3.—Earwicker receipt, J. A. S., ex'r.

NEW YORK, *June 1st*, 1860.

Received from Mr. Fairwicker thirteen dollars in advance for one month's rent.

$13.

JAMES CAHILL.

Q. 33. I see this is dated June 1, 1860; do you know where your father's place of business was at that time? If so, state.

A. No. 8 Stuyvesant street.

Q. 34. Where have you been engaged in business since 1861, and with whom?

A. With my father, at No. 8 and 10 Stuyvesant street, corner of 19th street and Sixth avenue and No. 5 Hall Place.

Q. 35. When did you leave Stuyvesant street?

A. I cannot state positive; it was either in 1865 or 1866.

Q. 36. State, if you can, when your father and yourself went to 5 Hall Place.

A. 1865 or 1866.

90 Cross-examined by Mr. WITTER:

X Q. 37. How old were you in years, months, and days on the 30th day of June, 1861? and you may make the calculation with pencil and paper, if you desire.

A. Twelve years, one month, and seventeen days.

X Q. 38. What do the letters "Sat." on the bill, marked Defendant's Exhibit No. 2, Earwicker bill, stand for?

(Complainant's counsel here objects to the two defendants, who are here present, holding any further communication in the presence and hearing of the witness.)

A. Satteen drill.

X Q. 39. What do the letters in writing immediately above those letters "Sat." stand for?

A. Amoskeag jean.

X Q. 40. Is that the material upon the Defendant's Exhibit No. 1, Amoskeag jean, or "satteen" drill; if yea, which?

A. It is neither; it is muslin.

X Q. 41. On what day in June, 1861, did your father sell any corset or corsets containing double steels, which you referred to in your answers to questions 8 and 9?

A. I cannot state positively to any day.

X Q. 42. Where did you live during the year 1860?

A. No. 8 Stuyvesant street.

X Q. What part of the building was used for the shop or salesroom?

A. The second floor.

91 X Q. 44. What did you live in?

A. Parts of the second and third floors.

X Q. 45. How can you say that during the year 1861, when you were only twelve years old, that your father sold corsets containing double steels to Mrs. Cary and Mrs. Allen Pierce? and in your answer give every reason upon which you base this statement; and state from whom you derived the information, if from anybody.

A. I don't understand the last part of the question, about information. I will answer the first part. In that year I took home the goods made, and also received orders for corsets.

X Q. 46. In your own handwriting did you take these orders?

A. No; in the handwriting of the persons giving the orders.

X Q. 47. Will you do your best to produce at the next meeting before the examiner an order in the handwriting of either Mrs. Cary or Mrs. Pierce, which was given in the year 1861, for one of these double steel corsets; or your father's bill during 1861 to either of these people for said corsets, or your books, which would show the fact at that time?

A. I cannot show an order in the handwriting of either parties mentioned, as all orders were destroyed as soon as made; the bills of my

father did not state whether they were double or single steels in the corsets, they only stated the words corsets, or goods; the books only stated corsets, or goods.

X Q. 48. Then you make this whole thing a matter of memory, do you?

A. I do.

92 X Q. 49. Give the name of the person, if you can do so, who in any part of the year 1861 wound the double steels with the material used for that purpose.

A. I cannot name any positively.

X Q. 50. Name any one who did this work in the year 1862.

A. Same answer.

X Q. 51. Name any one who did this work in 1863.

A. Same answer.

X Q. 54. Name any one who in any part of the year 1861 put the double steels of which you speak into the corsets, and sewed or otherwise fastened them there.

A. I cannot name any one positively.

X Q. 53. Does your father use these same kind of double steels at the present day?

A. He does.

Redirect by Mr. STAPLES:

R. D. Q. 54. In 1861, did your father have employees working for him in making corsets?

A. He did.

R. D. Q. 55. Were they males or females, or both?

A. Both.

R. D. Q. 56. About how many in all, and did they do their work at that place or elsewhere?

A. Between ten and fifteen; they did their work at that place.

R. D. Q. 57. Do you recollect the names of any of them? If so, state.

A. Miss Dougherty, Edward Grace (since dead); that is all I can recollect at present.

93 R. D. Q. 58. Do you know where Miss Dougherty is now?

A. She is employed by my father at present.

R. D. Q. 59. And has she continued with your father since that time, or have there been intervals of absence?

A. She has continued with him.

R. D. Q. 60. In making the corsets which had the double steels, in 1861, and about that time, did the employees of your father work generally at all parts of the corsets, or did some work at particular parts of the corsets, and some at other parts?

A. Particular parts.

R. D. Q. 61. So that a single corset in making would pass through several hands?

A. Through several hands.

R. D. Q. 62. In 1861, or about that time, do you know if any verbal orders were given for corsets at your father's place having double steels?

A. There were; but they were not called double steels. When a person wanted a stout steel, they would order it.

R. D. Q. 63. When they ordered a stout steel, what kind of a steel did you give them?

A. We put a side steel under the other steel, the same as that, pointing to Exhibit Earwicker Steel.

R. D. Q. 64. You were asked in cross-examination as to whether this whole thing was a matter of memory with you; are you able to
94 identify or distinguish the year 1861 in any way as connected with the use of these double springs? and, if so, state how.

A. I left school in June, 1861, and then went in my father's employment of working at corsets; when a heavy steel was wanted, the girls had to come to me to get it.

R. D. Q. 65. How are you able to fix the date of June, 1861, as the date of your leaving school?

A. I passed my examination from ward school No. 10 or 20 in May of that year.

R. D. Q. 66. Have you a written certificate of examination or written paper that will show the time of your leaving school?

A. I have not, as I did not graduate.

R. D. Q. 67. Is there any written memoranda or paper of any kind to which you can refer among your father's books and papers, or your own, which will show the date of your coming into your father's employ, as above stated?

A. Not as I know of.

R. D. Q. 68. Was there any interval between the time of your leaving school and between the time of your going into your father's employment? If yea, how long, and what did you do in that interval?

A. There was not.

CHARLES EARWICKER.

Subscribed and sworn to before me this 1st day of July, 1875.

JOHN A. SHIELDS,
Examiner, &c.

95 WILLIAM B. CARGILL, a witness called on behalf of defendants, being duly sworn, testifies as follows:

Q. 1. What is your name, age, residence, and occupation?

A. William B. Cargill; age, 56 years; residence, Waterbury, Connecticut; and occupation manufacturer of corset clasps and corset steels.

Q. 2. How long have you been engaged in that business, and in what place?

A. It is, as near as I can recollect, about thirteen years, in Waterbury and New Haven.

Q. 3. Are you acquainted with the various kinds of corset steels used in corsets; and, if so, how long have you had such acquaintance?

A. I am; and my acquaintance with them has been, as the different steels appeared, since I commenced manufacturing them, in the fall of 1862.

Q. 4. Please look at the corset steel now shown you, marked Defendants' Exhibit No. 4, Cargill Steel, and state whether you have ever seen a corset steel of that kind before; and, if yea, when first, where, and in whose possession, if anybody's?

(Objected to as leading.)

A. Those steels represent a pair of steels or clasps presented to me by my son, manufactured by him in the summer of 1863; that was at Waterbury, Connecticut.

Q. 5. Under what circumstances, or what was the occasion of your son's showing them to you?

A. At that time I had several customers that required a heavier
96 steel or clasp, and when he presented these steels to me as he had manufactured them, he asked me if I thought those steels would

be heavy or stiff enough. It was that idea that prompted him to make them, I suppose.

Q. 6. Was your son at that time engaged in the business of making these steels and clasps?

A. With me, he was.

Q. 7. Please look at defendants' Exhibit No. 4, and describe wherein this exhibit is like those shown you by your son, or where it is different, if at all.

A. They are a fac simile of those shown upon a former occasion as to the short piece placed on the outside with the clasps; they were unlike this exhibit in the width, shape of hook, shape of button, and riveting. I believe that is all the difference.

Q. 8. You speak of those shown on a former occasion; the question I ask you is, whether this exhibit is like the pair of clasps shown you by your son, which he manufactered in 1863?

A. This is the same, with the exception I have above spoken of; the one shown on a former occasion was the identical one manufactered by my son.

Q. 9. Was that pair of clasps produced in evidence by you on a former occasion in a suit in which you gave evidence?

A. It was.

Q. 18. Do you know what has become of it?

A. I am unable to find it.

Q. 11. Where did you last see it?

A. At the office of Thomas P. How, in Park Place, New York City.

97 Q. 12. Do you know what led your son to make this pair of clasps in 1863, or how he came to make it?

A. It was to obtain something stronger, to satisfy a limited demand.

Q. 13. In the clasps so made by your son as above stated, how were two plates of each half, constituting the pair, fastened together, if at all?

A. Precisely the same as Exhibit 4.

Q. 14. How many buttons and hooks were on that pair?

A. Three of each; three buttons and three hooks.

Q. 15. Was that pair put to any use; and, if yea, when, where, and by whom?

A. It was; soon after my son manufactured them I gave them to a young lady who was residing in my family, and asked her to place them in her corsets for the purpose of testing them; her name was Miss Emma Doolittle.

Q. 16. And do you know whether she did so, and what she did?

A. Some time after they were presented to her she returned them to me, stating that she had used them in her corsets, and liked them well.

(This answer objected to as hearsay evidence.)

Q. 16. State as near as you can the interval that elapsed between the time when your son made them and you presented them to Miss Doolittle, as you have stated.

A. I can't state definitely the time, but I think about two weeks.

98 Q. 18. Was this pair of corset clasps, as you call them, to your knowledge seen by others; and, if by any, by whom?

A. They were seen by my wife, Mrs. Maria L. Hamilton, Miss Delia F. Hine, and William A. Cargill, and I suppose by others.

Q. 19. Were these kept in any place where they could be seen by the public, or anybody?

A. They were; in my factory.

Q. 20. In what part of the factory—where the public had access, or not?

A. They were not kept in any particular place in the shop; sometimes on the bench, sometimes upon the girth of the shop, and I have picked them up from the floor; the public had access to all parts of the shop.

Q. 21. Does your answer refer to the time of your son's showing you the clasps, and the time of your giving them to Miss Doolittle, as you have stated?

A. It does not.

Q. 22. Do you know where Miss Doolittle is at present, or Miss Hine, or the other persons who saw that clasp? If so, state.

A. My wife, I expect, is home in Waterbury; Miss Doolittle and Mrs. Hamilton, I do not know their whereabouts at present; the last I heard of Miss Hine she was starting for California; Mr. William Cargill is also in Waterbury.

Adjourned to July 2, 1875, at 10 a. m.

99 NEW YORK, *July* 2, 1875—10 a. m.

Present, counsel as before.

Examination of WILLIAM B. CARGILL continued.

Q. 23. When did you last see the exhibit used on the occasion of your formerly given testimony—I mean the exhibit referred to in your answers to questions 9, 10, and 11?

A. At the time that my testimony was given in that case.

Q. 24. Have you made any inquiry for that exhibit recently?

A. I have.

Q. 25. When, and of whom, and where?

A. On Wednesday of this week, of Thomas P. How, at his office in Park Place, New York City.

Q. 26. State what took place on that occasion and at that interview.

A. I asked Mr. How for my exhibit, which I knew to be in his possession at the time that my previous evidence was given; he informed me that he hadn't it, and didn't know where it was. I don't recollect anything further that pertains to this case.

Q. 27. Did he say what he had done with it, or whether he had done anything with it?

A. He did not; neither did he know where it was, or what had become of it.

100 Q. 28. In the testimony as given by you, heretofore referred to, you spoke of a corset clasp then shown you, that you stated you believed was shown you by John L. Fitzpatrick; do you remember that corset clasp, how it was constructed, and when it was shown you? State particularly as you can.

A. I am not clear in my mind with reference to that, as I have it mixed up in my mind with other clasps; but my impression is at this time that it was a pair of clasps composed of two pieces of steel, each blade of which was composed of two pieces of steel running the entire length, fastened together in the usual way with rivets and buttons, and slots and rivets or buttons.

Q. 29. Can you state in what year it was that Mr. Fitzpatrick showed you this pair of clasps referred to in your testimony?

A. I think it was in the year 1863.

Q. 30. Have you any means of ascertaining and fixing the date last referred to?

A. I have.

Q. 31. Can you do it now, or will you have to refer to some other particulars?

A. I will have to refer to my books.

Q. 32. Where are your books?

A. They are in Waterbury.

Q. 33. You were acquainted, were you not, with the Mr. Fitzpatrick referred to?

A. I am, personally.

Q. 34. For how long?

A. For twelve years certain.

101 (Defendants' counsel closes the direct examination of this witness, except reserving the right to recall the witness to fix the date when Mr. Fitzpatrick showed him the clasp.

Complainants' counsel also reserved the right when such examination of the books shall have been reported upon, to further cross-examine, if he shall so desire.)

Cross-examined by Mr. WITTER:

X Q. 35. Have you or any one with whom you have been associated ever done any work for or sold any goods to the defendants, or either of them? The defendants are Phillip Lippmann and August Seligman.

A. I have.

X Q. 36. Which one, and when did you first commence: what was the work done, or goods sold?

A. I sold the firm of P. Lippmann & Co.; I think it was in 1870 or 1871 that I first commened selling them goods; I cannot tell accurately without looking at my books; I manufactured both single and double clasps and side steels for them.

X Q. 37. Are you still engaged in that manufacture for Lippmann & Co., or the suceessor of that firm?

A. For the successor of that firm.

X Q. 38. Who is that?

A. A. Seligmann.

X Q. 39. Who was the company in the firm of P. Lippmann & Co. when you sold to them as above stated?

102 A. P. Lippmann and A. Seligmann, as I understood the firm to be.

X Q. 40. You mean the gentlemen who were both present here yesterday, and one of whom is present to-day, do you not?

A. I do.

X Q. 41. How many double corset steels have you manufactured per month, from the time you commenced, for P. Lippmann & Co. or their successors?

A. I have no means of ascertaining that fact at present.

X Q. 42. What do you mean by "at present"?

A. Not having my books with me, so as to enable me to make a statement.

X Q. 43. Will you make an accurate statement, from your books, of the number of double corset steels, of all kinds, which you or any one associated with you, have manufactured for P. Lippmann & Co., or their successors, and produce the same before the examiner, before the close of your deposition?

A. I will, so far as I am able to do so.

(Counsel for defendants objects to the deposition being kept open, so far as the signature of the present witness is concerned, he desiring to complete the deposition so far as it is now to be taken, so as to provide against any accident to the witness.)

X Q. 44. State the circumstances under which you have manufactured and manufacture these double corset steels for P. Lippmann & Co.
103 and their successors; that is to say, who furnishes the steel, who the trimmings, and what are the present terms upon which you furnish the corset steels?

(Objected to as not having any relevancy to the issue of this case, and as inquiring into the private matters of the witness, which he is not bound to answer unless he thinks proper.)

(Complainants' counsel regards the question relevant, for the purpose of showing that the witness is an interested witness, and that his interest is measured in part by the profit which he derives from the sale of double corset steels to these defendants; and he deems the instruction to the witness contained in defendants' counsel's objection as unwarrantable and improper, and requests a full and frank answer to the question.

Defendants' counsel insists upon his objection.)

A. In the first of our transactions in dealing in corset clasps, I furnished all material and sold them the goods manufactured; since I have been engaged in the manufacture for A. Seligmann, he has furnished the material for the same.

X Q. 45. What price did you receive from P. Lippmann & Co. or A. Seligmann, when you furnished the material; and what price have you received since that time, for what you have done? If the price has varied, state as near as you are able to do so between what points; and mention at the same time that grade of goods to which you refer.

A. The first part of the question I am unable to answer, for
104 want of my books to refer to; the latter part of the question I am unwilling to answer without counsel.

X Q. 46. Defendant's counsel is present here, is he not?

A. I suppose he is.

X Q. 47. Please avail yourself of his advice.

A. Am I obliged to receive his advice in preference to any one else?

X Q. 48. No. Look at the corset steel marked Exhibit B, J. G., jr., ex'r, and state in what respect the steels which you made for P. Lippmann & Co., or A. Seligmann, differed from that exhibit.

(Defendants' counsel objects to any questions relating to the firm of P. Lippmann & Co., on the ground that A. Seligmann, the present defendant, not having been a partner in that firm since September 1, 1874, and the firm of P. Lippmann & Co. having then been dissolved, and P. Lippmann having no interest in the business of A. Seligmann since that time.

Complainants' counsel says that there is no proof of any of the statements made by defendants' counsel in his last objection, and he requests hereafter that any objections which defendants' counsel has to make be made out of the hearing of the witness, or handed in writing to the examiner; and he makes this request because he deems the above objection as tantamount to instructing the witness.

Defendants' counsel disclaims any such intention.

105 This disclaimer being made, complainants' counsel requests the witness to answer the question exactly as if he had not heard the objection made by defendants' counsel.)

A. The double steels were a fac simile of these, with the exception of end trimmings.

X Q. 49. Don't you think you made that identical pair of steels, as near as you can judge?

A. I think I made the clasps, but I don't think I made the end trimmings.

X Q. 50. Why don't you think you made the end trimmings? Give your reason.

A. From the facts that I hav'n't made any with end trimmings on for several years, and believe that this pair of clasps was made recently, and that the mechanism of placing the end trimmings on the steels is not done in the manner I was in the habit of doing my work.

X Q. 51. Mention all the kinds of trimmings which you at present, and for some time past, have put upon the double corset steels which you have made for A. Seligmann and P. Lippman, or either of them.

(Same objection as last, made in writing, as requested by complainants' counsel.)

A. Nothing but the buttons and hooks fastened with rivets.

X Q. 52. Will you produce before the examiner a pair of corset steels such as you intend to mean by your last answer?

A. I will.

X Q. 53. I see upon one of the elements of this double corset steel, Exhibit B, a printed label in the following words:

106 "Trade mark. Cantbustem. Made of the best watch steel double springs."

Do you or any one in your employ have anything to do with the fixing of that label, or labels like it, upon double corset steels for yourself or anybody?

A. Do not.

X Q. 54. At the time you say your son made the corset steel like the exhibit you introduced, "Exhibit 4, Cargill steel," the factory was in the garret of your house, was it not?

A. No, sir.

X Q. 55. Where was it?

A. It was in a little shop that I had had erected in the same enclosure that my house was in.

X Q. 56. When was that shop built, that is, completed?

A. The first of April, 1863, as near as I can recollect.

X Q. 57. I now read to you from a printed copy of a deposition purporting to have been given by you on the 20th day of February, 1873, and ask you to say whether you make the quotation a part of this your deposition; whether the matters therein testified to are true, and what Exhibit 1, therein referred to, was:

"X Q. 29. Narrate the travels and stopping places of this Exhibit 1 from the time you first saw it till the time you last saw it?

"A. This pair of steels have been in my possession from the time they were made, with the exception of the time they were in the possession of Miss Doolittle, until the time they were delivered to Judge Gillette, some three weeks since.

107 "X Q. 30. Whereabouts in your possession have you kept them?

"A. In my factory.

"X Q. 31. Whereabouts in your factory?

"A. In no particular place; they were sometimes lying upon the girths of the building and sometimes upon the benches in the factory.

"X Q. 32. Which building are you speaking of?

"A. I am speaking of the building that I had erected and moved into about the first of April, 1863.

"X Q. 33. Who put them upon the girths of the building?

"A. I am unable to say that, who did.

"X Q. 34. How long did you use that building as a factory in the corset clasp business?

"A. It has always been used for that, and for no other purpose.

"X Q. 35. Has it not been vacant for a period of any time?

"A. It has. Do I understand that the question asked is that the shop has been entirely vacant, and nothing in it, or that there has been a time that there was no manufacturing there?

"X Q. 36. The latter.

"A. There has been such period.

"X Q. 37. Was this pair of clasps there during this period?

"A. They were."

"X Q. 38. Was there more than one such period?

"A. There was not.

108 "X Q. 39. Where did you find it when you gave it to Judge Gillette, as you have stated?

"A. I found them in my desk.

"X Q. 40. When?

"A. At the time that I got them to give to Judge Gillette.

"X Q. 41. How long had they been in this desk?

"A. Something over two years.

"X Q. 42. Where was the desk?

"A. In my factory.

"X Q. 43. Do you mean the little shop to which you have referred, or to one built since that?

"A. To one built since the little shop was built, or the first one."

A. Exhibit 1 in the quotation is the pair of corset steels to which I have referred as having been made by my son; the statements of the quotation are true, and I made the quotation a part of this deposition.

X Q. 58. I now read to you again from the said deposition, and ask you what clasps are therein referred to; whether the statements therein are true, and whether you make the quotation a part of this your deposition; and I also read questions 8 and 9 referred to in that quotation:

"X Q. 49. What was done with these clasps next after Miss Doolittle, as you say, returned them to you?

"A. The next that I have any recollection of them was of their being in the factory.

109 "X Q. 50. Whereabouts in the factory, if you please?

"A. I can't answer that question definitely. They might have been upon the bench, or they might have been upon the girth that I have already spoken of.

"X Q. 51. When was this?

"A. It must have been the fore part of the winter of 1863.

"X Q. 52. What did you do with them then, if anything?

"A. Made no particular disposition of them.

"X Q. 53. Did you move them to any place at that time?

"A. Not that I have any recollection of.

"X Q. 54. When did you next see them that you remember, and where?

"A. I might have seen them a dozen times a day. I can't answer that question definitely.

"X Q. 55. I call to your attention questions 8 and 9 and answers,

and ask you upon what you formed the 'best knowledge and belief' there addressed to?

"A. Upon what I considered her truthfulness."

"Q. 8. What was done with those clasps, Exhibit 1, after your son handed them to you, as you have stated?

"A. Some short time after that (at what time I don't remember)
110 I handed them to a young lady by the name of Miss Emma Doolittle, and asked her if she would place them in her corsets for the purpose of testing them.

"Q. 9. State, if you know, whether she did so.

"A. To my best knowledge and belief she did."

A. The clasps referred to are those made by my son, as stated by me. The matters of the quotation are correct, and I make the quotation part of my deposition.

X Q. 59. Why did you change from furnishing the material and making the springs for these people, and cease to furnish the material?

A. I was financially unable to furnish the material.

X Q. 60. Did that inability arise from your failure to receive payment for your goods from these people, Lippmann & Seligmann, or either of them?

A. It did not.

X Q. 61. Did they always pay you promptly?

A. They did.

Complainants' counsel here closes the cross-examination, except upon subjects related to the memoranda and articles which the witness said he would produce.

W. B. CARGILL.

Subscribed and sworn before me this 2d day of July, 1875.

JOHN A. SHIELDS,
Examiner, &c.

Adjourned to July 7, 1875, at 11 a. m.

111 NEW YORK, *July 7th*, 1875—11 o'clock a. m.

Met pursuant to adjournment.

Counsel present as before.

Adjourned until Wednesday, September 1st, at 1:30 o'clock p. m.

NEW YORK, *September* 1, 1875—1.30 o'clock p. m.

Met pursuant to adjournment.

Counsel present as before.

JACOB GEERING, a witness of lawful age, produced on the part of the defendants, and being first by me duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. J. B. STAPLES for the defendants, says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Jacob Geering. I am 63 years of age. I live at 184 Spring street, New York City. I am a manufacturer of corsets and hoop skirts.

Q. 2. How long have you been engaged in the business of corset making?

A. About 32 or 33 years; say 32 years.

Q. 3. Where?

A. In Switzerland. I was there about nine years in the business, and here about twenty-three.

Q. 4. Have you ever known of the manufacture of corset steels
112 in which the plates constituting a pair were made of double steels, or of steels one laid over the other, face to face?

(Objected to as leading.)

A. I did; yes, sir.

Q. 5. State where and when.

A. I made them steels since I have been in the corset business; any time when I want one, I make them in my country.

Q. 6. What country?

A. Switzerland.

Q. 7. Is that where you first made such steels?

(Objected to, because the word "such" referring to corset steels, heretofore defined by counsel in his question, renders this question leading.)

A. Yes; that is the first time I made such steels.

Q. 8. When did you first make corset steels in New York?

A. It was in 1860 or 1861.

Q. 9. What kind of corset steels did you then make?

A. I make that kind of steel (taking up steel on table).

(This answer objected to, because the witness has not defined the kind of steel he made, except by picking up a pair furnished, upon the table before him, and that this is as gross a method of putting a leading question as it would be for defendant's counsel to define himself in his question the corset steels about which evidence is now to be offered.)

113 Q. 10. Please describe the kind of steel you made in New York in 1860, as you have just stated.

(This question is objected to, unless the corset steel heretofore referred to by witness is removed from his view.

The said steel is removed from the view of the witness.)

A. (Witness produces the steel.) There is the steel.

(Answer objected to, as not responsive to the question, and because it is open to the same objection as the answer to question 9, and said objections are here substantially repeated.)

Q. 11. Please describe from your best recollection the kind of corset steels you made in New York in 1860, without reference to the particular steel just produced by you. Describe it according to your best recollection; tell how they were made.

A. I made them just like the sample steel I just laid on the table.

(Same objection as to the answer to the 10th question.)

Q. 12. Describe the parts of the steel constituting the corset springs, and how they were put together and used.

A. Well, I take a single steel and one with a clasp, and then I make in each one a hole, and then I take a rivet and put it in those holes together, and hammer them over so as to make a head on it.

Q. 13. What purpose did the rivet perform; what was it for?

A. About slipping the steel from the other.

114 Q. 14. Are you now speaking of the corset steel made of a single plate, or of two plates put together?

(Objected to as leading.)

A. I made some with one plate and one with two plates.

Q. 15. You have produced yourself a pair of corset clasps. Who made this particular pair of corset clasps produced by you?

A. This kind, I buy them by the wholesale; this is only single steel.

Q. 16. The question I ask you is, who made this particular one you now produce; who made it?

A. I did.

Q. 17. When?

A. I made this this morning.

Q. 18. For what purpose did you make it?

A. Well, I got a notice from a lawyer's office; and Mr. Lippman brought me that himself.

Q. 19. Brought you the notice?

A. Yes; the notice.

(The steel referred to is here offered in evidence by defendant's counsel, and it is marked Defendant's Exhibit No. 1, September 1, 1875, Geering's Deposition.)

Q. 20. State whether the steels manufactured by you, to which you have referred in your former answers, were like, or unlike, this exhibit, and if there was any difference, state what it is.

(Objected to as leading.)

A. There was a difference; the steel is stronger, and helps a great deal from breaking.

115 Q. 21. Did you make steels like that in 1860?

(Same objection.)

A. Yes, sir.

Q. 22. Did you continue to make them after 1860?

(Same objection.)

A. Yes, I did, sir.

Q. 23. How many corset steels, like this exhibit, did you make in New York in 1860?

(Same objection.)

A. In 1860 I was workman in a place, Mrs. Bowle's, and I made some of those double steels there, not many; not many at a time.

Q. 24. Did you make any like those after 1860, in 1861 and 1862, and where?

(Same objection.)

A. Yes, sir; in the same place; I was there eight years.

Q. 25. Did you continue to make such double steels during that eight years?

(Same objection.)

A. Yes; sometimes we had another man to make the steels for Mrs. Bowles.

Q. 26. Who was that?

A. His name was Schneller.

Q. 27. Did you purchase any double corset steels of Schneller; and if you did, when, and how many?

A. Yes, I did; I can't tell how many.

Q. 28. In what year was that?

A. From 1860 to 1868.

116 Q. 29. Look at the exhibit now shown you, "Exhibit No. 1, of September 1, 1875, Geering Deposition," and say if the two steels are connected by a rivet?

A. Yes; these two (pointing to the uncovered ones) are held by a rivet.

Q. 30. Are both pairs of the clasp held by a rivet in the same manner?

A. Yes.

Q. 31. What did you do with the double corset steels so made by you; what did you do with them?

A. I put them in corsets; I make them in order corsets—that is, corsets made to order.

Q. 32. Were those double steels that you so made and put into corsets held together by a rivet like this exhibit?

(Objected to, as leading.)

A. Yes, sir.

Q. 33. Did you put in the rivet yourself, or some other person for you?

A. I did it myself.

Q. 34. Did you usually cover the steels as the half is covered in this exhibit with muslin or not?

(Same objection.)

A. It is better with muslin.

Q. 35. I did not ask you what was the best; I ask you whether you usually covered them with muslin, as this is done?

(Same objection.)

A. Yes.

117 Q. 36. Did you make the springs that were rivetted together like this, as you have stated, of the same length and width?

(Same objection.)

A. No, I did not; I buy them springs—them steels—where they are rivetted together.

Q. 37. You do not understand my question. The springs that you made like this exhibit—each side was made in two parts—were those two parts equal to each other, or otherwise, as you make them?

(Objected to as leading.)

A. I take two plates together; double is better; I like them the best; what is run down.

Q. 38. That is not the question.

(Question repeated, after verbal explanation by defendant's counsel.)

A. I make them all the time in that way, like this, never longer nor shorter; all the time like the outside is; the two pieces the same length.

Q. 39. Did the springs to which you have referred have clasps on them to hold the springs together when in the corsets; and, if so, were they like Exhibit No. 1?

(Same objection.)

A. Yes.

Q. 40. Did you put them on, or some other workman?

A. Some other.

Q. 41. Do you recollect where the clasps were procured—where bought—that you put on the steels in 1860 and afterwards?

A. Yes; Mr. Schneller we had the steels from, and clasps too.

118 Q. 42. How many of such double corset steels did you make and put into corsets in 1860 and 1861, as near as you can tell?

(Objected to because the word "such" makes the question leading.)

A. I cannot remember that, how many; that is too long.

Q. 43. Can you state whether you made a dozen, more or less, or two dozen?

A. I made not one dozen—about three or four pair.

Q. 44. About how many of such corset steels did you make in each year from 1860 and put into corsets?

(Same objection.)

A. I don't know; I can't tell how many.

Q. 45. About how many do you think you have made in each year, and put into corsets, since 1860?

(Same objection.)

A. About 20; the others were made by Mr. Schneller.

And being cross-examined by Mr. WITTER, says:

X Q. 46. What did you understand yourself to be asked by Q. 40?

A. I understood myself to be asked if I put the steels together myself.

X Q. 47. And you answered that some one else did it; who was it that did it?

A. Mr. Schneller.

X Q. 48. When?

A. That is from 1860 to to-day—now—some time last week.

119 X Q. 49. Where is Mr. Schneller now?

A. I don't know his number; he lives in Thompson street.

X Q. 50. What did you do yourself regarding those steels?

A. Regarding! What is that word?

X Q. 51. What does the word "otherwise" mean in the 37th question?

A. I mean I never made them another way than that on the table—what I brought myself.

X Q. 52. What is the cloth—the muslin—put around the steels for in Defendant's Exhibit No. 1, of September 1, 75, Geering's Deposition?

A. It keeps it more from the rust and sweat from the corset and cutting through so quick.

X Q. 53. Is that all?

A. Yes; that is all.

X Q. 54. Have you mentioned who wound the cloth?

A. Myself. If you wind it off, I will show you right away how I made it.

X Q. 55. What was the last thing done in making the steels which you say was made in 1860?

A. I wind the cloth around.

X Q. 56. Have you stated all the differences there were between the steels you say you made in 1860, and thereafter, and the exhibit Defendant's Exhibit No. 1, of September 1, '75, Geering's Deposition? If you have not, state any other differences there are between them.

A. I have.

120 X Q. 57. Do you remember being examined before, in a corset steel case, about 1873?

A. Yes.

X Q. 58. You brought a corset steel then, did you not?

A. No, I did not; I explained how it was made and then one was shown to me, and then he showed me one that was not like it, and then he showed me one that was from Mr. Lippman, and I say it was like it—with a rivet in the middle.

X Q. 59. Was the one that was used in the other case rivet ed in the middle?

A. Yes; like this here.

X Q. 60. Are these steels a pair of Lippman's steels fixed over by you? If not, where did they come from?

A. I brought them in, myself, here.

X Q. 61. Where did you get them?

A. Home, in my place.

X Q. 62. How did they come there?

A. Well, I bought them. I bought them by the gross—the steels.

X Q. 63. From whom?

A. From Mr. Stearne; he lives across town.

X Q. 64. When?

A. I don't know.

X Q. 65. How did they look before you did anything to them?

A. It was plain—plain steel.

X Q. 66. What do you mean by plain steel?

A. What is not doubled.

121 X Q. 67. Have you got the rest of the gross, or some of it?

A. Yes; more than one gross now. I make them when I use them.

X Q. 68. Will you produce a sample of just what you bought of Stearne, so that we may know what you did and what Stearne did?

(Counsel for defendants objected to calling on the witness to produce anything hereafter, if it shall lead to the postponing of the closing of this deposition.

Counsel for defendants has no objection to the obtaining of the steels to which he refers in any way which will not leave this deposition open.)

A. Yes.

X Q. 69. When?

A. Any time to-morrow or Friday.

X Q. 70. Will you do so at ten o'clock on Friday forenoon, September 3d?

A. Yes.

X Q. 71. Who asked you to produce this pair of corset steels, "Defendant's Exhibit No. 1, Sept. 1, 1875, Geering's deposition?"

A. Mr. Lippman.

X Q. 72. What did he say to you?

A. Well, he said, "Mr. Geering, will you please make me a double steel, so you generally make it." He didn't tell me anything about this case. I thought he wanted a steel for himself.

X Q. 73. Did he tell you to put a rivet in it?

A. No; he didn't tell me anything about it—he tell me to make a steel like I made before.

122 X Q. 74. Hadn't you made single steels before?

A. I made single steels in my country—not here.

X Q. 75. Did he say anything about this country as distinguished from any other country?

A. No.

X Q. 76. How did you know whether he wanted a single steel or a double steel?

A. He told me he wanted a double steel.

X Q. 77. Can you mention anybody to whom you sold in 1860 or 1861, or took an order from in those years, a corset containing such steels?

A. I can't, without my book at home—I can't tell.

X Q. 78. Can you find it out from your book at home?

A. I guess I can find out some.

X Q. 79. Will you do so, and give us the name or names when you bring the steels on Friday at 10 o'clock?

A. I can't do it. No, I can't come. I haven't time. I have a wooden leg, and it makes me too much trouble to come.

And being further examined by Mr. STAPLES, says:

X Q. 80. Are you willing that your books should be examined to see if there are any names to which you sold at your place of business?

A. I will do it.

J. GEERING.

Sworn to before me this 1st day of September, 1875.

R. A. STILWELL,
Examiner, &c.

123 GEORGE H. BARNES, a witness of lawful age, produced on the part of the defendants, and being duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. STAPLES, says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is George H. Barnes; I am 47 years of age; I reside at No. 400 West 24th street; I am a corset maker.

Q. 2. How long have you been engaged in the manufacture of corsets?

A. Thirty years.

Q. 3. Have you manufactured corsets as well for individuals as for the trade?

A. I have.

Q. 4. Have you ever manufactured corsets in which the steels used were double steels?

A. I have.

Q. 5. When did you first commence using double steels in corsets, and how long have you used them since?

A. I commenced in 1859; I have used them about twelve years since.

Q. 6. About how many in each year since that time?

A. About 100 pairs, as near as I can guess.

Q. 7. State how these double steels were constructed.

A. By laying a piece of plain steel inside of the clasp steel and binding them together either with tape or a strip of muslin.

124 Q. 8. In regard to the length and width of the two steels put together, state their construction as to each other.

A. They were right the same width, but the inside ones were generally shorter.

Q. 9. Do you see any steels upon the table here constructed similar to those described as having been made by you?

A. Yes, sir; "Defendants' Exhibit No. 1, Earwicker steel."

Q. 10. Any difference between that steel and those you made? If so, point it out.

A. No, sir; no difference.

Q. 11. Have you brought with you a steel of your own manufacture, such as you manufactured in 1859 and afterwards?

A. I have, and this is it.

(Defendants' counsel offers the same in evidence, and it is marked Defendants' Exhibit No. 2, Sept. 1, 1875.—Barnes' deposition.)

Q. 12. State when this was made, where, and if it corresponds or differs in any respect with those you have testified you made in 1859.

A. I made it to-day at 400 West 24th street. It does not differ, in any respect, with those I manufactured before.

Q. 13. In this do you include the fastenings?

A. Yes.

125 Q. 14. State if anything, and what, led you to the use of corset steels made of double plates, like the one you have produced.

A. By the single ones so frequently breaking, and persons of large bust and hips and small waist needing double steels.

Q. 15. Can you state the name of any person or persons to whom you sold these double springs, or corsets having these double springs, in the year 1860, or from 1860 down to 1865?

A. I cannot, as I have been ten years out of the retail business, and have lost track of the persons using them.

Q. 16. Did any person assist you in making these double springs, or putting them into corsets, down to 1865; and, if so, whom?

A. Yes; persons in my employment; but I do not know where to find them at this time. My brother, Henry M. Barnes, used to help me make them (I believe he is in Scotland), and others.

Q. 17. Who did the winding generally of the muslin or tape?

A. Myself generally.

Q. 18. Of whom did you purchase the steel and fastenings?

A. Of Mr. Schneller and others.

Q. 19. Where was your place of business in 1860, and down to 1865?

A. No. 36 Carmine street, 197 Bleecker street, and 148 Bleecker street, and 131 Waverly place. I had stores at those places.

126 Q. 20. Do you recollect giving testimony in another case in the year 1873?

A. I do.

Q. 21. To what matters did you then testify?

A. To the same as the present case.

And being cross-examined by Mr. WITTER, says:

X Q. 22. In your answer to question 8, you say the inside ones were generally shorter—shorter than what, do you mean?

A. The outside clasp steel.

X Q. 23. Then, if I understand you, you mean to say that in the double steels, which you constructed, and about which you have given your testimony, the inside steel was generally shorter than the outside?

A. Yes.

X Q. 24. In the testimony which you gave before, to which you and the counsel have referred in this deposition, I find the following question and answer:

"Q. 6. Please look at Defendant's Exhibit 24, and state how the steels used in it differed from the double steels used by you, as you have testified?

"A. The only difference between this and the one I used, the inner steel was the same length as the outer one."

How do you reconcile the apparent difference which appears between this answer to question 6 and your answer to cross-question 22?

127 A. The inner steel of that exhibit had the clasps removed; that made both the same length. The steels I used were side steels, made without clasps, and always shorter than the front steels.

And being further examined by Mr. STAPLES, says:

R. D. Q. 25. In direct question 13, in this deposition, you were asked if in your former answer you included the fastening, and you answered "Yes." To what did you refer by the term fastening?

A. The hook and button of the steel.

R. D. Q. 26. Did the steel that you made in 1859, and downwards to 1865, have such fastening?

A. They did.

R. D. Q. 27. Do you know Mr. Charles Schneller?

A. I did know him, but I don't know his present address.

R. D. Q. 28. Did you know of his making corset steels?

A. I did.

R. D. Q. 29. What kind did you see him make?

A. Single steels.

GEO. H. BARNES.

Sworn to before me this 1st day of September, 1875.

B. A. STILWELL,
Examiner, &c.

Adjourned until Friday, Sept. 3d, 1875, at 10 a. m.

128 NEW YORK,
Friday, September 3, 1875—10 o'clock a. m.

Met pursuant to adjournment.
Present, counsel as before.

CHARLES SCHNELLER, a witness of lawful age, produced on the part of the defendants, and being first by me duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. STAPLES for the defendants, says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Charles Schneller; I am 48 years of age; I reside in Williamsburg, N. Y., but do business in New York City; I am a corset-maker at 244 Thompson street.

Q. 2. Have you ever manufactured corset springs?

A. I make it now, too.

Q. 3. When did you commence manufacturing corset springs?

A. In 1857.

Q. 4. Where was that?

A. 145 Elm street, New York City.

Q. 5. Where did you next manufacture corset springs, if anywhere, after Elm street?

A. All in New York City, except eighteen months in Waterbury.

Q. 6. What kind of corset springs did you manufacture while you were in Elm street?

A. Every kind what the corset-makers used; any kind or shape.

129 Q. 7. Have you ever manufactured double corset springs?

(Objected to as leading, because the witness should be asked to describe from his own mind, and not from that of the counsel, the character of any corset steels about which evidence is sought to be introduced, especially if about such a corset steel as is claimed to fall within the purview of the complainants' patent.)

A. Well, here is a question. Since I make the steels, all the time I make the double steels, but I don't make them just like the people make them now; only my customers sometimes want a few pair—sometimes one dozen—so I make it all the time.

Q. 8. Describe how you constructed the first double steels which you made?

A. The first one must be made in 1857, too. I begin to put three clasps on one single steel, and, after, I put one clasp to keep the second steel with the first one, and do the same for the knobs.

Q. 9. Was there any fastening of the two plates of steel together, other than that you have just mentioned?

A. Sometimes I put a rivet to keep the two pieces together, but no fastening at all.

Q. 10. Whereabouts did you place this rivet when you used it?

A. In the middle of the steel.

Q. 11. With regard to the length of the steels thus put together, how were these lengths compared with each other?

A. Oh, that makes no difference; it is all the same, the exterior and interior both the same length.

130 Q. 12. (Witness being shown a pair of corset steels marked Defendant's Exhibit No. 1, of September 1, '75, Geering's deposition.) State whether the springs you manufactured as you just stated, were like this exhibit.

(Objected to as leading.)

A. Yes, like that.

Q. 13. Do you see any difference between this and those you have described as having been made by you? If so, state.

A. Yes; the two plates were rivetted together by the rivet of the middle clasp, and not by a separate rivet as in this exhibit.

Q. 14. (A pair of corset steels being produced, witness is asked:) Have you ever seen corset steels like that before?

(Objected to as leading.)

A. Yes, sir.

Q. 15. Do you know who made this pair of corset steels now shown you?

A. That is me.

Q. 16. When did you make this pair of corset steels now shown you?

A. That one I made, I guess, one year ago; I don't know exactly.

Q. 17. How does this pair of corset steels compare with those made by you in 1857?

(Objected to as leading.)

A. Oh, it is just the same.

131 (Counsel for defendants offers the corset steels in evidence, and it is marked Defendant's Exhibit No. 1, of Sept. 3, '75, Schneller I.)

Q. 18. How many corset springs like Defendant's Exhibit No. 1, of September 3, '75, Schneller I, did you make in 1857, and the three or four following years?

(Objected to as leading.)

A. Well, sometimes I would make one dozen, two dozen pairs, six pairs; I did not make all double—sometimes single ones.

Q. 19. Did you make those springs for yourself, or your private customers, or general dealers?

A. They were made for the corset-maker.

Q. 20. What corset-makers did you make them for, and sell to?

A. Well, at that time we made for Mr. Gaynor, Mrs. Sebille, Mrs. Bowles, and a good many others I don't know now.

Q. 21. Do you mean by your last answer that you made double corset springs like Defendant's Exhibit No. 1, of September 3, '75, Schneller I, for the persons you have just named, as well as others?

(Objected to as leading.)

A. Yes, sir.

Q. 22. Do you know Jacob Geering?

A. Yes, sir.

Q. 23. How long have you known him?

A. I have known him, I guess, since 1862.

132 Q. 24. Have you not known him longer ago than 1862?

A. No; I guess not.

Q. 25. Did you ever purchase any corset steels from him?

A. Yes; since he was in this business.

Q. 26. You mean you or he was in this business?

A. He.

Q. 27. What kind did you purchase, single or double?

(Objected to as leading.)

A. Generally I sold single to him, but sometimes he wants a few pairs of double, I do it.

Q. 28. Was it Mr. Geering that bought of you, or you of him?

A. Him from me.

Q. 29. Do you recollect the year whn ehe first bought of you double steels?

A. I don't know. He wanted now and then a pair; but I couldn't say exactly when.

Q. 30. State, as near as you can, the year.

A. Five or six years ago; six or seven years ago.

Q. 31. Did you make of the double springs, like Exhibit Schneller I, before the war of the rebellion, which you sold Mr. Geering?

A. No; I make none for Mr. Geering. I make some with another kind of fastening, I don't remember exactly, for Mr. Gaynor before the war; none for Mr. Geering.

133 Q. 32. Did you make any double springs for Mrs. Bowles before the war?

(Objected to as leading.)

A. Yes, sir.

Q. 33. Who ordered those springs for Mrs. Bowles?

A. Well, Mrs. Bowles or Mr. McKenzie; Mrs. Bowles' son-in-law, I think.

Q. 34. Do you recollect whether Mr. Geering ordered any such springs for Mrs. Bowles?

A. No; I don't recollect. It may be so, but I don't recollect.

Q. 35. In your answer to Q. 31 you say: "I made some with another kind of fastening, I don't remember exactly, for Mr. Gaynor." What other kind of fastening do you mean?

A. Two hooks, one hook in each end and one wide across the middle; and I made a good many of the double ones of that kind for Mr. Gaynor.

Q. 36. Have you at your place of business, or anywhere, any double steels and clasps that were put together by you before the war?

A. No; they were all made by order.

Q. 37. Did you ever make or give to Mr. Mayer a pair of double corset steels?

A. I don't know.

Q. 38. Where was the residence of Madame Sebille when you made these double steels for her?

A. In Amity street.

134 Q. 39. Where was Mrs. Bowles' place of business, if you know?

A. In Broadway.

Q. 40. Where Mr. Gaynor's?

A. In Broadway too, and Third avenue.

Q. 41. Did you ever make any of these double corset steels for Mrs. Sherman or Mrs. Nathan?

(Objected to as leading.)

A. Yes; I did.

Q. 42. When did you make for these persons first; about what year?

(Objected to as leading.)

A. It was before the war too; about 1861 or 1862, I don't know exactly; 1861, I think.

Q. 43. Of whom did you purchase the steel which you made into double corset springs before the war.

A. I bought steel from Jessup & Son, corner of Gold and John streets.

Q. 44. Do you know if Mr. Geering was in the employment of Mrs. Bowles at any time before the war?

A. He was.

Q. 45. Have you any recollection of his bringing any orders to you from Mrs. Bowles' establishment for springs for Mrs. Bowles?

A. No; I guess he never did.

Q. 46. Before the war, did you purchase your steel from any other house than Jessup & Son; and, if so, whom?

A. I bought it all the time from Messrs. Jessup & Son.

135 Q. 47. When you first made the double springs, as you have stated, like the Exhibit Schneller I, what led you to make them in this manner, double, rather than single?

A. Because the customer wanted the steel heavy and elastic.

Q. 48. Was it your idea to make them double, or was it suggested by the customer?

A. Sometimes I make one steel heavy and strong. When I had no time I made it myself double, and many times, when the steel is covered with kid, the customer don't know anything about it.

Cross-examination waived.

CHARLES SCHNELLER.

Subscribed and sworn before me this 3d day of September, 1875.

R. E. STILWELL,
Examiner, &c.

MINA SEBILLE, a witness of lawful age, produced on the part of the defendants, and being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, being examined by Mr. STAPLES, says:

Q. 1. Where is your place of residence, and what is your business?

A. I reside at No. 21 E. 16th street; I am a corset-maker.

Q. 2. How long have you carried on the business of corset making?

A. I commenced business in 18[illegible]2 in this city.

136 Q. 3. Do you know Mr. Charles Schneller?

A. I do.

Q. 4. How long?

A. I can't say that I knew him since 1862, but my husband did. I have known him since 1864.

Q. 5. Have you a pair of double corset springs made by him for you? and, if so, produce them.

A. I have; and I produce them here.

Q. 6. How long ago were these double springs now produced by you made or how long have you had them?

A. About four months.

(Defendants' counsel offers the springs referred to in evidence, and they are marked Defendants' Exhibit No. 2, of September 3, '75—Mrs. Sebille's deposition.)

Q. 7. When did Mr. Schneller first begin to make springs for you—about what year?

A. About 1864—before that he made them for my husband—for me.

Q. 8. When did Mr. Schneller first make springs like this exhibit—Defendants' Exhibit No. 2, of Sept. 3, '75, Sebille's deposition—for you?

A. I couldn't say that—the day or month—but it was some time in 1864—the beginning of that kind.

Q. 9. Did you get steels of this kind subsequently during the follow-years, 1865, '6, and '7.

A. Oh, yes, if I wanted them; longer or shorter.

137 Q. 10. Do you know if your husband, before 1864, got any of these steels so constructed of Mr. Schneller?

A. That I couldn't say, because they were covered. I bought them already covered; they were extra strong, but I couldn't see.

Cross-examination waived.

MINA SEBILLE.

Subscribed and sworn to before me this 3d day of September, 1875.

R. E. STILWELL,
Examiner, &c.

THOMAS LOVE, a witness called on behalf of the defendants, and being first by me duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. STAPLES, says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Thomas Love; age, 68; I reside in Rutherford Park; my business is corset-maker.

Q. 2. How long have you been in the corset business?

A. About 50 years.

Q. 3. For the past 20 years has your business been in making corsets for your customers, or supplying the trade?

A. Both, sir.

Q. 4. During the past 20 years have you been accustomed to manufacture corsets for customers who desired to wear them?

A. Yes, sir.

138 Q. 5. Please look at Defendants' Exhibit No. 1, Earwicker Steel, and state whether you ever use steels like those which it contains, and when you first used them.

A. This is one steel put at the back of the other one, isn't it? Yes, sir; I have used plenty of them.

Q. 6. When did you first use them?

A. Well, I couldn't fix upon any particular date when I first used them. I have used them ten, or twelve, or thirteen years, probably, back, as I needed them.

Q. 7. For what classes of customers did you use them?

A. Only for those ladies who required stout steels.

Q. 8. State, if you please, how many of such steels you used, on the average, yearly during the last twelve or thirteen years.

A. On the safe side, perhaps five or six a year.

Q. 9. During this period of time how have you been accustomed to unite those double springs?

A. By placing them at the back of the steel; sometimes pushing them up and sometimes covering them with muslin.

Q. 10. What kind of clasps did you use with these double steels for fastening them in front?

A. Similar to those on Defendants' Exhibit No. 1, Earwicker Steel.

139 Q. 11. Of whom have you purchased the steels which you used in your corsets for the last thirteen years?

A. Mostly from Louis Bernisce and Goubault.

Cross-examination waived.

THOMAS LOVE.

Sworn to before me this 3d day of Sept., 1875.

R. E. STILWELL,
Examiner, &c.

Adjourned until Wednesday, Sept. 8, '75, 11 a. m.

NEW YORK, *Tuesday, Sept.* 14, 1875.

Present, J. B. Staples, esq., of counsel for defendants; N. C. Witter, esq., of counsel for complainants.

JOSEPHINE WHITE, being duly sworn on the part of the defendants, deposes and says:

Q. 1. What is your name, where do you reside, and what is your occupation?

A. Josephine White; 731 Fulton avenue, Brooklyn; corset maker.

Q. 2. How long have you been the business of corset-making?

A. Twelve years.

Q. 3. With whom did you work first as corset-maker?

A. Mary A. Sherman.

Q. 4. What was her business, and where did she have her place of business?

A. 202 Broadway.

Q. 5. What business?

A. Corset-making.

140 Q. 6. What part of the business did you particularly attend to?

A. Well, I sewed in the steels, and did a little of everything; I do a little of everything on them.

Q. 7. What kind of corset steels did you put into the corsets which you made at Mrs. Sherman's?

A. Putting one spring underneath the other, and wrapping them around with a piece of muslin to prevent their sliding.

Q. 8. After being so put together and wrapped around, how were they put into the corsets?

A. Just placed into the corset and sewed.

Q. 9. Have you with you a pair of corset steels?

A. Yes, sir. (Witness produces steels.)

Q. 10. How do the corset steels now produced by you compare with those you made when you first went to Mrs. Sherman's?

(Objected to as leading.)

A. Well, they are made the same as they were made then—one spring underneath the other.

(The pair of springs now produced by witness, marked Defendants' Exhibit No. 1, White, Sept. 14, 1875.—J. A. S., Ex'r.)

Q. 11. State if there is any difference between this pair of corset steels now produced by you and corset steels which you used in the corsets at Mrs. Sherman's.

(Objected to as leading.)

A. Just the same.

141 Q. 12. What year was it when you first used corset steels at Mrs. Sherman's like that pair produced by you?

(Objected to as leading.)

A. 1863.

Q. 13. How long did you continue with Mrs. Sherman?

A. Making them?

Q. 14. Yes.

A. Till the present time.

Q. 15. State whether such corset steels were used by Mrs. Sherman in corsets made and sold by her in 1862, and subsequently, and down to the present time.

(Objected to as leading.)

A. They were used there at the time when I went there, and since that time down to the present.

A. Oh, yes, if I wanted them; longer or shorter.

137 Q. 10. Do you know if your husband, before 1864, got any of these steels so constructed of Mr. Schneller?

A. That I couldn't say, because they were covered. I bought them already covered; they were extra strong, but I couldn't see.

Cross-examination waived.

MINA SEBILLE.

Subscribed and sworn to before me this 3d day of September, 1875.

R. E. STILWELL,
Examiner, &c.

THOMAS LOVE, a witness called on behalf of the defendants, and being first by me duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. STAPLES, says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Thomas Love; age, 68; I reside in Rutherford Park; my business is corset-maker.

Q. 2. How long have you been in the corset business?

A. About 50 years.

Q. 3. For the past 20 years has your business been in making corsets for your customers, or supplying the trade?

A. Both, sir.

Q. 4. During the past 20 years have you been accustomed to manufacture corsets for customers who desired to wear them?

A. Yes, sir.

138 Q. 5. Please look at Defendants' Exhibit No. 1, Earwicker Steel, and state whether you ever use steels like those which it contains, and when you first used them.

A. This is one steel put at the back of the other one, isn't it? Yes, sir; I have used plenty of them.

Q. 6. When did you first use them?

A. Well, I couldn't fix upon any particular date when I first used them. I have used them ten, or twelve, or thirteen years, probably, back, as I needed them.

Q. 7. For what classes of customers did you use them?

A. Only for those ladies who required stout steels.

Q. 8. State, if you please, how many of such steels you used, on the average, yearly during the last twelve or thirteen years.

A. On the safe side, perhaps five or six a year.

Q. 9. During this period of time how have you been accustomed to unite those double springs?

A. By placing them at the back of the steel; sometimes pushing them up and sometimes covering them with muslin.

Q. 10. What kind of clasps did you use with these double steels for fastening them in front?

A. Similar to those on Defendants' Exhibit No. 1, Earwicker Steel.

139 Q. 11. Of whom have you purchased the steels which you used in your corsets for the last thirteen years?

A. Mostly from Louis Bernisce and Goubault.

Cross-examination waived.

THOMAS LOVE.

Sworn to before me this 3d day of Sept., 1875.

R. E. STILWELL,
Examiner, &c.

Adjourned until Wednesday, Sept. 8, '75, 11 a. m.

NEW YORK, *Tuesday, Sept.* 14, 1875.

Present, J. B. Staples, esq., of counsel for defendants; N. C. Witter, esq., of counsel for complainants.

JOSEPHINE WHITE, being duly sworn on the part of the defendants, deposes and says:

Q. 1. What is your name, where do you reside, and what is your occupation?

A. Josephine White; 731 Fulton avenue, Brooklyn; corset maker.

Q. 2. How long have you been the business of corset-making?

A. Twelve years.

Q. 3. With whom did you work first as corset-maker?

A. Mary A. Sherman.

Q. 4. What was her business, and where did she have her place of business?

A. 202 Broadway.

Q. 5. What business?

A. Corset-making.

140 Q. 6. What part of the business did you particularly attend to?

A. Well, I sewed in the steels, and did a little of everything; I do a little of everything on them.

Q. 7. What kind of corset steels did you put into the corsets which you made at Mrs. Sherman's?

A. Putting one spring underneath the other, and wrapping them around with a piece of muslin to prevent their sliding.

Q. 8. After being so put together and wrapped around, how were they put into the corsets?

A. Just placed into the corset and sewed.

Q. 9. Have you with you a pair of corset steels?

A. Yes, sir. (Witness produces steels.)

Q. 10. How do the corset steels now produced by you compare with those you made when you first went to Mrs. Sherman's?

(Objected to as leading.)

A. Well, they are made the same as they were made then—one spring underneath the other.

(The pair of springs now produced by witness, marked Defendants' Exhibit No. 1, White, Sept. 14, 1875.—J. A. S., Ex'r.)

Q. 11. State if there is any difference between this pair of corset steels now produced by you and corset steels which you used in the corsets at Mrs. Sherman's.

(Objected to as leading.)

A. Just the same.

141 Q. 12. What year was it when you first used corset steels at Mrs. Sherman's like that pair produced by you?

(Objected to as leading.)

A. 1863.

Q. 13. How long did you continue with Mrs. Sherman?

A. Making them?

Q. 14. Yes.

A. Till the present time.

Q. 15. State whether such corset steels were used by Mrs. Sherman in corsets made and sold by her in 1862, and subsequently, and down to the present time.

(Objected to as leading.)

A. They were used there at the time when I went there, and since that time down to the present.

Q. 16. About what number of corsets, having such corset steels as those just produced by you, were made at Mrs. Sherman's place in 1863, so far as your knowledge extends?

(Objected to as leading.)

A. Well, I suppose about 50 pair a week.

Q. 17. Since 1863, about that number, as far as your knowledge goes?

A. A great many; I cannot tell how many.

Q. 18. To whom were these corsets so made sold—to the trade or individual customers?

A. To the trade and to the customers?

142 Q. 19. When you first came to Mrs. Sherman's did you find corsets there already made, having the double steel, such as you produce?

(Objected to as leading.)

A. Yes, sir.

Q. 20. Do you recollect the names of any persons who were at work at Mrs. Sherman's upon corsets when you went there?

A. There was Miss Wiley and Miss Potter. I couldn't say the rest of the names; it was so long ago. Mr. Seder, he filed the steels so that they could be put together.

Q. 21. Are there any persons now here who were there when you went there other than those you have mentioned?

A. Mrs. O'Donnell.

Cross-examination by Mr. WITTER:

X Q. 1. Are you the same Josephine White who, about two years ago, gave substantially the above testimony on this subject?

A. Yes, sir.

X Q. 2. In a copy of that testimony I find the following question and answer:

"Q. What was the wrapping for?

"A. To keep the blades together."

Is that answer correct?

A. Yes, sir.

JOSEPHINE WHITE.

Sworn to before me this 14th day of September, 1875.

B. A. STILWELL,
Examiner, &c.

143 Complainant's counsel here produces and requests the examiner to mark the identification, a circular and the envelope containing it, purporting to be issued, the one by P. Lippmann, and the other by A. Seligman, and gives notice that it will be read on the hearing of this case.

The circular is marked "P. Lippmann, for identification," and the envelope, "A. Seligmann, for identification."

KATE O'DONNELL, called as a witness for the defendants, being duly sworn, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. Kate O'Donnell; 103 William street, Brooklyn; corset maker.

Q. 2. You know Mrs. Mary A. Sherman?

A. Yes, sir.

Q. 3. Have you been in her employment?

A. Yes, sir.

Q. 4. When; how long?

A. About fourteen years.

Q. 5. What is your particular business? What were you employed on?

A. I worked on all parts of the corsets.

Q. 6. Did Mrs. Sherman use corset steels in corsets made in her establishment when you first went there?

A. Yes, sir.

Q. 7. Describe how such corset steels were made and put into the corsets.

A. One pair had the clasps filed off, placed against the other pair, and wrapped around with a piece of muslin.

144 Q. 8. Do you mean by a pair a single blade, or what? Please explain.

A. One pair of steels was filed off and placed against another pair of steels and that made a double pair.

Q. 9. Please look at White's Exhibit No. 1, now produced, and state whether that resembles or differs from the corset steels used by Mrs. Sherman.

(Objected to as leading.)

A. They are exactly the same.

Q. 10. What did Mrs. Sherman do with the corsets having such steels at the time you were there?

A. Had them for sale.

Q. 11. And did she sell them?

A. Yes, sir.

Q. 12. Did you yourself personally assist in putting together corset steels like Exhibit No. 1, and in putting them into the corsets when you first went to Mrs. Sherman's?

(Objected to as leading.)

A. Yes, sir.

Q. 13. About what number of such corsets having such steels were made or sold by Mrs. Sherman a week when you first went there?

(Objected to as leading.)

A. About 40 or fifty pair a week.

Q. 14. Where was Mrs. Sherman's place of business when you first went there?

A. Corner of Grand and Crosby streets.

145 Q. 15. Where is it now?

A. 320 Fulton street, Brooklyn. She is still in the same business.

Q. 16. Are you there with her still?

A. Yes, sir.

Q. 17. Who wrapped the muslin around the blades when you first went there, as shown in Exhibit No. 1, White?

A. I did it.

Q. 18. Any one else at that time?

A. Miss Wiley and Miss Potter, Miss Martin.

Q. 13. Who filed the buttons off the steels as you have stated?

A. Mr. Seder.

Cross-examination by Mr. WITTER:

X Q. 1. Are you the same Kate O'Donnell who about two years ago gave similar testimony to the above?

A. Yes, sir.

X Q. 2. I find in a copy of your testimony given at that time, the following:

"X Q. 9. And the wrapping was to keep the two steels together, was it not?

"A. Yes, sir."

Is that answer correct?

A. Yes, sir.

KATE O'DONNELL.

Sworn to before me this 14th Sept., 1875.

B. A. STILWELL,
Examiner, &c.

146 SARAH E. GILCHRIST, called on the part of the defendants, being duly sworn, testifies as follows:

Q. 1. What is your name, place of residence and occupation?

A. Sarah E. Gilchrist; 165 Pierrepont street, Brooklyn; no occupation; house-keeper for my own family.

Q. 2. Are you a sister of Mrs. Mary A. Sherman, corset maker?

A. Yes, sir.

Q. 3. Have you ever worn any corset steels which you obtained from Mrs. Sherman?

A. Yes.

Q. 4. State when and for how long.

A. Over twelve years.

Q. 5. In the corsets referred to by you how are the steels constructed and how put into the corset?

A. They were double, like those (witness points to Exhibit i); they were held together by being wrapped around with muslin, as in Exhibit No. 1, White; I have had them three double more than twelve years ago.

Q. 6. How are you able to fix the time?

A. By the birth of my last child, which was on the 30th of June, 1863, and I wore them before that; I had them three double before that time.

Q. 7. You were examined before, two years ago, I believe, were you not, in reference to this subject?

A. Yes, sir.

Q. 8. Do you recollect an exhibit which was produced before you on your examination, and which was called a Sherman Exhibit?

A. I do.

147 Q. 9. Do you know where that exhibit came from?

A. Mrs. Sherman had it.

Q. 10. Do you know how long that exhibit had been made and used in corsets?

A. I don't know any further than between twelve and thirteen years ago I went into one of Mrs. Sherman's branch stores and complained of the steels not being strong enough, and the young lady there told me that Mrs. Sherman used double steels for all of her order corsets, so I left my order, and she had them made with steels in like those (pointing to Exhibit No. 1, White). A few months after I had them made still stiffer, with three instead of the two.

(What the young lady said objected to as hearsay.)

Q. 11. Have you continued since you first wore corsets with double steels, as stated, to wear them?

A. Yes, sir; I have continued to wear them with three steels in.

Cross-examination waived.

SARAH E. GILCHRIST.

Subscribed and sworn before me this 14th day of Sept., 1875.

JOHN A. SHIELDS,
Examiner, &c.

Adjourned until Friday, Sept 17, 1875, at 11 a. m.

148 NEW YORK, *Friday, Sept.* 17, 1875.

Present, counsel as before.

SAMUEL A. CASTLE, being called and sworn on part of defendants, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. Samuel A. Castle; No. 129 West 45th street, New York; place of business, 50 and 52 Howard street; late commission merchant.

Q. 2. Are you one of the defendants in the suit of Frances Lee Egbert, ex rel. Samuel A. Castle, Rufus E. Hitchcock, and Henry S. Magrane?

A. I am one of the firm of S. A. Castle & Co. I believe they were defendants in that suit, though I don't know much about it.

Q. 3. Was that suit defended by S. A. Castle & Co.?

A. I think it was.

Q. 4. Do you know whether they employed counsel in that suit?

A. They did not to my knowledge.

Q. 5. Were any damages or costs ever paid by S. A. Castle & Co. on account of that suit, or of any decree entered therein?

A. Not to my knowledge.

Q. 6. Was the firm of S. A. Castle & Co. selling double corset steels in 1872, '73, and '74; and, if so, where? I mean, in what city?

A. I couldn't tell you the year that we commenced selling those corset steels, double steels. We were the agents for selling those steels for New York and Philadelphia and Baltimore, and I think Boston.

149 Q. 7. State, according to your best recollection and as near as you can fairly state, the time when you commenced the agency or sale of those double corset steels.

A. I couldn't say, without referring to my books, whether it was 1871, '72, or '73.

Q. 8. How far back can you recollect that S. A. Castle & Co. were the sellers of those steels?

A. I can recollect back to 1874. I am pretty certain to '73, but would not like to say without referring.

Q. 9. When did the firm of S. A. Castle & Co. stop selling those corset steels, if at all?

A. August 9th, 1875.

Q. 10. Did they continue to sell them from the time they commenced down to August, 1875?

A. They were in the store for sale all that time.

Q. 11. Were they ready for sale to any customers who might want them who were good and paid your price?

A. Yes.

Q. 12. Where did you procure those double corset steels?

A. They were consigned by Disston, Morse & Co., through Frank W. Marston.

Q. 13. Have you or firm of S. A. Castle and Co. been called upon to take a license under the Egbert patent; or have you ever taken any license; or have you paid any license fee, under any patent, for selling those double-extension corset steels?

(Objected to as irrelevant.)

A. Not to my knowledge.

150 Q. 14. Did you at any time receive a circular from Disston, Morse & Co. in reference to the sales of the corset steels by your firm?

A. We received circulars from them to distribute among the trade.

Q. 15. Look at the printed paper now shown you, and state what that is?

A. One of the circulars that was sent us by Disston, Morss & Co.

Q. 16. About how many of these were so sent to your firm by Disston, Morss & Co. and distributed?

A. I could not tell.

Q. 17. Were there a number—a good many?

A. Quite a number. Yes.

(The printed paper above mentioned is put in evidence, and marked "Exhibit 1, Sept. 17, 1875, Castle's testimony," and is as follows:)

"LET US HAVE PEACE.

"Disston, Morss & Co. (Frank W. Marston) have become licensees under the above" (Barnes) "patent this day."

F. LEE EGBERT,
Executrix.

OFFICE OF DISSTON, MORSS & CO.,
Front and Laurel streets, Philadelphia, July 1, 1874.

[Trade mark, "Disston's guarantee."]

GENTLEMEN: The suit of Egbert, executrix, vs. S. A. Castle & Co., has been decided by Judge Blatchford in the circuit court of the
151 U. S., southern district of New York, in favor of Egbert, and after an exhaustive trial and hearing, Barnes' patent for double steels has been finally sustained.

S. A. Castle & Co. are our agents in New York, and were the nominal defendants in the above suit. Our firm being manufacturers of the double steel, against which suit was brought, were the active defendants, and became responsible for and have settled all claims in the nature of damages against ourselves, our agents and customers.

Since the decision we have become licensees under the Barnes patent, now owned exclusively by Egbert, executrix, by the terms of which license we, our agents and customers, are relieved of all responsibility on account of past sales of double steels, and are fully protected and guaranteed under this license in the future.

This vexed question being finally settled, we respectfully solicit a share of your trade in corset clasps.

Our trade mark, "Disston's guarantee," covers both our single and double clasps, and is the assurance we offer you of the excellence of our goods, which are made of the same material and tempered by the same process which has given to the saws of Henry Disston & Sons their world-wide reputation.

We have this day, July 1st, 1874, received a license from Jacobs, Strouse & Co. to use and sell their patent silvered shield for the ends of corset clasps and all our goods from this date furnished with them.

DISSTON, MORSS & CO.

152 Q. 18. Did you circulate those among your customers and the trade?

A. I presume we did; I am not personally knowing to it.

Q. 19. Please to state why you discontinued, in August, 1875, the sale of those double steels.

A. On account of the failure of our firm and their stopping business.

Q. 20. Do you know who did employ counsel to defend the suit against your firm, above referred to?

A. I suppose Disston, Morss & Co. I don't know of my own knowledge.

Q. 21. Do you know who did attend to the management of the defense in that suit, other than the counsel; I mean to the procuring the testimony?

A. Mr. Frank W. Marston.

Q. 22. Was he connected in any way with the firm of Disston, Morss & Co., or in their employment?

A. My impression was that he was the company.

Q. 23. Could any payments on account of royalties or license fee, or for damages under the Egbert patent, have been paid by your firm of S. A. Castle & Co., without you being acquainted with it?

A. It might have been done, but I don't think it was.

Q. 24. At and before the time that the circulars like Exhibit 1, just referred to, were received by your house, were you selling the double corset steels, as you had done before?

A. Yes.

153 Cross-examination by Mr. WITTER:

X Q. 1. Did any of the circulars like Exhibit 1 get to Philip Lippmann, through your house, or to A. Seligmann, or to P. Lippman & Co., do you think?

A. I couldn't say. They were sent out by boys that belonged to the store.

(Complainant's counsel here produces and requests the examiner to mark for identification, a circular with the envelope containing it purporting to be issued by P. Lippmann, and gives notice that it will be read at the hearing. They are each marked P. Lippmann, No. 2, for identification.)

S. A. CASTLE.

Sworn to before me, this 17th day of September, 1875.

R. A. STILWELL,
Examiner, &c.

Adjourned to Monday, Sept. 20, 1875, at 11 a. m.

NEW YORK, *Monday, Sept.* 20, 1875—11 *p.* m.

Present, counsel as before.

HENRY TEN BROECK, being called and sworn as a witness on the part of defendants, testified as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Henry Ten Broeck; 46 years old; 291 Greenwich street; carpenter.

154 Q. 2. Do you know Mr. Lippman, and how long have you known him?

A. Yes, I know Mr. Lippman; have known him since 1859 and 1860. 1860.

Q. 3. Where was Mr. Lippmann at that time?

A. 35 Jane street, New York.

Q. 4. What was his business there?

A. Repairing hoop-skirts and corsets.

Q. 5. Where were you doing business at that time?

A. In the rear of the same number.

Q. 6. How did you get access to the rear?

A. Through an alley-way adjoining Lippmann's store.

Q. 7. Were you in Mr. Lippmann's place of business at the time, and if so, how frequently?

A. Sometimes I used to be there ten or twelve times a day.

Q. 8. Did you see him working upon any corset materials, and if so, what?

A. I did see him work on them, and I saw him file rivets off, and take parts of others to make full sets of double ones.

Q. 9. Look at pair of corset steels now shown you and state whether you have seen any such corset steels as those, and where.

(Objected to as leading.)

A. I have seen them at 35 Jane street; I saw them, I suppose, twenty times a day, in spring, summer, and fall, as he, Lippmann, was working at them by the window, in the year 1859 and 1860, at 35 Jane street.

155 (The pair of steels shown witness is now offered in evidence on part of defendant, and is marked Exhibit 1, Ten Broeck's deposition, Sept. 20, 1875.—J. A. S., examiner.)

Q. 10. How many do you think you saw there?

A. I cannot tell; there was a pile lying there in the window; there may have been 20 pair or 40 pair.

Q. 11. How long were you in the habit of visiting Mr. Lippmann's premises?

A. Off and on, seven or eight months.

Q. 12. During this period of time, did Mr. Lippmann use any of your tools, and if so, what tools?

A. Yes, sir; I lent him some out of my shop; I lent him some saw files and a small hammer.

Q. 13. What did he use them for, if you know?

A. For them frames—steels; for filing those rivets.

Q. 14. Did you know Miss Rosenberg, and if so, what was her business?

A. She was in the store there, as saleswoman, to tend to the business, I suppose, just as I would.

Q. 15. What was the business done at the store where she was saleswoman?

A. Repairing hoop-skirts and corsets, and things of that kind.

Q. 16. When was this?

A. In 1859 and 1860, the same as I told you before; 1860 or 1861.

156 Q. 17. Did you ever know her to sell or to use any corset steels like Exhibit 1, just shown you, during this time?

A. They used to be brought there to be fixed.

Q. 18. What was brought there to be fixed?

A. Corsets and hoop skirts.

Q. 19. Do you mean ladies brought corsets there to be fixed.

A. Yes, sir.

Q. 20. Did you ever know Miss Rosenberg to use these double steels to repair corsets during this time; if so, how often?

A. Yes, sir. I couldn't say how often; I seen her working at them, putting them into corsets.

Q. 21. Do you know where Miss Rosenberg got those double steels she used in the corsets?

A. No, sir; I don't know where she got them.
Cross-examination waived.

HENRY TEN BROECK.

Sworn and subscribed before me, this 20 day of September, 1875.

J. A. STILWELL,
Examiner, &c.

Adjourned to Tuesday, October 12, 1875.

157 NEW YORK, *Tuesday, Oct. 12th*, 1875.

Present, counsel as before.

BERNARD ADLER, being called and sworn as a witness on part of the defendants, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. Bernard Adler; 472 West Thirty-fourth street; manufacturer of hats.

Q. 2. How long have you been in business in this city?

A. About seven years; been in business here since 1853.

Q. 3. Do you know Mr. Philip Lippmann, of New York?

A. I do.

Q. 4. How long have you known him?

A. Since about ten or eleven years.

Q. 5. Have you had acquaintance with him in business transactions, as well as personal?

A. I had.

Q. 6. What is his standing and his reputation as regards truth and veracity, in the community where you have known him?

A. That of an honest, honorable business man.

Q. 7. State specially in regard to the man's truth and veracity.

A. In the business transactions we have had together, I have always found him prompt and straightforward.

158 Q. 8. In regard to his reputation—not as to his prompt, correct business transactions, but as to truth and veracity—what is his reputation, as far as you know it? Is it good or bad?

A. It is good.

BERNARD ADLER.

Sworn to before me this 12th day of Oct., 1875.

R. E. STILWELL,
Examiner, &c.

GEORGE SANDERSON, being called as a witness on the part of the defendants, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. George Sanderson; I reside in Brooklyn; steel manufacturer and importer.

Q. 2. How long have you been engaged in that business?

A. Thirty years.

Q. 3. Are you acquainted with Mr. Philip Lippmann?

A. I am.

Q. 4. How long?

A. About three years.

Q. 5. Have you known him in business matters, as well as personal?

A. I have known him in no other capacity than in business. I have had business dealings with him for the last three years.

Q. 6. During this period, state what was his standing and reputation

as a man of varacity and truth, in the business community, so far as you know.

159 A. I have always found Mr. Lippmann very correct. He met all of his engagements promptly with me.

Q. 7. Is his standing as a man of veracity and truth, so far as you know, such as you would believe his statements?

A. I have no other cause but to believe him to be a man of veracity and truth.

Q. 8. Is your firm a firm largely engaged in selling steel in this city?

A. Yes, sir.

Q. 9. Do the trade engage in making corset steels?

A. Yes, sir.

Cross-examined by Mr. WITTER:

X Q. 10. And, among other parties, have you sold steel to Mr. Lippmann and Mr. Seligmann during these three years?

A. I have sold steel to both.

X Q. 11. Do you continue to do so?

A. Yes, sir.

X Q. 12. Have you sold either of them any this week?

A. No, not this week.

X Q. 13. In whose name was the last bill made out against?

A. Mr. Seligmann.

X Q. 14. What is the number and street of your place of business?

A. No. 57 John street, New York.

Redirect:

R. D. Q. 15. Have you been selling also to the Carrington Manufacturing Company?

A. I have sold to them within five days.

160 R. D. Q. 16. Do you know whether the Carrington Manufacturing Company represents the plaintiffs in this suit?

A. I do not.

R. D. Q. 17. You say you sold the last bill of goods and made it out in Mr. Seligmann's name?

A. Yes, sir.

R. D. Q. 18. Why was that?

A. The bills have been made out in A. Seligmann's name for six months or more, but for what reason I am not able to say.

R. D. Q. 19. Did you receive a notice of the dissolution of the firm?

A. I did not, sir.

GEORGE SANDERSON.

Sworn to before me this 12th day of October, 1875.

B. A. STILWELL,
Examiner, &c.

JOHN H. N. GLASSFORD, being duly sworn on the part of defendants, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. John H. N. Glassford; 496 West Nineteenth street, New York; dealer in fancy goods and notions.

Q. 2. How long have you been in that business?

A. I have been it eleven and a half years.

Q. 3. Do you know Mr. Philip Lippmann, and how long have you known him?

A. I do; I have known him for a period of about two years, perhaps more.

161 Q. 4. Have you known him in business relations or personal, or in both?

A. Purely in a business capacity.

Q. 5. So far as you have known him, state what is his reputation and standing for truth and veracity?

A. During the time I have known him, he has always kept business engagements with us promptly.

Q. 6. So far as you know, is his standing for truth and veracity as good as men in general?

A. Yes.

Q. 7. Do you know any reason why his statements should not be believed, the same as men in general?

A. I do not.

Cross-examined by Mr. WITTER:

X Q. 8. I noticed you were not asked your age; what is it?

A. Thirty-one and a half years.

X Q. 9. When you say "us," in your examination in answer to question 5, whom do you mean?

A. James Glassford & Sons.

X Q. 10. Does their business include the sale and purchase of corsets?

A. Yes.

X Q. 11. What have been your dealings with Philip Lippmann, of which you speak in your direct examination?

A. Principally corset steels.

JOHN H. N. GLASSFORD.

Subscribed and sworn to before me, this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

162 HERMAN URY, being called and sworn as a witness on part of defendants, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. Herman Ury; 83 Orchard street, New York; jobber in hosiery, in notions, and fancy goods.

Q. 2. Where is your place of business?

A. No. 80 Walker street.

Q. 3. Please name the name of your firm?

A. Solomon Ury & Son.

Q. 4. Do you know Mr. Philip Lippmann, and how long have you known him?

A. I do; between three and four years.

Q. 5. Have you known him personally, or only in business transactions, or both?

A. Personally and in business transactions.

Q. 6. State what Mr. Lippmann's standing, in regard to truth and veracity, in the community, so far as you know and believe?

A. It is good.

Cross-examined by Mr. WITTER:

X Q. 7. What are the business transactions you have had with Mr. L ppmann during the last three or four years?

A. Been buying corset steels of him.

HERMAN URY.

Subscribed and sworn before me this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

163 WILLIAM E. STEIN, being duly sworn as a witness on part defendants, deposes as follows:

Q. 1. What is your age, residence, and occupation?

A. I am 35 years old; I live at 214 East 58th street; am in the corset business.

Q. 2. What is your firm? How long have you been in business?

A. William E. Stein is the firm; been in business about thirteen years.

Q. 3. Do you know Mr. Philip Lippmann; if yea, how long, and where?

A. I do; for about twelve years; New York.

Q. 4. Has your acquaintance with him been of a personal or business character, or both?

A. Both.

Q. 5. What is Lippmann's standing in regard to truth and veracity, so far as you know and believe, during the period that you have known him?

A. Good.

Cross examined by Mr. WITTER:

X Q. 6. What have been your business relations with Mr. Lippmann?

A. I have bought goods of him, and sold him goods.

X Q. 7. What goods?

A. Sold him skirt wire, tapes, skirts, and skirt materials. I have also bought such goods as the above from him sometimes.

164 X Q. 8. Are you in any way related to Mr Lippmann or Seligmann or either of the defendants, or is your wife?

A. No, sir.

WM. E. STEIN.

Sworn to before me this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

JOSEPH LEHMAN, being duly sworn on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Joseph Lehman; 37 years; 115 West 40th street, New York; hosiery and white goods.

Q. 2. Where is your place of business; what is the name of your firm, and how long have you been in business?

A. No. 19 Lispenard street, New York; J. & M. Lehman; I have been in business fourteen years in this city.

Q. 3. Are you acquainted with Mr. Philip Lippmann, and how long, and where?

A. I am; about fourteen years; in this city.

Q. 4. Have you known him personally or in business matters, or both?

A. Both.

Q. 5. What was his standing and reputation during this period of your acquaintance, for truth and veracity, so far as you know and believe?

A. Very good.

165 Cross-examined by Mr. WITTER:

X Q. 1. What business relations have you had with Mr. Lippmann?

A. I used to buy skirt materials of him.

JOSEPH LEHMAN.

Sworn and subscribed before me this 12th day of Oct., 1875.

R. E. STILWELL,
Examiner, &c.

LOUIS BORCHARD, being duly sworn on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Mr. Burchard; age, 25; residence, 663 Eighth ave.; occupation, clothier.

Q. 2. How long have you been in business in the city of New York?

A. Fifteen years.

Q. 3. Do you know Mr. Philip Lippmann; if so, how long?

A. I do; I have known him about fourteen years.

Q. 4. Have you known him personally as well as in business matters?

A. I have known him in both.

Q. 5. What sort of business matters have you had with him?

A. I bought hoop-skirt material from him.

Q. 6. What is Mr. Lippmann's reputation and standing as regards truth and veracity, so far as your knowledge or belief extends?

A. It is good.

166 Cross-examined by Mr. WITTER:

X Q. 7. Where is your business of clothier carried on?

A. No. 663 Eighth avenue.

X Q. 8. What personal relation have you had with Mr. Lippmann, as you testified? State fully.

A. When I was in the hoop-skirt business I dealt with him.

X Q. 9. What is the difference between truth and veracity, as you understand it?

A. I wish you would put that a little more explained.

Redirect:

R. D. Q. 11. You were asked what personal relation you had had with Mr. Lippmann, and you have answered that when you were in the hoop-skirt business you dealt with him. State now, in answer to that question, whether Mr. Lippman visited to your house, or the house of your father and mother, and whether he was in the habit of so doing.

(Objected to as leading.)

A. He did, very often.

R. D. Q. 11. Has he been an invited guest at weddings in your family; and, if so, when?

A. Yes, sir; he has been invited to a wedding in our family about ten years ago, and one four months ago. It was the wedding of my sister, and my own wedding.

R. D. Q. 12. Did he attend as such guest?

A. He attended one, that of my sister.

LOUIS BORCHARD.

Sworn and subscribed before me this 12th day of Oct., 1875.

R. E. STILWELL,
Examiner, &c.

167 CHARLES EICHLER, being called and sworn on part of the defendants, deposes as follows:

Q. 1. What is your name, age residence, and occupation?

A. Charles A. Eichler; age, 56; residence, No. 235 Thompson street, New York; occupation, physician.

Q. 2. How long have you been a physician in the city of New York?

A. About twenty-six years in this city.

Q. 3. Are you acquainted with Mr. Philip Lippmann; if so, how long have you known him?

A. Yes; I have known him ten years or more.

Q. 4. Are you acquainted with the families and people with whom Mr. Lippmann associates?

A. Some.

Q. 5. What is the standing and reputation, as regards truth and veracity, so far as you know and believe, of Mr. Lippmann, during the period you have known him?

A. Good.

Q. 6. Have you been his physician?

A. Yes.

Cross-examination by Mr. WITTER:

X Q. 7. Did you ever know or hear anything about a suit against Philip Lippmann for breach of promise of marriage?

A. Yes.

X Q. 8. Did you hear whether judgment was rendered against him or in his favor?

A. Against him.

CHAS. EICHLER.

Subscribed and sworn to befere me this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

168 GEORGE E. BATCHELLER, being duly sworn on the part of the defendant, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. George C. Batcheller; age, 41; residence, New York City; occupation, merchant.

Q. 2. What firm are a member of, and how long have you been a member of such a firm?

A. Thompson, Langdon & Co.; say ten years, going on eleven.

Q. 3. Are you acquainted with Mr. Philip Lippmann? If so, how long have you known him?

A. I have known him in a casual way since 1862.

Q. 4. Have you had business relations with Mr. Lippmann, either individual, or as a member of that firm, or any other firm?

A. I have a slight recollection of Mr. Lippmann doing some business with our house, but in a very slight way.

Q. 5. Were you formerly with Mr. Eagleton & Co.?

A. Yes, sir; in 1861.

Q. 6. Did Mr. Lippmann have any business with you or with that company?

A. I think he had business with the company.

Q. 7. What place did you occupy in that concern?

A. I had a general charge of the skirt department.

Q. 8. Did Mr. Lippman purchase goods of you in that department, and how frequently?

A. I have no recollection of his purchasing goods of my department.

169 Q. 9. Was he there frequently?

A. Yes, sir; I have a recollection of seeing Mr. Lippmann there, and of seeing goods marked for him.

Q. 10. Was the house of Eagleton & Co., and also the house of Thompson, Langdon & Co., extensively engaged in the business of skirt material, or in the business of making and selling corsets?

A. I couldn't answer that question intelligently when put in that way.

Q. 11. What business has Thompson, Langdon & Co. been engaged in?

A. In the manufacture of skirts and corset steels and importation of kid gloves.

Q. 12. The house of Thompson, Langdon & Co. have been extensively connected in the corset and skirt business with the trade in New York, have they not?

A. They have.

Q. 13. Mr. Lippmann has been in that trade during the time you have known him, has he not?

A. I have known of him as a manufacturer of skirts and of corset steels in this city.

Q. 14. What is the reputation and standing of Mr. Lippmann, as regards truth and veracity, so far as you know and believe?

A. So far as my experience goes in regard to Mr. Lippmann, I know of nothing derogatory to his character.

Q. 15. Please state as to truth and veracity?

A. So far as all my transactions go, I know of nothing to the contrary.

170 Q. 16. Have you ever said to any one that you did not believe Mr. Lippmann to be a man of truth and veracity?

A. I have no recollection of ever making such statement.

Q. 17. Have you, to your recollection, knowledge, and belief, ever spoken unfavorably of Mr. Lippmann's reputation for truth and veracity?

A. No.

Q. 18. Are you acquainted with George Cruttendon, junior?

A. No, sir; not by name. I may know him by sight.

Q. 19. Did you ever speak to Mr. Cruttendon, or in his presence, unfavorable in regard Mr. Lippmann's reputation for truth and veracity?

A. I have no recollection of ever having any conversation with Mr. Cruttendon.

G. C. BATCHELLER.

Sworn to and subscribed before me this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

HENRY SCHWARZ, being duly sworn on the part of the defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Henry Schwarz; I am 42 years of age; I reside 218 East 22d street; commission merchant, at 506 Broadway, and have been for about twelve months.

171 Q. 2. How long have you been in business in this city?

A. About ten years.

Q. 3. Are you acquainted with Mr. Philip Lippmann; and if so, how long?

A. I am; about six or seven years.

Q. 4. What has been Mr. Lippmann's business and occupation during the time you have known him?

A. He has been in the hoop-skirt, bustle, and corset steel business.

Q. 5. Have you, in the course of your business, become acquainted with the trade and persons engaged in the skirt and corset business in the city of New York?

A. I have.

Q. 6. Among the trade, so far as you know, and those who are acquainted with Mr. Lippmann, what is the reputation and standing of Mr. Lippmann for truth and veracity in this community?

A. Good, as far as I know.

HENRY SCHWARZ.

Sworn and subscribed before me this 12th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

HENRY S. HAWKS, being duly sworn on the part of the defendants, deposes as follows:

Q. 1. What is your name, residence, age, and occupation?

A. Henry S. Hawks, St. Nicholas Hotel; age, 41 years; occupation, merchant.

172 Q. 2. Were you, and, if so, when, a member of the firm of L. M. Bates & Co., in the city of New York?

A. I was, in the years of 1872, '73, '74; but in 1872 only in a certain department of that business.

Q. 3. What was the business of L. M. Bates & Co. in 1872, and was it, and is it, a house of extensive business?

A. It is called properly a silk goods house, and is one of the largest wholesale houses in the city.

Q. 4. Have you any acquaintance with a person of the name of George Cruttendon, jr., formerly of Barnes & Cruttendon?

A. I have met the gentleman. I have no personal acquaintance with him. I should not know him to-day if I should see him.

Q. 5. In April 3, 1873, George Cruttendon testified in his deposition in the suit of Egbert vs. Castle and others that he had heard Mr. H. S. Hawks, of the firm of L. M. Bates & Co., speak unfavorably of Mr. Lippmann's reputation for truth and veracity in this community. Please state if you ever did speak unfavorably to Mr. Cruttendon, or to any person in his presence, of Mr. Lippmann's reputation for truth and veracity?

A. No, sir; I have never said that about anybody's reputation. Lippmann sometimes talked considerably just as I do myself; as far as truth and veracity, I have dealt with him many years, and have never seen anything to shake my confidence in him in business matters.

Q. 6. Did Mr. Cruttendon at any time ask you to swear that you would not believe him under oath or words to that effect?

173 A. Mr. Cruttendon, if he is the gentleman I think he is, to the best of my recollection, called at the store one day, and in conversation asked me if I would swear, or take an oath, that I wouldn't believe Mr. Lippmann under oath. I said to him I certainly could not, as I never had seen anything of Mr. Lippmann, in all of our business transactions, that was not perfectly satisfactory or square.

HENRY S. HAWKS.

Sworn to before me this 12th Oct., 1875.

B. A. STILWELL,
Examiner, &c.

Adjourned to Thursday, at 11 o'clock a. m.

MAX ROSENSTOCK, a witness on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Max Rosenstock; age, 36 years; residence, 399 Eighth street; occupation, salesman at 316 Canal street.

Q. 2. How long have you been in business and where?

A. I have been in business for 12 years in the city of New York.

Q. 3. What kind of business?

A. Well, I have been in different kinds of business since 12 years; I am now salesman for K. Rosenstock & Co., dealers in ladies' undergarments.

Q. 4. Are you acquainted with the trade in that line of business in the city of New York?

A. Yes, sir.

174 Q. 5. Do you know Mr. Phillip Lippmann; and, if so, how long have you been acquainted with him?

A. I know him; I have been acquainted with him for ten years.

Q. 6. In what way have you been acquainted with him?

A. Dealing with him.

Q. 7. What is his general character for truth and veracity?

A. Good.

Cross-examined by Mr. WITTER:

X Q. 8. What is the difference between truth and veracity, as you understand it?

A. I don't understand those two words very well in English what they mean.

X Q. 9. Where was you born?

A. France.

X Q. 10. How long did you live there?

A. Thirteen years.

X Q. 11. Where did you go then?

A. Germany; lived there ten years.

Redirect:

R. D. Q. 12. You know the meaning of the word truth, do you not?

A. Yes, sir; I know the meaning of the word truth.

R. D. Q. 13. But you do not know the difference between the word truth and the word veracity?

A. I know the word truth, but I don't know the word veracity.

175 Recross:

R. X Q. 14. Upon what do you found your opinion considering Mr. Lippmann, whatever that opinion may appear to be by this examination?

A. I don't understand anything about it.

Redirect:

R. D. Q. 15. Mr. Rosenstock, why, or for what reason, have you said that Mr. Lippmann's character for truth was good?

(Objected to, because it is not proper redirect examination.)

A. Because I have known Mr. Lippmann for ten years, and have been dealing with him, and he is a gentleman.

MAX ROSENSTOCK.

Subscribed and sworn to before me this 14th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

G. W. LOCKWOOD, being called and sworn as a witness on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Age 48, nearly; salesman in this city; residence in this city.

Q. 2. Have you been in the business of skirt trade and skirt trade materials in this city; and, if so, how long?

A. Yes, connected with it about seventeen years.

Q. 3. Do you know Mr. Phillip Lippmann; and, if yea, how long?

A. Yes; I can't say how long; perhaps ten years, more or less.

176 Q. 4. Have you known him as connected with the trade of skirt making and selling, or personally, or both?

A. I only know him in connection with business transactions.

Q. 5. Has your acquaintance with the merchants, manufacturers, and dealers in the shirt trade in the city of New York been extensive, or otherwise?

A. I should say fairly so.

Q. 6. What is Mr. Lippmann's standing and reputation as regards truth and veracity in this community, so far as you know and believe?

A. Good.

GEORGE W. LOCKWOOD.

Subscribed and sworn to before me this 14th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

ALBERT KOMP, being called and sworn as a witness on the part of defendants, deposes as follows:

Q. 1. In deposition given by you 5th of April, 1873, now made evidence in this case, you testified as to the reputation for truth and veracity of Mr. Lippmann that it was bad. State upon what reason you so testified, and whether that is now your belief.

A. My reason was information received from parties who were hateful to Mr. Lippmann. I remember that years ago I heard a man speak against Mr. Lippmann on account of opposition in business. Further, I remember the statements made to me by the plaintiff, and I believe I have been misinformed.

Q. 2. Who do you allude to when you say that you heard persons speak of Mr. Lippmann in your last answer?

A. I allude to words uttered by Mr. Eull, formerly of the firm of Letz & Eull, and to what I have heard ot the plaintiff.

177 Q. 3. Give the name of the person to whom you allude as the plaintiff.

A. Mr. Cruttendon.

Q. 4. Is Mr. Cruttendon the person who gave testimony in the case in which your testimony was given, under the name of George Cruttendon, jr.?

A. I believe so.

Q. 5. Did Mr. Cruttendon personally solicit you to give testimony against Phillip Lippmann?

A. I am not acquainted and was not acquainted at the time with Mr. Cruttendon; the gentleman who gave me that name represented to me that he was the plaintiff.

ALBERT KOMP.

Subscribed and sworn before me this 14th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

L. ROTHSCHILD, being called and sworn as a witness for defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Leopold Rothschild; age, 34; residence, 309 West 29th street; occupation, manufacturer of ladies' and children's underwear; 35 Lispenard street, place of business.

Q. 2. Have you been in the skirt trade business in this city; and, if so, how long?

A. I have; about ten years, both as manufacturer and seller, in the city of New York.

Q. 3. Were you acquainted with persons and firms engaged in the business of manufacturing, selling, and dealing in the skirt trade in the city of New York?

A. I was.

178 Q. 4. Do you know Mr. Phillip Lippman; and, if so, how long in the city of New York?

A. I have known Mr. Phillip Lippmann for about fourteen or fifteen years.

Q. 5. Have you had business transactions with Mr. Lippmann?

A. Yes, sir; I did.

Q. 6. What is Mr. Lippmann's standing and reputation for truth and veracity?

A. Good.

LEOPOLD ROTHSCHILD.

Subscribed and sworn to before me this 14th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

THOMAS ROBINSON, being called and sworn as a witness on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Thomas Robinson; I am 45 years of age; I reside at 825 Willoughby avenue, Brooklyn, New York; I am salesman in the house of Calhoun, Robbins & Co.

Q. 2. What is the business of Calhoun, Robbins & Co.?

A. Fancy goods.

Q. 3. How long have you been a dealer, as salesman and otherwise, in the fancy-goods business in the city of New York?

A. Fifteen years.

Q. 4. How long have you been with Calhoun, Robbins & Co.?

A. Three months.

179 Q. 5. With whom were you before that?

A. Abraham, Gieve & Co., fancy goods, and before that with Abraham, Hooley & Co., to whose business the last mentioned firm succeeded.

Q. 6. Do you know Mr. Phillip Lippmann, and if so, how long have you known him?

A. I do; I have known him about seven years.

Q. 7. Have you had business transactions with him during that period?

A. I have.

Q. 8. What is his reputation and standing for truth and veracity?

A. Good.

THOMAS ROBINSON.

Sworn to before me this 14th day of October, 1875.

B. A. STILWELL,
Examiner, &c.

W. B. CARGILL, being recalled by defendants, deposes as follows:

Q. 1. In question 52 of your former examination you were asked to produce before the examiner a pair of corset steels such as you intended to mean by the previous answer, the previous answer being read to you. Produce, if you have such corset steels.

A. I now produce the same, and they are marked Defendants' Exhibit Cargill, October 14, 1875.

W. B. CARGILL.

180 EDWIN B. STIMPSON being called and sworn as a witness on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence and occupation?

A. Edwin B. Stimpson; residence, 238 South 4th street, Williamsburg; age, 48; shoe-upper manufacturer; business, 31 Spruce street, N. Y.

Q. 2. Have you been acquainted with springs and the manufacture and use of them for gaiters and leggins; and if so, how long?

A. Yes, sir; for 25 years.

Q. 3. Have you any samples of springs such as you *you* refer to? if so, produce them.

(The testimony of this witness objected to, so far as it has any bearing on the prior use or knowledge of the invention patented by complainants' patent, for the reason that his name and residence and place of use or knowledge are not pleaded in the answer.)

A. I have; and I produce them.

(They are offered in evidence, and marked Defendants' Exhibit, October 15, 1875, Stimpson.)

Q. 4. How long have you known springs of this kind?

A. Say 25 years; that is the time I brought them with me from England.

Q. 5. What number of them did you bring with you from England?

A. I can't say; only a few pairs; perhaps less than a dozen.

181 Q. 6. Have you been selling them nearly all that time?

A. No, sir; I think that the first 9 or 10 years after 1851 that I did not sell any of them.

Q. 7. When did you begin to sell them?

A. I may have sold them during that nine or ten years, but I don't know whether I did or not; after that time I sold thousands of them.

Q. 8. State as near as you can during what years you sold thousands of those springs.

A. 1856 to 1860.

Q. 9. Where?

A. In Pearl street, N. Y., 365, in 1857; No. 376 same street for the following years.

Q. 10. Do you remember any persons or firms to whom you made such sales? If so, state.

A. Eugene Ferris, Nassau street, a bootmaker; and plenty of others sold them all over the city and country.

Q. 11. Did you import these springs that you sold, or manufacture them, or cause them to be manufactured?

A. The few I brought with me were made in England; the springs I speak of, in 1856 to 1860, were made here.

Q. 12. Who did you get to make them in this country?

A. The man's name was Vaughn; it might have been Thomas Vaughn, in the city of New York, 1st or 2d avenue, far up town; the man is living yet.

182 Q. 13. Were these springs any new thing in England when you brought them from there?

A. I cannot remember how long I had then been acquainted with them.

Q. 14. State what these springs are composed of.

A. Steel.

Q. 15. Are they tempered?

A. Yes, sir.

Q. 16. What is the object of the short leaf riveted in the centre to the long leaf?

A. To give it strength without adding much weight.

Q. 17. Please look at the article I now show you, and state what it is.

A. It is a spring to an over-gaiter.

Q. 18. Of what is it composed?

A. Steel, tempered.

Q. 19. How long have you known that article in this country?

(Above objection is repeated with reference to prior patents and publications.)

A. I can't say exactly.

Q 20. State as far back as your memory will enable you to say.

A. Well, I don't want to state any time, as I have no recollection; I believe they have been in use since 1851, when I came here, and probably I have used them ever since.

183 Q. 21. Can you speak positively that you have known the use of them in this country in 1861, and since the war?

A. Yes; and before that time.

Q. 22. Did you have such made for your use and customers?

A. Yes, sir.

(Defendants now offer in evidence the last-mentioned spring, and which is marked Defendants' Exhibit No. 2, October 15th, 1875, Stimpson.)

EDWIN B. STIMPSON.

Subscribed and sworn before me this 14th day of October, 1875.

R. E. STILWELL,
Examiner, &c.

Adjourned to Saturday, October 16th, at 9½ o'clock.

AUGUST SELIGMANN, being called and sworn as a witness on the part of defendants, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. August Seligmann; age, 38; residence, 412 E. 57th street; occupation, importer of white goods and manufacturer of corset steels.

Q. 2. Were you formerly a partner of Mr. Phillip Lippmann?

A. I was.

Q. 3. Has that partnership been dissolved; and, if so, when?

A. I did; in the 28th of October, '74, if I am correct.

184 Q. 4. Are you related to Mr. Lippman?

A. I am not.

Q. 5. How long have you known Mr. Lippmann?

A. I have known him for about 10 years, but I have been better acquainted with him for the last 4 or 5 years.

ness, I made several changes, leaving off manufacturing of skirts and bustles, enlarged my business of importation, of which Lippman—never was a partner.

X Q. 33. You and he have since that time done business in the same locality, and in the same rooms, have you not?

A. No, sir.

189 X Q. 34. State how differently.

A. All the business transacted at 486 Broadway is done to my individual benefit, Lippmann only acting as salesman.

X Q. 35. Than it is you who carries on this business of alledged infringement at present, is it?

A. I carry on the business, as before stated.

X Q. 36. Question repeated.

A. Yes.

X Q. 37. Have you any objection to your credit and that of Phillip Lippman's standing for the purpose of this case upon the report, which shall be obtained from Dunn, Barlow & Co.?

A. I have no objection to get any report from our present time in regard to one's self. In regard to Mr. Lippmann, I am not authorized to answer.

X Q. 38. Answer the question as applicable to the firm of P. Lippmann & Co. during the time that partnership existed.

A. I have, for reason that I refused one of their solicitors a statement, and I think they may have not done me justice.

X Q. 39. During what period were you and Phillip Lippmann in partnership, making and selling corset steels, complained of in this case as infringements?

A. I think from 1872 to October, 1874; I believe it was some time in June or July of 1873; I went in as partner in July, 1873.

190 X Q. 40. What was the cause of the dissolution of partnership in October, 1874?

A. There was no cause at all in the business itself. It only was privately arranged between the former partner and myself for her to retire and me to become a partner.

X Q. 41. Are you willing to abide by the report of Dunn, Barlow & Co. as to the reason for the various rotations or changes in partnership which seem to have taken place among you, your wife, and Phillip Lippmann?

A. I have objections, for the reason that I think myself more competent to give reason myself than they are; they may be misinformed.

X Q. 42. By "her" in your answer next above the last, you mean your wife, do you not?

A. Yes, sir.

X Q. 43. Does she or did she attend at your place of business, sell goods, or conduct the business?

A. She did not.

X Q. 44. About what time was the judgment rendered against Phillip Lippmann in the suit against him for breach of promise?

A. In the fall of last year; I don't know the date.

X Q. 45. For what amount was that judgment?

(Objected to as irrelevant, and as not being the proper way to prove the judgment, or the amount of it, if there was such.

Question withdrawn.)

191 X Q. 46. What, according to your understanding, was the amount of that judgment?

(Same objection.)

A. I heard $3,000.

X Q. 47. Has it ever been paid, so far as you know?

(Same objection.)

A. I don't know.

X Q. 48. You never heard of its being paid, have you?

(Same objection.)

A. I never heard anything about it, whether it has been paid or not.

X Q. 49. Is Clara Seligmann at present a partner in your business?

(Objected to as irrelevant.)

A. She is not.

X Q. 50. Do you not know of Mr. Lippmann circulating the report that this present suit has been won by the defence, or report substantially to that effect?

A. I never heard anything of it.

X Q. 51. Are you being sued at present for "tip" which you use on your corset steels?

(Objected to as immaterial.)

A. Yes, sir.

192 X Q. 52. State in how many places in your place of business in Broadway the word "Cantbustem" appears in public view?

(Objected to as irrelevant and immaterial.)

A. I believe once.

X Q. 53. Is that on the Broadway side?

(Same objection.)

A. It is.

X Q. 54. Give, as near as you can, the dimensions of the sign containthat word, "Cantbustem."

(Same objection.)

A. Say about twenty-two feet long, and about a foot wide.

X Q. 55. Where else has that word been used in your business by you?

(Same objection.)

A. On corset steels and the box containing them.

X Q. 56. Under what name are the corset steels known which are made and sold by the complainant in this suit?

(Same objection.)

A. "Cantbreakem."

X Q. 57. Has Mr. Lippmann any interest in the stock of goods of your business, or in the profits of your business?

A. No, sir.

193 X Q. 58. What was your position in the business when your wife was partner?

(Same objection.)

A. Acting for her interest.

X Q. 59. In any way you thought proper?

A. Yes, sir.

X Q. 60. Why did Phillip Lippmann go out of the partnership in October, 1874, as you understand it?

A. Because he allowed himself to give accommodation paper without my knowledge; for this reason I dissolved.

X Q. 61. Was judgment obtained against him on that paper?

A. I was so informed.

X Q. 62. Was the amount of the judgment paid so far as you know?

A. I cannot say under oath.

X Q. 63. Was this endorsement in his own name, or that of the firm?

A. In his own name.

X Q. 64. Did the articles for partnership forbid his endorsing paper with his own individual signature?

A. It does; but this paper I speak of was signed by him before making of the copartnership paper.

194 X Q. 65. Will you produce before the examiner these articles of copartnership, and have a copy thereof made by him and annexed to your deposition?

A. I beg to correct myself by saying "or copartnership paper," as there was only one copartnership paper made between Phillip Lippmann and Clara Seligmann. At the time Clara Seligmann went out of business full confidence was established between Phillip Lippmann and myself; we therefore never deemed it necessary to have the expense of making of the papers, and carried on business under the same conditions as before.

X Q. 66. Will you now answer the question last put you?

A. If I can find it yet, I will.

X Q. 67. Have you not said, within a couple of months or so, to Allexander Myer, who is here present, that he must excuse Phillip Lippmann in what he said, on account of his (Lippmann's) peculiarity of not speaking the truth?

A. I emphatically say no; I never remember anything of the sort.

AUGUST SELIGMANN.

Subscribed and sworn before me this 16th day of Oct., 1875.

JOHN A. SHIELDS,
Examiner, &c.

195 *Stipulation.*

United States circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX,
vs.
PHILLIPP LIPPMANN & A. SELIGMANN.

It is stipulated and agreed by and between the solicitors of the respective parties in the above-entitled suit, that either party may use, upon the hearing of this case, any of the printed depositions taken in the case of Frances Lee Egbert, executrix, against S. A. Castle et al., with the same effect in all respects as if regularly retaken and resworn in this case.

New York, Sept. 20, 1875.

GEORGE GIFFORD,
Complainant's Solicitor.

J. B. STAPLES,
Defendant's Solicitor.

(The exhibits referred to in the depositions are to be provided by substitutes, if the originals cannot be obtained.)

196 Circuit court of the United States for the southern district of New York, in equity.

FRANCES LEE EGBERT, AS EXECUTRIX, &c., of Samuel H. Barnes, deceased,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK, and Henry S. Magrane.

Proofs for final hearing taken on the part of the complainant in the above action, under and pursuant to the 67th rule in equity, before Joseph Gutman, jr., examiner.

NEW YORK, *Feb.* 15, 1873, 2 p. m.

Present: Mr. Gifford, counsel for complainant, and Mr. How, counsel for the defendants.

Complainant's counsel puts in evidence a certified copy of the reissued letters patent granted to Frances Lee Egbert, executrix, dated January 7, 1873, and numbered 5216, which is marked Complainant's Exhibit A, J. G., jr.

JOHN BOYD ELIOT, a witness of lawful age, produced on the
197 part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is John Boyd Eliot; I am forty-five years old; I reside at New York City; I am by profession a mechanical engineer, and for the last fifteen years have been much occupied in testifying as an expert in patent causes.

2. Q. Have you read, and do you understand, the contents of the reissued letters patent, marked Complainant's Exhibit A, in this case?

A. I have read said letters patent, and believe I understand the contents thereof.

3. Q. State whether or not you find in Complainant's Exhibit C the invention described in said patent, and referred to in the first claim thereof.

A. I do; I find in said exhibit a pair of corset springs, each spring consisting of two or more metallic plates, placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length, substantially as set forth in the first claim of said reissued patent.

4. Q. State whether or not you find in said Exhibit C the invention described in said patent, and referred to in the third claim thereof.

198 A. I do; I find in said exhibit a pair of corset springs, each spring consisting of two or more metallic plates, placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length, the pair being provided with clasps, by which the two members of the pair can be connected and disconnected, substantially as specified in the third claim of said patent.

And being cross-examined by Mr. HOW, he says:

5. X Q. What do you understand to be the difference between the invention or improvement described in said letters patent, and referred to in the first claim thereof, and that described in said patent and referred to in the third claim thereof.

A. In the third claim the subject-matter of the first claim is included, and in addition thereto the clasps for uniting the two members to form a pair are added.

6. X Q. Do you mean by your last answer that the third claim claims the subject matter which is claimed in the first claim of the said patent, and also claims besides, in addition, the clasps for uniting the members to form a pair?

A. I mean the combination of the elements recited in the first claim, with the clasps as an additional element, to form the combination of the third claim.

7. X Q. Do you mean by your answer to the third question that the first claim is for a pair of corset springs, each spring consisting
199 of two or more metallic plates, placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length, irrespective of any means of uniting the two springs to each other?

A. I do not.

8. X Q. Do you then mean by your said third answer that the clasps which unite said springs are an element of the said first claim?

A. I mean that any kind of fastening that will unite said members into a pair is sufficient to answer the conditions necessary for uniting said springs, as claimed in the first clause of said claim.

9. X Q. Please to state whether the said first claim makes any mention whatever of any means of uniting the two springs?

A. The word pair itself implies the necessity of their being united in some manner so as to form a combination.

10. X Q. Do you then consider the first claim a combination claim?

A. In so far as the two members are to be connected so as to form a pair, I would regard it as a combination.

11. X Q. Then do I understand you to mean that this first claim is for the combination of two springs, each spring consisting of two or more metallic plates placed one on another, and so connected as
200 to prevent their sliding off each other laterally, with a means for uniting the two springs?

A. If, by such combination, the two springs or members, when so united, form a pair, so as to act in conjunction with each other, and thereby constitute a co-operative combination, I do regard it as the subject-matter of the first claim, and in that sense is a combination claim, by whatever means they may be united together.

12. X Q. Then if I understand you, you mean that the subject-matter of the first claim of said patent consists in the combination of two corset springs, constructed as described in the previous question, with the function or result of uniting them together, and not with any particular means by which such result or function is accomplished. Is that what you mean?

A. No, it is not; nor have I intended to give such a meaning to anything that I have said, but that the subject-matter of the first claim is for a pair, or individual thing, when combined, as a pair tongs, or a pair of scissors, or a pair of hames, do not constitute two things; or as mentioned in the question, two springs, when they are united, by whatever means said union may take place or be effected.

13. X Q. Then if I now understand you, some means of uniting the two springs are an essential element in the subject-matter of the first claim, are they?

A. If not, they would not then constitute a pair.

201 14. X Q. And if I understand you correctly, it makes no differ-
m ence what the element of union between the springs may be, or
by what device such result is accomplished, provided it is accomplished;
? is that what you mean?

A. Substantially so, I believe.

15. X Q. Must they be so connected that they can be separated?

A. So far as the first claim is concerned I do not think their separation is a necessary condition, inasmuch as they might be united by links extending from one to the other, so as to co-act as stays or springs, without the necessity of separating them, and the corset might be opened and closed by lace work on some other portion of the body.

16. X Q. Then do you mean to be understood that when the springs are united, as suggested in your previous answer, they are substantially one?

A. They are substantially one pair.

17. X Q. Are they substantially one spring?

A. In so far as they co act together to perform the functions of a corset spring, they are one pair of springs.

18. X 2. Cross-question 17 repeated.

A. Only in the sense in which I have already explained as one individual pair.

19. X Q. And the connection of these two springs by some means is an element in the combination recited in the first claim of the said patent, is it?

202 A. Only in so far as I have already explained, that there must be some means of forming a pair; but I do not regard it as an element of the first claim, as all that is necessary is to provide two members so that they may be united to form a pair.

20. X Q. Then, if I now understand you, the subject-matter of the said first claim is the formation of a pair of these springs, irrespective of the means by which such formation is accomplished; is that correct?

A. Provided each member of the pair consists of two or more metallic plates, placed one on another, so as to slide longitudinally one upon another, and so connected as not to slide off each other laterally.

21. X Q. Then the subject-matter of the said first claim consists in the function of the formation of two such springs into a pair, and not in any particular means by which such function or result is accomplished; is that so?

A. I do not understand what is meant by "the function of the formation," unless it be the mechanical construction; and, if so, I do not mean such a function. The first claim, as I understand it, is broadly for a pair of corset springs, each member consisting of two or more parts, and there is nothing recited in said claim that states how they should be united in order to form a pair. Specific devices for such a purpose are named in the third clause of the claims, and in this respect the two claims are different.

22. X Q. Then any device which will unite the two springs will
203 answer the condition of the said first claim, which you find involved or intimated, as you suggest, in the word "pair," would it?

A. It will.

23. X Q. Then the uniting of these two springs is what constitutes this part or element in this combination, is it?

A. I don't so understand it; but the fact of their being united, thereby constituting a pair, is a necessary condition of the elements included in the first clause of the claims.

24. X Q. Then it is really one of the conditions of the claim, and one of the elements of it, is it not?

A. I do not understand to what the word "it" refers in said question.

25. X Q. By the word "it" I refer to the fact of their being united thereby constituting a pair?

A. It may be one of the conditions without being an element, and in this case is so in fact. The condition depending upon a certain combination need not necessarily constitute an element of a combination, as I understand the use of the word.

26. X Q. Then if the connection of the two springs to each other were lacking, would the two springs nevertheless contain all the elements of the invention recited in the said first claim, or involved thereby?

A. They would, provided they were so constructed as that they might be united.

204 27. X Q. But suppose all means of uniting the two springs to each other were lacking, how then?

A. Then they would never constitute a pair, because then they could not co-act together to perform any function whatever.

28. X Q. Would they, in that case, contain all the elements of the invention recited in the said first claim?

A. If they did not constitute a pair, they would not, in my opinion, form the subject matter of the first claim, although they might contain the elements, namely, the two members of the pair, formed of two or more plates, when said plates are so fastened as to move longitudinally one upon another, and not to slide off each other laterally.

29. X Q. Cross question 28 repeated.

A. In my opinion, it is necessary that the two members of said springs shall be united together in order to fulfil the conditions of that first claim, but without being limited to the means by which they shall be united. The elements of the claim are the two members, each consisting of two or more plates and their fastenings, by which said plates are held from sliding off each other laterally, and without regard to the means by which the two members shall be united together.

30. X Q. Do you mean your last answer to be an affirmative or a negative answer to cross question 28?

A. Affirmative.

205 31. X Q. What do you mean by the words "substantially as set forth in the first claim of said reissued letters patent," in your answer to question 3?

A. I mean as there stated in the words of the first claim.

32. X Q. Do you mean that the same devices must be used, and the same construction involved, or do you mean to be understood that "substantially as set forth" includes any and all means by which the result or results may be accomplished?

A. In so far as the word "pair" is concerned, I mean any devices that will unite these several elements together to form a pair, inasmuch as the claim is not limited to any particular means of making such combination or union; and for the rest of the claim, I mean two springs or members, consisting of two or more metallic plates, the said plates being so united as not to slide off each other laterally, and so arranged as to play upon one another longitudinally.

33. X Q. Then if I understand you, the mode of uniting and arranging the plates, referred to in said claim, is not limited to any specific device but includes all devices or modes by which these results may be accomplished. Is that what you mean?

A. It is, for the reason that the claim does not specify any particular manner of uniting them.

34. X Q. Suppose the clasps on Exhibit C were removed from
206 the springs shown in said exhibit, would the parts that would remain, contain the invention described in the said reissued letters patent and recited in the first claim thereof?

A. Not unless something were substituted to prevent their sliding laterally from each other.

35. X Q. Then, does not the infringement of this claim consist, in your opinion, in uniting the parts Exhibit C by the clasp?

A. No, not entirely.

36. X Q. What do you mean in your answer to question 4 by the words "substantially as specified in the third claim of said patent"?

A. I mean a pair of corset springs consisting of two members, each member consisting of two or more plates, said plates so fastened upon one another as to prevent their separating laterally, and the two members provided with clasps or devices, one-half of which consists of pins or studs, and the other of eyes or loops, by which the two members can be connected and disconnected.

37. X Q. Then, if I understand you, it makes no difference how the plates of the springs are prevented from sliding off each other laterally so long as this is accomplished. Is that what you mean?

A. It is.

38. X Q. Do you mean by your answer to the 36th cross-question,
207 that the invention described by said letters patent and recited in the third claim thereof, is the combination with the springs of the particular clasp described in said patent, as contra-distinguished from any other clasp which will unite the two springs? And that said claim is limited to this particular form or construction of clasp?

A. I think said third claim is limited to such clasps as will allow the members to be connected and disconnected; but in so far as the first portion of said question relates to the combination, I do not regard said third claim as limited to a combination other than what I have already stated as necessary to constitute a pair. In other words, as I understand the first part of the question, said claim is not a combination claim, in the usual meaning of that term, but is for a pair of corset springs, such as described and claimed in the first clause of the claim, provided with the clasp or clasps by which they may be connected or disconnected, as stated in said claim.

39. X Q. Is not a clasp or clasps an element of said third claim?

A. It is.

40. X Q. Is there any other condition necessary in these clasps than that they shall be capable of being connected and disconnected so as to unite or separate the springs?

A. I believe not.

41. X Q. Then any clasp which will answer the purpose of con-
208 necting and disconnecting the springs answers the requirements of this claim in regard to the clasp or clasps, does it not?

A. I believe it does.

JOHN BOYD ELIOT.

Subscribed and sworn to before me this 17th day of February, 1873.

JOSEPH GUTMAN, JR.,
Examiner.

NEW YORK, *March* 5, 1873—11 a. m.

Present: Counsel as before.

Examination further adjourned to 2 p. m. of the same day.

JOSEPH GUTMAN, JR.,
Examiner, &c.

NEW YORK, *March* 5, 1873—2 p. m.

Present: Mr. Witter, counsel for complainant, and Mr. How, counsel for defendant.

JOSEPH H. STURGES, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in
209 the matter of controversy herein, and being examined by Mr. WITTER, of counsel for complainant, deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Joseph H. Sturges; I am thirty-one years old; I reside at Fairfield, Fairfield County, Connecticut; I am in no business at present.

2. Q. How were you employed, and where, during the year 1863?

A. I was baggage master and also telegraph operator at Fairfield station, on the N. Y. & New Haven Railroad.

3. Q. State whether or not, at any time during that year, you met a man by the name of Barnes.

A. I did.

4. Q. Who was this Mr. Barnes?

A. The husband of the present Mrs. Egbert, complainant in this suit.

5. Q. Where did you meet him, and what, if anything, occurred between you and him?

A. I met Mr. Barnes on the train on the New York and New Haven Road, between Stamford and Bridgeport somewhere, and, in a business way talking with Mr. Barnes, he stated that he had two inventions to sell, new inventions of his own; that he would sell one of them; he had one invention for an improvement for tanning leather, and
210 the other was an invention in corset-steels; I was looking for better business, something that I could make more money at, and I said to him that I would look at them and see if I could do anything with them, and I made an engagement with him to meet him in New York, at his house, which I did probably some two or three weeks after, according to agreement.

6. Q. State where you met him and what occurred on this occasion.

A. I met Mr. Barnes at his house in Abingdon Place, Twelfth street; Mr. Barnes showed me his invention for tanning leather, which was done with some kind of chemicals that I did not understand, nor feel much interested in, and I asked him to show me his corset-steel. His reply was that he was sorry he could not show me any, as the sample he had he had given out a few days previous to some party to try, but "by the way," he said, "my wife has a pair in her corset which she has on." Mrs. Barnes was present on the room at this time; "if my wife will take them out," he says, "I will show them to you." Mrs. Barnes went out and returned with a pair of corsets and scissors and ripped them open and took the steels out. Mr. Barnes took them and explained to me how they were made and how they were used, and all the principal points.

7. Q. Please describe this pair of corset-steels as well as you are able.

A. These steels were composed of two plates—one on top of the
211 other, the upper one the shorter—fastened together in the centre with a rivet, and the upper plate at each end by a pin with a slot, allowing the upper plate to move lengthwise when the spring was in use or bent. These corset-steels were something new to me—something I had never seen before—and they did not strike me as anything that I could do anything with, or make a business of, and I did nothing with them.

8. Q. Was there a pair, or only one member of a pair of these steels? and if you say there was a pair, state what provision there was for connecting the two members of the pair together, if any.

(Objected to as leading.)

A. There was a pair of steels; they were in two parts, connected, when ready for use, by three clasps; the middle clasp was riveted in the centre, and the clasp at each end riveted through the lower plate only—that was on one member of the steel; on the other member of the steel were three pins which answered the place of a hook.

9. Q. Were the two members of the pair alike, or unlike, except as you have stated in reference to the pins and clasps?

A. They were alike.

10. Q. Could, or could not, the upper plate of each member be moved laterally on the lower plate?

(Objected to as leading and immaterial.)

A. No, sir; they could not.

212 11. Q. Why not?

A. The slot was only large enough for the rivet or pin.

12. Q. What was the shape of the slot, as near as you remember?

A. What I mean by a slot was just a little hole cut in the upper steel; it might have been half a quarter inch long, perhaps, just enough for a little play there.

13. Q. State whether or not Mr. Barnes told you what he was going to do with his invention.

A. He did not state to me any more than he offered to sell one of them.

14. Q. Were you in the habit of riding to and fro on the trains at this period?

A. I was between Bridgeport and Stamford.

(Complainant's counsel puts in evidence a pair of corset steels, which are marked Complainant's Exhibit D.)

15. Q. Look at the pair of corset steels marked Complainant's Exhibit D, and state how that pair compares with the pair shown you at this time by Mr. Barnes.

A. I should say they were the same thing, precisely like.

16. Q. When you so went to and fro on the railroad, did you not pay fare?

A. I did not.

213 17. Q. When was it when you so visited Mr. Barnes and was shown this pair of corset steels?

A. In the winter of 1863.

18. Q. State whether or not he said anything to you about patenting this invention.

(Objected to as already answered.)

A. He said he was going to get a patent for his invention.

And being cross-examined by Mr. How, he deposes and says:

19. X Q. How long have you resided at Fairfield, Conn.?

A. Always; ever since I can remember; I was born there; excepting a year or two that I was in New York.

20. X Q. When was that?

A. That was in 1866–1867.

21. X Q. How long were you baggage-master, and also telegraph operator at Fairfield Station, on the New York and New Haven Railroad; when did you commence, and when did you quit?

A. I commenced there indirectly ever since I was big enough to do anything; my father occupied the same position—the position of baggage master, and, after I was big enough to do anything, I used to do portions of his work off and on, when he was at something else;

214 I cannot state the exact time I went there under wages from the company, but I think in 1861; and, as telegraph operator, I commenced the office when it was opened; I think it was 1862; I cannot remember the exact date; I was the first operator that was there. I left there on the 1st of March, 1866.

22 X Q. What was the cause of your leaving?

(Objected to as entirely immaterial.)

A. I resigned, sir, for a better business in New York.

23 X Q. What business?

A. A book keeper with Jones & Co., New York City Flour Mills.

24 X Q. How long were you engaged in that business?

A. I left them in July, 1871.

25 X Q. What business did you go into then?

A. I was then introducing and selling a cleaning and polishing powder.

26 X Q. How long did you continue in that business?

A. Until last fall.

27 X Q. Have you ever been in the employ of Barnes & Cruttenden, and, if so, when, for how long, and what were you doing for them?

A. I have, at short periods during the last year or more, perhaps two or three weeks at a time, or less; taking Mr. Cruttenden's place when he was absent.

215 28 X Q. Is that all you did for them?

A. Yes, sir.

29 X Q. Did not you act also as a detective for that firm?

(Objected to as immaterial.)

A. I have bought corset steels for them, but not in a capacity as a detective.

30 X Q. Did you ever, while employed by them, represent yourself to be what you were not?

(Objected to as immaterial.)

A. No, sir.

31 X Q. Did not you represent to Mr. Frank W. Marston, here present, that you were a small dealer in the country?

(Objected to as immaterial.)

A. I can't say that I did; I might have done so.

32 X Q. Where was that?

(Objected to, as the witness has not said that he did so represent himself, and that, therefore, this is not a proper question; also objected to as immaterial, and assuming what has not been testified to.

A. I don't understand the question.

216 33 X Q. Where was it that you represented to Mr. Marston that you were a small dealer from the country, or in the country.

(Same objections as to last interrogatory.)

A. I don't say that I did.

34. X Q. Don't you know that you did?

(Objected to, as the witness has already said that he does not know that he did.)

A. I do not, sir.

35. X Q. Don't you know that you made a representation to him to that effect?

(Same objection as to 32d X-question.)

A. I do not.

36. X Q. Did you not represent to him that you were a dealer from the country, or in the country?

(Objected to as immaterial and as already answered.)

A. That is the same question as the last or one previous.

37. X Q. Did you not represent to him that you came to see if you could get corset springs cheaper from him than you could from the stores?

(Same objection as to last question.)

A. I don't understand what you mean by "represent" there.

217 I bought corset steels of Mr. Marston, I presume his name is—the gentleman you refer to there—and I tried to buy them at the lowest point.

38. X Q. Question repeated.

(Objected to as substantially answered and as immaterial.)

A. My answer is the same as I have given.

39. X Q. Do you mean to say that you can't tell whether or not you represented to Mr. Marston that you were a dealer from the country?

A. Not positively.

40. X Q. Will you say that you did not?

A. You have my answer to that previously.

41. X Q. Please answer the question definitely to the best of your recollection.

A. I have answered it to the best of my recollection.

42. X Q. Do you mean to say that you have no recollection about it?

A. Nothing definitely.

43. X Q. Didn't you represent to Mr. Marston that you came to see if he would not give you a larger discount than his agents would give you?

A. I did not, sir.

44. X Q. Where did you first see Mr. Marston?

A. At Philadelphia.

45. X Q. At what place in Philadelphia?

218 A. At his place of his business—I don't recollect where it was.

46. X Q. What were you there for?

A. To buy some of his steels.

47. X Q. Whom for?

A. For J. H. Sturges.

48. X Q. Why did you want to buy them?

(This line of examination objected to as immaterial and a waste of the time of the court.)

A. For my own purposes.

49. X Q. Question repeated.

A. My answer is repeated.

50. X Q. Question again repeated.

A. I have no further answer than I have given.

51. X Q. For what purposes did you want them?

A. My own personal object, sir.

52. X Q. Question repeated.

A. You have my answer.

53. X Q. Do you mean to say that you will not answer the question?

A. I have answered the question.

54. X Q. What were your own purposes which you bought them for?

A. I bought them to make money off of.

219 55. X Q. How?

A. By selling them.

56. X Q. Were you at that time employed by Barnes & Cruttenden?

A. No, sir.

57. X Q. Were you in trade in the corset spring or analogous business?

A. Not in an analogous business; I was in the corset spring business in a small way.

58. X Q. Where? State the number, and street, and place.

A. I had no place of business, except my own residence where I resided.

59. X Q. What did you do with the corset springs which you purchased of Mr. Marston, as you have stated?

A. I have got them yet.

60. X Q. Now, didn't you buy them for the purpose of obtaining evidence?

A. No, sir.

61. X Q. How came you to go to Philadelphia to buy this two dozen of corset springs?

A. I did not go there to buy two dozen.

62. X Q. How many did you go there to buy?

A. All I wanted.

220 63. X Q. Did you not represent to Bardwell, Castle & Co., or to S. A. Castle & Co., in Howard street, or to some one in their employ, either in Howard or Leonard street, that you were a dealer in the country?

(Objected to as immaterial.)

A. I can't say whether I did or did not.

64. X Q. What is your best recollection about it?

A. That is my best recollection.

65. X Q. Do you think you did, or do you think you did not?

A. I can't say.

66. X Q. Are you not generally able to recollect what representations you make to people?

A. Not in a business way.

67. X Q. Is your memory equally poor in regard to what representations people make to you?

A. Yes, sir.

68. X Q. When was it that you purchased these steels from Mr. Marston, as you have stated?

A. I can't say the date without referring to the bill.

69. X Q. Well, about when?

A. Last summer some time; last spring; in the spring or summer.

70. X Q. When was it that you called at Bardwell, Castle & Co.'s?

221 A. I have called there a number of times during the last year.

71. X Q. Who did you represent yourself to them to be when you first called there?

A. Joseph H. Sturges; I never represented anything else.

72. X Q. Of what place, and what business?

A. I am not positive that I stated any business or any place.

73. X Q. State your best recollection on that point.
A. That is my best recollection.
74. X Q. What representations do you think you made to them in regard to that matter?
A. In regard to what matter? I don't know that I have stated any matter.
75. X Q. I mean the matter stated in question 72.
A. I don't remember that I stated any place or business.
76. X Q. Did you buy any steels at that time of Bardwell, Castle & Co.?
A. At what time?
77. X Q. At the time you first called there, as you have stated.
A. I have not stated any first time that I called there, and don't know whether I bought steels or not at that time.
222 78. X Q. Did you at the second time you called there?
A. I can't say.
79. X Q. Did you at any time?
A. I have.
80. X Q. How often, and when?
A. That I cannot say.
81. X Q. Well, about?
A. Half a dozen times, more or less.
82. X Q. More or less?
A. I can't say.
83. X Q. Did not Mr. Bardwell at one time refuse to sell you springs?
A. I am not positive about that.
84. X Q. Well, what is your impression as to whether he did or not?
A. My impression is that I bought all the steels I wanted.
85. X Q. Did you go to the place of business of Jacob Strouse & Co. at one time and represent to them or to any person belonging to their house that you came from E. Ridley & Sons?
A. I may and I may not.
86. X Q. Do you mean to say that you don't know whether you did or not?
223 A. I can't say positively.
87. X Q. Did you ever belong to the house of E. Ridley & Sons in any manner or respect?
A. Not directly.
88. X Q. Did you indirectly?
A. I can't say.
89. X Q. What did you do with the steels you bought of Castle & Co.?
A. I have got them.
90. X Q. If you bought those, and those you say you bought from Mr. Marston for the purpose of making money off of them, how happens it that you have kept them yet?
A. Because I did not sell them.
91. X Q. Have you ever tried to sell them?
A. No, sir.
92. X Q. Now, is it not true that you bought those steels as a detective for Barnes & Cruttenden, or in their interest?
A. No, sir.
93. X Q. Did you not buy them in the interest of Egbert & Cruttenden, or of Mrs. Egbert, or of Mr. Cruttenden?
A. I did not.
94. X Q. Were you employed by any one to buy them, and, if so, who?

224 A. No, sir; I was employed by no one.

95. X Q. Outside of your employment by the firm of Barnes & Cruttenden, where and to whom have you ever sold any corset springs?

A. I don't think I have sold any; I can't state positively as to that.

96. X Q. How came you to meet Mr. Barnes on the train between Stamford and Bridgeport, in the year 1863, as you have stated?

A. Casually, as I would meet any stranger, sitting in the seat with him.

97. X Q. Coming towards or going from New York?

A. That I can't say.

98. X Q. Are you a relative of his?

A. No, sir.

99. X Q. Are you a relative of either Mrs. Egbert or Mr. Cruttenden of the firm of Barnes & Cruttenden?

A. No, sir.

100. X Q. How came you to get into their employ?

A. To accommodate Mr. Cruttenden as a friend more than anything else.

101. X Q. How long have you known Mr. Cruttenden?

A. Ever since he was married.

102. X Q. Did he marry a relative of yours?

A. No, sir.

225 103. X Q. Had you known Mr. Barnes prior to your seeing him on the train, as you have stated?

A. No. sir.

104. X Q. How came he to speak to you, as a stranger, of two unpatented inventions which he wanted to sell?

A. The subject came up in general conversation.

105. X Q. How long have you been employed by Barnes & Cruttenden?

A. I was only employed at short intervals, two or three weeks at a time, more or less, when Mr. Cruttenden was away.

106. X Q. About how many times, and how long altogether, and when?

A. I can't say; within the last year or more.

107. X Q. How long since you were last in their employ?

A. I can't say; it may be six months, more or less.

108. X Q. What was the last service you performed for them?

A. That I can't say.

109. X Q. You cannot be sure whether it was more or less than six months since that you performed any service for them?

A. No, sir.

226 110. X Q. What other service, besides going around among manufacturers and buying steels for the purpose of evidence, did you ever perform for Barnes & Cruttenden?

(Objected to, as the witness has not said that he has performed any such service.)

A. I don't say that I did any such service.

111. X Q. Question repeated.

A. You have my answer.

112. X Q. Is that all you did for them?

(Objected so as ambiguous, and because the witness has stated what is inconsistent with the fairness of the question.)

A. You have my answer.

113. X Q. Can't you state whether you performed any other service for them or not?

(Same objections.)

A. I have no other answer to make than I have given you.

114. X Q. Do you mean to say that you will not answer the question?

A. I have answered the question.

115. X Q. Where had Mr. Barnes been, or where was he going, at the time you saw him on the train, as you have stated?

227 A. I don't know, sir.

116. X Q. And you have no idea whether he was going from New York or coming towards it?

A. I can't state positively.

117. X Q. Where were you going at the time and where from?

A. That I can't say.

118. X Q. Can you tell what place you were going from?

A. No, sir.

119. X Q. Nor where to?

A. No, sir.

120. X Q. How do you know that it was on the train at all that you saw him?

A. Because it was an unusual circumstance with me; and I recollect where it happened.

121. X Q. Well, where?

A. On the train on the New York and New Haven Railroad, between Stamford and Bridgeport.

122. X Q. How do you know it was between Stamford and Bridgeport?

A. Because I seldom went beyond those points, unless on special business.

123. X Q. On what errand where you going at that time?

A. I can't say; probably nothing particular.

228 124. X Q. At what number in Abingdon place, or Twelfth street, did Mr. Barnes reside at the time you say you called on him?

A. I can't say, sir; I don't recollect.

125. X Q. What time of day did you call?

A. Probably between 10 a. m. and 3 p. m.; I can't state any positive time.

126. X Q. When next after that interview, if ever, did you see those corset springs which you say Mrs. Barnes took from her corset?

A. I probably never saw them since.

127. X Q. When did you next see any like them?

A. When Mr. Cruttenden took up the patent to introduce it.

128. X Q. When was that?

A. I can't fix any date to it; it was either the fall and winter of 1867 or 1868.

129. X Q. How long did this interview between you and Mr. Barnes, at his home, as you have stated, last?

A. I can't say; it might have been an hour; it might have been two hours.

130. X Q. What was the object of that interview?

A. My object was to see what he had to sell, and to see whether I would do anything with it or not.

229 131. X Q. At what price did Mr. Barnes offer to sell it to you at the previous interview; I mean the corset spring invention?

(Objected to, as it does not appear that any price was mentioned.)

A. There was no price mentioned.

132. X Q. At what price did he offer to sell it to you for at this interview at his house?

A. There were no terms mentioned nor offered.

133. X Q. What was the reason you did not purchase it at that time?

A. Purchase what? The invention? Because I did not want it.

134. X Q. Were you at that time a man of means, able to purchase such an invention, if you wanted it?

A. I can't tell whether I was able to purchase it or not, as there was no price on it at all.

135. X Q. How much were you worth at that time?

A. Do you mean in property? I was worth enough to buy whatever I wanted.

136. X Q. Question repeated.

A. I have answered that question.

137. X Q. Is that the best answer you can give?

A. Yes.

138 X Q. At that time how long had you been yourself baggage master and telegraph agent, when you first saw Mr. Barnes, as you have stated?

230 A. As I stated, I had been telegraph operator ever since the office was opened, and baggage master—positively I can't state, but indirectly; I had been there ever since I was old enough to do anything.

139. X Q. How long had you yourself personally been the responsible baggage master there at that time?

A. I was always responsible when I acted in that capacity; I cannot state the exact date when I was there under salary.

140. X Q. Well, about how long had you been there as baggage master under salary at that time?

A. I can't say; it might have been one year, or three or more.

141. X Q. How long after you were twenty-one before you were engaged there under salary as baggage master?

A. I don't say I was there till after I was twenty-one; I could give you exact dates if I had my books to refer to.

142. X Q. Then, if I understand you, the invention did not make sufficient impression upon you at the time of your interview with Barnes, at his house as you have stated, as to give you any desire to invest in it; I mean the corset springs?

A. No, sir; it did not.

143. X Q. At the first interview with Barnes, did he describe the construction and operation of the corset spring that he had invented?

231 A. He did in a general way, but not so that I understood it—so that I knew what it was.

144. X Q. Do you mean to say that the two members of the corset steel were exactly alike which he showed you at his house, as you have stated?

(Objected to as already answered and that the witness has stated in what they were alike and in what they were unlike.)

A. I stated as nearly as I could recollect the difference between the two members.

145. X Q. What did you understand to be the object or office of the slots and pins?

A. To allow the upper plate a little play in order to give it strength and elasticity.

146. X Q. Is that all?

A. And to hold the two plates together from slipping off from one another sidewise.

147. X Q. Anything else?

A. Nothing more than I have stated.

148. X Q. How could the plates of each spring slide off each other laterally, if they were riveted in the centre, as you have stated?

A. I don't know.

149. X Q. How do you know, then, that those pins and slots were to keep the springs from sliding off each other laterally?

232 A. I don't know, only as it was explained to me for that purpose or object.

150. X Q. Who was present at this interview between yourself and Mr. Barnes at his house?

A. Mrs. Barnes.

151. X Q. Any one else?

A. No, sir.

152. X Q. Did Mr. Barnes state to you, at that interview, that the pins and slots were to keep one of the plates of each of the springs from turning around on the other on the central fastening?

A. Not that I remember, particularly, more than I have stated.

153. X Q. Have you ever bought any corset springs of Jacob Strouse & Co.?

A. I can't say positively.

154. X Q. Have you ever offered any corset springs for sale, that you purchased of Marston, Bardwell, Castle & Co. or Jacobs, Strouse & Co.; and, if so, to whom and whom?

A. I don't say that I purchased any of Strouse & Co.; that I have from Bardwell, Castle & Co., and Marston, I have on hand.

155. X Q. Question repeated.

(This line of examination again objected to as immaterial and a waste of time.)

233 A. I think I have answered that question.

156. X Q. Question again repeated.

A. I state that I have not stated that I bought of Jacobs, Strouse & Co., and that those bought from Marston and Bardwell, Castle & Co., I have not sold or offered to sell.

157. X Q. What did you do with the bills that you got for those goods purchased from Mr. Marston and from Bradwell, Castle & Co.?

A. The bills I have on hand, and can produce them.

158. X Q. Where are they now?

A. That is more than I can say.

159. X Q. Whom did you give them to, and when did you last see them?

(Objected to, as he has not said that he gave them to anybody.)

A. I can't say when I last saw them; I don't say that I gave them to anybody.

160. X Q. Did you give them to anybody?

A. I can't answer that question as a whole, but I think they are on file; I can produce them.

161. X Q. On whose file, and where?

A. That I can't say, sir.

162. X Q. Where did you last see them?

A. That I can't say.

234 163. Are they or not now in your possession?

A. They are; and they are not in my possession.

164. X Q. Did you ever show them to Mrs. Egbert, or Mrs. Barnes, or George Cruttenden, jr.?

A. I cannot state positively; I may and I may not.

165. X Q. Do you know where those bills are now?

A. No, sir; not directly, but I can find them.

166. X Q. Where are the springs which you say you bought from Marston and from Bardwell, Castle & Co.?

A. In my house, or rather where I live.

167. X Q. Are the bills there too?

A. They may and they may not be; I am not positive.

168. X Q. Were they there when you last saw them?

A. I can't say.

169. X Q. Have you any definite idea as to where those bills are?

A. No, I have not.

170. X Q Did you ever pass them out of your possession?

A. I have and I have not.

171. X Q. If you have no definite idea where they are, how can you say that you can produce them?

A. By hunting for them.

235 172. X Q. Well, where would you hunt for them as the most likely place to find them?

(This line of examination again objected to as immaterial and frivolous, and gives notice to counsel for defendants that he will move at the hearing that it be struck out at the defendants' expense.)

A. I should commence where I first came into possession of them, and keep going until I found them.

173. X Q. Did Mr. Cruttenden ever ask you for those bills, or ask you to show them to him?

A. Not that I recollect.

174. X Q. Have you ever purchased any corset springs of Adams & Moulton, in Baltimore; and, if so, when?

A. I can't say positively; I may or I may not.

175. X Q. Do you think you have, according to your best recollection?

A. I don't know the house, or remember them, and I could not say.

176. X Q. Did you ever buy any corset springs of any house in Baltimore?

A. Yes, sir.

177. X Q. What house, and when?

A. I can't say what house, or remember any date, without referring to bills.

178. X Q. About when?

A. During the year 1872.

236 179. X Q. Of how many houses did you purchase corset steels in Baltimore?

A. I can't say.

180. X Q. Were the springs of those corset steels made of single or double plates?

A. Double plates.

181. X Q. What was your object in purchasing them?

A. To make money on.

182. X Q. How?

A. Bartering in them or with them.

183. X Q. Did you ever sell or barter any of those corset springs?

A. I have not sold them; I have them yet.

184. X Q. Did you ever try to sell or barter them?

A. I never tried to sell them or barter them.

185. X Q. Did you ever purchase any corset springs in Philadelphia, besides those purchased of Mr. Marston, and when?

A. Yes, and about the same time.

186. X Q. When was that?

A. I can't state the date; within the last year; in 1872.

187. X Q. From whom did you purchase them and for what purpose?

A. I don't remember what house; and for the same purpose that I have stated.

237 188. X Q. Have you sold, or offered for sale or barter, any of those springs?

A. You have my same answer as before.

189. X Q. Were they single or double springs?

A. Mostly double, I think.

190. X Q. Were they not all double?

A. They may and they may not be. I have not examined them thoroughly.

191. X Q. Did you buy corset springs of more than one house in Philadelphia, and if so, of how many?

A. I have stated more than one. I can't state how many.

192. X Q. After you purchased the corset springs from Mr. Marston, as you have stated, did you see him at Barnes & Cruttenden's in this city?

A. I did.

193. X Q. Did you then say to him in regard to the purchase you had made from him, or in regard to any of the circumstances attending it, that you had to use some artifice in these matters, or words to that effect?

A. Not that I remember. I think not.

194. X Q. Did not Mr. Marston say to you at that time that if he had known or you had told him who you were, or that you were from Barnes & Cruttenden's, he would have shown you more attention or politeness, or words to that effect?

A. I don't recollect his conversation enough to state; we had but a few words at most, if I recollect right.

238 195. X Q. Do you now recollect anything that was said at that conversation?

A. Nothing that I could state positively.

196. X Q. Now that your memory has been perhaps refreshed in regard to the conversation, state what is your best recollection in answer to question 193?

(Objected to as substantially answered in answer to cross-question 195.)

A. I cannot answer any more definitely than I have stated.

197. X Q. Were you at that time in the employ of Barnes & Cruttenden?

A. I can't state that date, nor do I recollect whether I was or no.

198. X Q. What was the nature of your employment, and what was your salary while you were employed by Barnes & Cruttenden?

A. My employment was as I have stated. My salary was what I would ask. I took Mr. Cruttenden's position when he was away, and did what he does every day. I have before stated that.

199. X Q. Did you ever travel for that house?

A. No, sir.

200. X Q. Are you in the habit of keeping a memorandum book, and for what purpose?

A. I do, for all business transactions.

239 201. X Q. Then your memorandum book will show from whom you purchased corset springs in 1872, will it not?

A. I can't say whether it will or no—all of them.

202. X Q. Will you produce such memorandum book before the examiner, and have a record made from it of the names of the parties, the dates of the purchases, and the numbers and kinds of springs so purchased by you?

(Counsel for complainant offers to use his influence to produce said items from the book before the examiner.)

A. I will.

203. X Q. Is there anything in that book relating to the reason why you purchased those springs?

A. I can't say whether there is or no.

204. X Q. If there is, will you also make a memorandum from it, to form a part of your testimony in regard to that?

(Counsel for complainant makes the same offer regarding this matter as regarding the other items.)

A. I will.

JOSEPH H. STURGES.

Subscribed and sworn to before me, this 5th day of March, 1873.

JOSEPH GUTMAN, JR.,
Examiner, &c.

Adjourned to March 6, 1873, at 10 a. m.

240 NEW YORK, *March* 6, 1873—10 a. m.

Counsel present as before.

ISRAEL BOWER, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, counsel for complainant, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Israel Bower; I am sixty-nine years old; I reside at 299 West Twelfth street, or 26 Abingdon place, New York City; at the present time I am out of business; the greater part of the last ten months I spent in Europe.

Q. 2. Did you ever know Samuel H. Barnes? If yea, when did you first become acquainted with him?

A. Yes; my first acquaintance with Mr. Barnes was on September 2, 1862.

Q. 3. Where did this acquaintance take place?

A. At my place of residence, 299 West Twelfth street. He came there to live with us.

Q. 4. How long did he live with you there, or up to what time?

A. He remained there until the 9th of July, 1863. He was there from the 2d of September, 1862. He remained there until the 9th of July, 1863. He then got married. About six weeks after that he re-
241 turned with his wife, and both remained there till 1864, September 7th. They left September 7th, 1864.

Q. 5. Did you ever know of his having a pair of corset steels? If yea, when and where first? and state the circumstances.

A. Yes, I did. He and his wife occupied the fourth story front hall bedroom, and in that bedroom was the first time I saw the steels. He was getting them up. He had a sample in steels, and he also had a sample in, I think, wood or coarse paper. I saw him to work at these

things, and I asked him what he was doing or making. He told me what they were, and showed me the principle on which they would act, different from any others. He was at that time about getting out a patent for improving, tanning, or polishing leather. I was aware of that fact, and I asked him what it was that he wouldn't be getting up next. I saw no more of these steels, that I can recollect, until the spring of 1866. That is, I saw no more as coming from him. He had given my wife some. He was then living in Jane street, right in the rear of my house. I used to call on him about once a week, sometimes twice. I think, on this occasion, it was in the month of May, but it might have been in the fore part of June that I called in there, and he had several pairs of the steels looking them over. He told me he was going out to get them patented right away. I asked him why it was that he delayed so long; why he hadn't done it before. The reason, he stated, was that he had been sick, and had not felt like attending to it. He at-
242 tributed it to his sickness, why he hadn't attended to it; but now he was going to get the patent right away, and go into the business. He died, I think, the 9th of August in the same year.

Q. 6. When was it that you first saw the pair of steels and the model in the hall bedroom?

A. I can't tell you the month nor the day of the month. In fact, it might have been either in 1863 or 1864. He came there with his wife in August, 1863, and he left there with his wife in September, 1864, and it was during that time that he and his wife boarded there.

Q. 7. Did they ever board there with you afterwards?

A. No; they never boarded there together after that.

Q. 8. How did the pair of corset steels which you saw in the hall bedroom correspond with the pair marked Complainant's Exhibit D?

(Objected to as not the best evidence.)

A. To the best of my recollection, these look very much like them.

Q. 9. State how those which you saw in 1866, and which Mr. Barnes said he was about to patent, corresponded with those which you saw in the hall bedroom in 1863 or 1864.

(Same objection, and also as incompetent and immaterial.)

A. I have no doubt in my mind that they were of the very same pattern that I saw in that room. I hadn't any doubts of it then; I have none now.

243 Q. 10. You have stated that he showed you the "principle on which they would act different from any others"; please state what you recollect on that subject.

(Objected to as incompetent.)

A. Mr. Barnes explained to me the manner of their working. Now, the only thing that I learned from him that I remember that was different from any other was just this: the working of those rivets on the strain or press of the corset would give instead of breaking, consequently they would stand a greater pressure by their giving or rather yielding to the pressure.

And being cross-examined, he says:

X Q. 11. I think you said that when you saw those corset steels in that bedroom in your house Mr. Barnes was at work getting them up. I suppose you mean by that that he had not got them completed. Is that what you mean?

(Counsel for complainant requests the examiner to read from the answer of the witness the words immediately following those quoted by the

counsel for defendant, in order that the witness may not be misl
misquotation.)

A. I could not say that that is just what I mean. He showed n
full operation of the steels, and at that time it occurred
244 that he had finished this pair with which he was explainin
system to me. I think so yet, sir.

ISRAEL BOW

Subscribed and sworn to before me this 6th March, 1873.

JOSEPH GUTMAN, JR.,
Exami

Adjourned till 3 p. m. same day.

NEW YORK, *March* 6, 1873—3 p.

Present, counsel as before.

Mrs. M. LOUISA BOWER, a witness of lawful age, produced o
part of the complainant, having been by me first duly cautioned
sworn to testify the truth, the whole truth, and nothing but the t
in the matter of controversy herein, and being examined by Mr. WI
counsel for complainant, deposes and says as follows:

1. Q. What is your name and residence?

A. My name is M. Louisa Bower. I reside at No. 27 Christo
street, New York City.

2. Q. Are you the daughter-in-law of Israel Bower?

A. I am.

3. Q. Were you acquainted with Samuel H. Barnes in his life-t

A. I was.

245 4. Q. Do you recollect of his residing at the house of
father-in-law in that part of West Twelfth street known as A
don place—299 West Twelfth street?

A. I do.

5. Q. Do you remember Mr. Barnes moving from your father-in-
house there to Jane street?

A. I do.

6. Q. Did you ever hear your father in-law speak about Barnes
ing anything to do with steel springs?

(Objected to as incompetent.)

A. Several times.

7. Q. Was the first time you heard him speak of this matter befo
after the removal to Jane street, according to your best recollectio

(Objection continued.)

A. I think it was before.

Mrs. M. LOUISA BOWE

Subscribed and sworn to before me this 6th day of March, 1873.

JOSEPH GUTMAN, JR.,
Examiner, d

Adjourned to March 8, 1873, at 11 a. m.

JOSEPH GUTMAN, JR.,
Exan.in

246 U. S. circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX, &c.,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK, and Henry S. Magrane.

Proofs for final hearing, taken on the part of the complainant in the above cause, under and pursuant to the 67th rule in equity, as amended, before me.

W. H. WILLIAMS,
Special Examiner.

PORTAGE, CAMBRIA COUNTY, PA.,
March 7th, 1873—11 a. m.

Present, W. C. Witter, counsel for complainant, and Thomas P. How, counsel for defendants.

Mrs. EMILIE D. MARTIN, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by W. C. WITTER, for complainant, deposes and says as follows:

247 Q. 1. What is your name and residence?

A. Mrs. Emilie D. Martin. My residence is Portage, Cambria County, Penn.

Q. 2. What was your name and residence in 1863?

A. Miss Emilie Doolittle. My residence was then in Waterbury, Conn.

Q. 3. State what circumstance, if any, having relation to a pair of corset steels, you remember as having taken place at about this time.

A. At the house of William Cargill. He requested me to come up stairs in the garret. He then handed me a pair of corset steels. I think, from his manner, he would have had me take them, but I handed them back. Then he asked me what I thought of them. I said they were a good thing.

Q. 4. Did you ever put them into your corsets or wear them?

A. No.

Q. 5. State whether you or any one else, to your knowledge, ever sewed them into a pair of corsets?

A. I never knew of any person.

Q. 6. About when was it that this circumstance took place?

A. In the fall of 1863.

Q. 7. Did Mr. Cargill ever show you more than one pair?

A. He never did.

248 Q. 8. Could you describe that pair of corset steels?

A. It had a strengthening piece in the centre of the corset.

Q. 9. And is that all you remember about it?

A. It is.

Q. 10. If you were shown any particular pair of corset steels, would you be able to swear whether they were the ones shown you at this time?

A. I could not.

Q. 11. Were you boarding with Mr. Cargill at this time?

A. No, sir; I was staying there over night.

counsel for defendant, in order that the witness may not be misled by misquotation.)

A. I could not say that that is just what I mean. He showed me the full operation of the steels, and at that time it occurred to me
244 that he had finished this pair with which he was explaining the system to me. I think so yet, sir.

ISRAEL BOWER.

Subscribed and sworn to before me this 6th March, 1873.

JOSEPH GUTMAN, JR.,
Examiner.

Adjourned till 3 p. m. same day.

NEW YORK, *March* 6, 1873—3 p. m.

Present, counsel as before.

Mrs. M. LOUISA BOWER, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, counsel for complainant, deposes and says as follows:

1. Q. What is your name and residence?

A. My name is M. Louisa Bower. I reside at No. 27 Christopher street, New York City.

2. Q. Are you the daughter-in-law of Israel Bower?

A. I am.

3. Q. Were you acquainted with Samuel H. Barnes in his life-time?

A. I was.

245 4. Q. Do you recollect of his residing at the house of your father-in-law in that part of West Twelfth street known as Abingdon place—299 West Twelfth street?

A. I do.

5. Q. Do you remember Mr. Barnes moving from your father-in-law's house there to Jane street?

A. I do.

6. Q. Did you ever hear your father in-law speak about Barnes having anything to do with steel springs?

(Objected to as incompetent.)

A. Several times.

7. Q. Was the first time you heard him speak of this matter before or after the removal to Jane street, according to your best recollection?

(Objection continued.)

A. I think it was before.

Mrs. M. LOUISA BOWER.

Subscribed and sworn to before me this 6th day of March, 1873.

JOSEPH GUTMAN, JR.,
Examiner, &c.

Adjourned to March 8, 1873, at 11 a. m.

JOSEPH GUTMAN, JR.,
Examiner.

246 U. S. circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX, &c.,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK, and Henry S. Magrane.

Proofs for final hearing, taken on the part of the complainant in the above cause, under and pursuant to the 67th rule in equity, as amended, before me.

W. H. WILLIAMS,
Special Examiner.

PORTAGE, CAMBRIA COUNTY, PA.,
March 7th, 1873—11 a. m.

Present, W. C. Witter, counsel for complainant, and Thomas P. How, counsel for defendants.

Mrs. EMILIE D. MARTIN, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by W. C. WITTER, for complainant, deposes and says as follows:

247 Q. 1. What is your name and residence?

A. Mrs. Emilie D. Martin. My residence is Portage, Cambria County, Penn.

Q. 2. What was your name and residence in 1863?

A. Miss Emilie Doolittle. My residence was then in Waterbury, Conn.

Q. 3. State what circumstance, if any, having relation to a pair of corset steels, you remember as having taken place at about this time.

A. At the house of William Cargill. He requested me to come up stairs in the garret. He then handed me a pair of corset steels. I think, from his manner, he would have had me take them, but I handed them back. Then he asked me what I thought of them. I said they were a good thing.

Q. 4. Did you ever put them into your corsets or wear them?

A. No.

Q. 5. State whether you or any one else, to your knowledge, ever sewed them into a pair of corsets?

A. I never knew of any person.

Q. 6. About when was it that this circumstance took place?

A. In the fall of 1863.

Q. 7. Did Mr. Cargill ever show you more than one pair?

A. He never did.

248 Q. 8. Could you describe that pair of corset steels?

A. It had a strengthening piece in the centre of the corset.

Q. 9. And is that all you remember about it?

A. It is.

Q. 10. If you were shown any particular pair of corset steels, would you be able to swear whether they were the ones shown you at this time?

A. I could not.

Q. 11. Were you boarding with Mr. Cargill at this time?

A. No, sir; I was staying there over night.

And being cross-examined by THOS. P. HOW for defendants, she says:

X Q. 12. Please look at the corset springs now shown you, marked Def't's Ex. 1, R. E. S., Ex'r, and state whether you ever saw them before.

A. Not that I know of, although I have seen a pair like them; I could not swear that these are the ones.

X Q. 13. When and where did you see a pair like them?

A. In the fall of 1863, in Mr. Cargill's garret; namely, the pair I have spoken of.

X Q. 14. Do you see any difference between these springs (Ex. 1) and the ones then shown you?

A. I do not, as both had strengthening pieces.

249 X Q. 15. Do you know what led to these springs then shown you being made with strengthening pieces?

A. I do not, for I was not in confidence with the family.

X Q. 16. And you do not recollect having worn those springs?

(Objected to, as the witness has said she did not wear them.)

A. I do not.

X Q. 17. Do you recollect any subsequent conversation with Mr. Cargill about those springs?

A. We were strangers; his wife's niece was my chum at school; therefore Mr. Cargill and myself had no conversations.

X Q. 18. Do you recollect any conversations with Mrs. Cargill about them, or with any other member of the family?

A. I met Mrs. Cargill; asked her how her husband was succeeding; she said she thought he was going to do well; nothing more.

X Q. 19. Do you remember Mr. and Mrs. Cargill visiting you after your school commenced?

A. Mrs. Cargill called on me at the close of school one day, and Mr. Cargill came out to an evening debate.

250 X Q. 20. Do you recollect at that time Mr. Cargill having spoken of the corset springs?

A. I do not.

X Q. 21. You don't then recollect of his asking you at that time how you liked them, or what you thought of them, do you?

A. Never having broken a pair of corset steels, I had no need to replace them with others; therefore could not speak of that that I knew nothing of, and had not been requested by Mr. Cargill to rip out a pair of corset steels for one of his manufacture; I do not recollect of his asking me as stated in the question.

Mrs. EMILIE D. MARTIN.

Subscribed and sworn to before me this 7th day of March, 1873.

W. H. WILLIAMS,
Special Examiner.

NEW YORK, *March* 8, 1873—11 a. m.

Examination further adjourned to same day at 2 p. m.

JOSEPH GUTMAN, JR.,
Examiner.

251 NEW YORK, *March* 8, 1873—2 p. m.

Present, Mr. Gifford, counsel for complainant, and Mr. How, counsel for defendants.

Examination adjourned to March 12, 1873, at 11 a. m.

JOSEPH GUTMAN, JR.,
Examiner.

252 N. Y., *March* 12, 1873—11 a. m.

Adjourned to March 28, 1873, at 10 a. m.

MARCH 28, 1873—10 a. m.

Examination adjourned to April 3, 1873, at 12 m.

APRIL 3, 1872—12 m.

Present, Mr. Witter, counsel for complainant, and Mr. Howe, counsel for defendants.

SAMUEL H. DOUGHTY, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and, being examined by Mr. WITTER, deposes and says as follows:

1. X Q. What is your name, age, residence, and occupation?

A. My name is Samuel H. Doughty; I am forty-eight years of age; I reside at Nyack, N. Y.; I am a manufacturer at New York City.

2. X Q. Are you acquainted with Philip Lippmann, of this city?

A. I am.

3. X Q. Are you acquainted with his general reputation for truth and veracity?

A. Yes.

4. X Q. What *in* his general reputation in the community for truth and veracity?

A. Bad.

5. X Q. Would you believe him under oath?

A. I would not.

253 6. X Q. Have you known or heard of him as an infringer of letters patent of the United States?

(Objected to as irrelevant and incompetent.)

A. I have.

7. X Q. What is the reputation of Mr. Lippmann among merchants, so far as you know, for honesty and fair dealing?

(Objected to as incompetent.)

A. I believe it to be decidedly bad.

And being cross-examined by Mr. HOW, counsel for defendants, he says:

8. X Q. Of what are you a manufacturer?

A. Ladies' belts.

9. X Q. Under a patent?

A. I manufacture ladies' belts under a patent.

10. X Q. Did you ever have any personal difficulty with Mr. Lippmann?

A. His firm took a license from me to manufacture bustles about a year ago, agreeing to pay a royalty and make monthly returns under oath, and I have called on them many times, but have not been able to get any returns or royalties, as agreed under the license.

11. X Q. Did you ever have any business connections with Mr. Lippmann previous to the time of the granting of this license?

A. Mr. Lippmann has called to see me many times, ostensibly on business connected with licenses to use my patents—several times.

254 12. X Q. How long have you known Mr. Lippmann?

A. Ten or twelve years.

SAMUEL H. DOUGHTY.

Subscribed and sworn to before me this 3d day of April, 1873.

JOSEPH GUTMAN, JR.,
Examiner.

LYCURGUS BROWER, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, deposes and says, as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Lycurgus Brower; I will be twenty-one years old in May; I reside at 71 Jane street, New York City; I am a shipping clerk.

2. Q. Are you acquainted with Philip Lippmann, of this city?

A. Yes, sir.

3. Q. Are you acquainted with his general reputation for truth and veracity?

A. Yes, sir.

4. Q. What is his general reputation in the community for truth and veracity?

A. Very bad.

5. Q. How long have you been acquainted with him and with his character in these particulars?

A. For the past three years.

6. Q. Would you believe him under oath?

255 A. I would not.

7. Q. Have you any personal interest in this suit?

A. None whatever.

And being cross-examined by Mr. HOW, he says:

8. X Q. By whom are you employed as shipping clerk?

A. E. & H. T. Anthony & Co.

9. X Q. Have you made an affidavit heretofore in this cause?

A. Yes, sir.

10. X Q. Did you make an affidavit heretofore in the case of Frances Lee Barnes, as executrix, against Carlos Bardwell and others?

A. Yes, sir; I have.

11. X Q. How long have you been employed by E. & H. T. Anthony?

A. About two years.

12. X Q. And twice during this time you have been to the defendants' place of business, in Howard street, for the purpose of buying corset springs for the complainant to use as evidence against the defendants, have you?

A. I have purchased there for myself.

13. X Q. How came you to purchase them for yourself?

A. So that I could realize something by the purchase.

14. X Q. Well, how did you expect to realize anything by the purchase?

A. By again selling them.

256 15. X Q. Whom to?

A. Barnes & Cruttenden.

16. X Q. In other words, they sent you there to buy those springs, did they not?

A. No, sir.

17. X Q. What made you think, then, that you could sell them to Barnes & Cruttenden?

(Objected to, as the witness has not stated his thoughts on the subject.)

A. At the time I purchased them I did not think so.

18. X Q. Did you not state, in your answers to cross-questions 13, 14 and 15, that you purchased the springs so that you could realize something by the purchase by again selling them to Barnes & Cruttenden?

A. I did not state that I could realize anything by selling them to Barnes & Cruttenden.

19. X Q. How many of these corset springs did you purchase at each of these times before referred to?

A. I don't recollect.

20. X Q. About how many?

A. About seven dollars' worth.

21. X Q. Who, if any one, gave you the money to purchase them with?

A. No one, sir.

22. X Q. Who did you expect to sell them to when you made the purchases, if not to Barnes & Cruttenden?

A. No one.

257 23. X Q. You had never been in the corset spring business, had you?

A. I was with a house that dealt in corset springs.

24. X Q. What house?

A. Lewis, Titus & Cooke.

25. X Q. How long ago?

A. About three years ago.

26. X Q. Since which time you have had no connection with that house, have you?

A. No, sir.

27. X Q. How many times have you been to S. A. Castle & Co.'s, or Bardwell, Castle & Co.'s, in Howard street, in this city, to purchase springs for these suits?

A. These springs I purchased for myself.

28. X Q. Well, how many times did you go to purchase springs for yourself, as you say?

A. Twice, that I recollect of.

29. X Q. Didn't you go three times?

A. I recollect of but twice.

30. X Q. And in both these cases you sold the springs to Barnes & Cruttenden, did you?

A. Yes, sir.

31. X Q. What made you think you could sell them to Barnes & Cruttenden?

A. I knew that they were purchasing.

32. X Q. Well, how did you know they would purchase them?

A. I was informed so.

33. X Q. By whom?

A. By different parties.

258 34. X Q. Question repeated.

A. I have answered that once, haven't I?

35. X Q. I think not; will you answer it now?

A. I was informed by Mr. Sargeant.

36. X Q. Is that the whole of your answer?

A. I guess that answers the question.

37. X Q. What other parties besides Mr. Sargeant so informed you?

A. Mr. George Cruttenden, jr.

38. X Q. In other words, Mr. Cruttenden arranged with you to go and buy these springs, did he?

A. I offered Mr. Cruttenden my services.

39. X Q. And you really bought them for him, then?

A. I bought those steels for myself.

40. X Q. And you did not buy them for Mr. Cruttenden then, or for Barnes & Cruttenden?

A. I bought them for myself.

41. X Q. Please answer the last question directly?

A. I don't know how I can answer it any other way.

42. X Q. Can't you state whether you bought them for Mr. Cruttenden, or for Barnes & Cruttenden, or not?

A. I stated that I bought them for myself twice.

43. X Q. Do you mean to say that you did not buy them for Barnes & Cruttenden, or for Mr. Cruttenden?

A. I mean to say that I bought them for myself.

44. X Q. Question repeated, and a direct and definite answer required.

A. I mean to say that I bought them for myself.

259 45. X Q. Is that the only answer you will give to the question? (This line of examination objected to, as having no bearing either directly or collaterally on the direct examination of this witness.)

A. I can give no other.

46. X Q. Now, isn't it true that in both these cases you were engaged by Barnes & Cruttenden, or by some one acting for them, to buy these springs for the purposes of suit; and was it not understood at the time that you were to purchase these springs and then make an affidavit of such purchase, to be used in a suit against the parties of whom you purchased them?

A. No, sir.

47. X Q. What is the Christian name of the Mr. Sargeant of whom you testify as having told you that Messrs. Barnes & Cruttenden would buy the springs if you purchased them?

A. I don't know, sir.

48. X Q. Where is he now employed?

A. I don't know.

49. X Q. Where was he employed when you had this understanding with him?

A. With Bardwell, Castle & Co., I think.

50. X Q. And these assurances, that if you bought the springs, Barnes & Cruttenden would purchase them, were the reasons of your buying them, or what led you to buy them, were they not?

260 A. I don't exactly understand that question. (After having the question again read to him and explained to him, witness answers): Yes, sir.

51. X Q. Then what made you say, in answer to cross-question 17, that at the time you purchased these springs you did not think you could sell them to Barnes & Cruttenden?

A. I was told so after the purchase was made.

52. X Q. Then how came you to say, in answer to cross-question 50, that these assurances, that Barnes & Cruttenden would purchase them, were the reasons of your buying them, or what led you to buy them?

A. I bought them to realize something on the purchase.

53. X Q. Question repeated.

A. I bought them to realize on them.

54. X Q. Is that all the answer you can give to that question?

A. Yes, sir.

55. X Q. At the time you purchased these springs, as you have stated, did you not understand that you were to make affidavits about them?

A. No, sir.

56. X Q. In neither case?

A. In neither case.

57. X Q. Do I understand that to be the case when you sold them to Barnes & Cruttenden?

A. Yes, sir.

58. X Q. How long after such purchase, in each case, before you understood that you were to make an affidavit about them?

A. I don't recollect the time.

261 59. X Q. About how long?

A. I can't remember about how long it was.

60. X Q. Was it more or less than two weeks?

A. I don't remember.

61. X Q. How long have you known Philip Lippmann?

(Objected to as already answered.)

A. About three years.

62. X Q. Have you ever had any business dealings with him?

A. Yes, sir.

63. X Q. When?

A. I don't recollect the time; in the year 1872.

64. X Q. What business was it?

A. I purchased goods from him.

65. X Q. What kind of goods?

A. Corset springs.

66. X Q. How came you to purchase corset springs from him?

A. I purchased them to realize something from the purchase.

67. X Q. How?

A. By again selling them.

68 X Q. To whom?

A. To anybody.

69 X Q. Had you any particular one in mind at the time, to whom you proposed to sell them?

A. Yes, sir.

70. X Q. Who?

A. To Barnes & Cruttenden, or George Cruttenden, jr.

262 71. X Q. And you purchased them then for Barnes & Cruttenden, did you?

A. I purchased them for myself.

72. X Q. And did not purchase them for Barnes & Crittenden?

A. I purchased them for myself.

73. X Q. Please answer the question.

A. I don't know as I can give any other answer to it.

74. X Q. Will you say that you did not purchase them for Barnes & Cruttenden?

A. I have already said that I purchased them for myself.

75. X Q. (Question repeated.) Please answer the question, yes or no.

A. No.

76. X Q. Then, if I now understand you, you will not say that you did not purchase them for Barnes & Cruttenden; is that correct?

A. I have said no.

77. X Q. Do you mean by your two last answers that you did or did not purchase the springs for Barnes & Cruttenden?

A. I purchased those springs for myself.

78. X Q. Did you purchase them for Barnes & Cruttenden; answer definitely, yes or no?

A. I have already answered that question.

79. X Q. No matter; answer it now definitely, yes or no?

A. No.

263 80. X Q. Who, if any one, informed you that Barnes & Cruttenden would purchase the springs, if you bought them from Mr. Lippmann?

A. I don't recollect.

81. X Q. But you had such information, did you, before you purchased the springs?

A. Yes, sir.

82. X Q. How much profit on these springs were you informed you would get from Barnes & Cruttenden and how much did you get?

A. I was not informed that I would get any; the amount that I got I don't recollect.

83. X Q. Were you given to understand that you would get any profit from Barnes & Cruttenden on those springs?

A. I expected to realize something on them.

84. X Q. Before you purchased these springs from Lippmann, did you have any conversation with George Cruttenden, jr., about making such purchase?

A. Yes, sir.

85. X Q. And you purchased them at the instance of Barnes & Cruttenden, or of George Cruttenden, jr., with the understanding that he, or they, would pay you for making such purchase, did you?

A. He or they did not say they would pay me; there was no such understanding.

86. X Q. Did you purchase them at the instance of Barnes & Cruttenden?

A. No, sir.

87. X Q. Did you ever have any other dealings with Philip Lippmann, except the purchase of those springs?

264 A. No, sir; not that I recollect of.

88. X Q. Did you buy corset springs from other parties; and if so, from whom, and when?

A. I have bought them from other parties—the time I cannot recollect. I cannot think, at present, of the parties' names, excepting the two that I have given.

89. X Q. Did you make an affidavit, or affidavits, in favor of Mrs. Barnes or Mrs. Egbert against any other parties?

A. To the best of my recollection, I don't think I did.

90. X Q. Will you swear positively that you did not make an affidavit in favor of Mrs. Barnes or Mrs. Egbert against Jacobs, Strouse & Co.?

A. I will not.

91. X Q. Did you at any time purchase corset springs of Jacobs, Strouse & Co.; and when, if at all?

(Objected to, as the witness has said that he did not remember the names of any other parties of whom he may have purchased corset springs.)

A. I don't recollect from whom I purchased them.

92. X Q. Don't you remember purchasing from Jacobs, Strouse & Co.?

(Objected to as already answered, and counsel for defendants is requested to confine his cross-examination to proper topics, because the complainant has only two more days in which to close her testimony.)

A. I don't recollect the firm name.

265 93. X Q. Did you not represent to Jacobs, Strouse & Co. that you belonged up the Hudson River?

A. Yes, sir; I don't know to whom I represented this.

94. X Q. And at this time did you not purchase corset springs of them?

A. I have already stated that I don't recollect the firm's name.

95. X Q. What did you do with the corset springs you purchased from other parties besides Bardwell, Castle & Co., S. A. Castle & Co., and Philip Lippmann?

(Objected to, as witness has not said that he purchased any of S. A. Castle & Co.)

A. I purchased no springs of S. A. Castle & Co., that I recollect of.

96 X Q. Have you never sworn that you did?

A. I don't recollect, sir.

97. X Q. What is the business of E. & H. T. Anthony?

A. Chromos, stereoscopic views, views, graphoscopes, and photographers' materials.

98. X Q. Please, now, to answer cross-question 95.

A. I don't know as I can give any other answer to that question. I have not any recollection at present of purchasing goods of S. A. Castle & Co.

99. X Q. The question is what you did with the corset springs which you purchased from other parties besides those named in the question.

266 (Question objected to as tending to mislead the witness into the admission that he has purchased corset springs of S. A. Castle & Co., of which he says that he has no present recollection.)

A. I have no recollection of purchasing goods, at present, from S. A. Castle & Co.

100. X Q. Question repeated and an answer required.

A. I can give no other answer.

101. X Q. Cannot you state what you did with the corset springs purchased from other parties?

(Same objection as to cross-question 99.)

A. I say that I have no recollection of purchasing corset springs, at present, from S. A. Castle & Co.

102. X Q. My question does not ask about your recollection of having purchased corset springs from S. A. Castle & Co., but simply asks what you did with corset springs which you purchased from anybody except the persons named in the question.

(Objected to as assuming that the witness has said that he bought corset springs of S. A. Castle & Co., as tending to mislead the witness.)

A. I purchased no corset springs that I recollect of from S. A. Castle & Co.

103. X Q. Will you state what you did with corset springs which you purchased, that you did not purchase from Bardwell, Castle & Co., S. A. Castle & Co., or Philip Lippmann?

(Same objection as to preceding question.)

267 A. I can't understand that question, sir.

104. X Q. The question asks you to state what you did with corset springs purchased from any one except the parties mentioned in the last question, and does not ask in relation to your purchases from those parties at all.

(Same objection as to the preceding question.)

A. I don't understand that question.

105. X Q. What did you do with corset springs which you purchased

from any other party, Philip Lippmann, Bardwell, Castle & Co., and S. A. Castle & Co., being excluded from the question?

(Question objected to as only another form of the question immediately preceding, and as therefore tending to mislead the witness into the admission that he has bought corset springs of S. A. Castle & Co.)

A. I have no recollection at present of purchasing goods of S. A. Castle & Co.

106. X Q. I do not ask you now whether you did or not, but ask you what you did with corset springs which you purchased from anybody not named in the last preceding question.

A. I sold them.

107. X Q. To whom?

A. To Barnes & Cruttenden.

108. X Q. Have you had any further business transaction with Philip Lippmann than the one you have stated?

268 A. Not that I recollect of.

LYCURGUS BROWER.

Subscribed and sworn to before me this 3d day of April, 1873.

JOSEPH GUTMAN, JR.,
Examiner, etc.

GEORGE CRUTTENDEN, jr., called as a witness on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is George Cruttenden, jr.; I am forty years old; I reside at Montclair, N. J.; I am a manufacturer and dealer in corset steels.

2. Q. Are you a member of the firm of Barnes & Cruttenden?

A. I am.

3. Q. Are you acquainted with Philip Lippmann, of this city, and who has testified in this suit, and with his general reputation for truth and veracity?

A. I am.

4. Q. How long have you been acquainted with him and his general character and reputation in the community?

A. Between three and four years.

5. Q. What is his general reputation for truth and veracity in this community?

269 A. It is very bad.

6. Q. What is the reputation among merchants, so far as you know, of Mr, Lippmann for honesty and fair dealing?

(Objected to as incompetent.)

A. His reputation for honesty and fair dealing is very bad, financially and morally.

7. Q. Would you believe Mr. Lippmann under oath?

A. I would not.

8. Q. State who is present attending on this examination on the part of the defendants and what you believe as to the existence of a combination to destroy the patent on which this suit is brought.

(Objected to as irrelevant and incompetent.)

A. A junior member of the firm of S. A. Castle & Co.; Mr. Marston, of the firm of Disston, Morss & Co., who are the owners of the patent under which is made the corset steel which the complainant is suing in

this case; Mr. Meyer, also, of the firm of Jacobs, Strouse & Co., who are infringers of complainant's patent; a Doctor Brown, who was the inventor of the drawing-out principle of defendant's corset steel—said Brown informed me, since this suit commenced, that he still had an interest in the corset steel alluded to; Mr. Fitzpatrick, who has testified in this case, and who also has a patent for a similar steel to that of complainant; Mr. Cargill, who has also testified in this case, is also a patentee of one or more inventions for double corset steels; Mr.
270 Philip Lippmann, an infringer of complainant's patent, has also been giving evidence and in apparent active consultation with defendants during the progress of this case. I believe from what Mr. Lippmann has told me, from what Mr. Marston has told me, and from what Mr, Meyer has told me, and from the rumors which have reached me of the talk by agents and interested parties connected with these various patented steels that they have put their time, knowledge, money, and influence together for the purpose of breaking down complainant's patent or compelling her to license them for a nominal sum.

9. Q. How did you understand the last question to read, "who is present," or "who has been present," &c.

A. Who has been present.

10. Q. Now, please state who is present.

(Objected to as irrelevant.)

A. Besides counsel, Mr. Marston, before alluded to, and Mr. Meyer, also previously spoken of by me.

11. Q. Look at your answer to cross-question 38 of your deposition, contained in defendant's record, fol. 179, line 7 of said folio, and state how you intended that that line should read when you gave your testimony.

(Objected to as incompetent.)

A. "Rigidly riveted through both the plates at their centres, and they."

And being cross-examined by Mr. How, he says:

271 12. X Q. What dealings, if any, have you had with Philip Lippmann?

A. No dealings with him.

13. X Q. Have you ever corresponded with him?

A. I think Barnes & Cruttenden, of which I am a member, wrote him a letter—the letter was written by me.

14. X Q. Did you ever write him any letters in your own name?

A. This letter that I referred to may have been signed George Cruttenden, jr., as I sometimes sign the firm's letters thus; but that is the only letter that I recollect writing to Lippmann.

15. X Q. Did the firm of Barnes & Cruttenden ever send him other letters?

A. Not that I know of.

16. X Q. Did that letter contain a request to meet you at some place named on some matter of business?

A. I do not recollect the contents of that letter and cannot say.

17. X Q. Nor its purpose?

A. I do not recollect its purpose.

18. X Q. Did you never write him asking him to meet you at Mr. Gifford's office for some business purpose?

A. I don't recollect that I ever did.

19. X Q. Did you never ask him to call at Mr. Gifford's?

A. I did ask or suggest to Mr. Lippman that he call on Mr. Gifford; this I did because he stated that he had made corset steels like com-

plainant's and could prove the same, and I told him that I did not
272 believe it and asked him to satisfy my mind on that subject by submitting the steel and the facts to Mr. Gifford, counsel for complainant in this case.

20. X Q. Was any such request contained in the letter above referred to?

A. I do not recollect.

21. X Q. What were the circumstances of your first becoming acquainted with Philip Lippmann?

A. I think I went to his place of business; I desire all the foregoing to be erased; I will now state that I believe Lippman came to the office of Barnes & Cruttenden, and introduced himself to me, and that that was the way I became acquainted with him.

22. X Q. Did you do any business with him at that time?

A. I did not.

23. X Q. Since you became acquainted with Mr. Lippman, have you ever been at his place of business, and about how often?

A. I think I have been to Mr. Lippman's place twice, and at periods three or four months apart.

24. X Q. When?

A. During the years 1871 or 1872.

25. X Q. What persons have you heard speak unfavorably of Mr. Lippmann's reputation for truth and veracity in this community?

A. Mr. H. S. Hawks, now of the firm of L. M. Bates & Co.; Mrs. Stowell, Bowery, above Houston street; Mr. S. H. Doughty, of Canal street; Raymond & Courson, lawyers, 247 Broadway; Dickerson & Beman, Park Row; Mr. West, of West, Bradley & Cary, Broad-
273 way; Mr. Batchelder, of the firm of Thompson, Langdon & Co., Broadway; a partner of Mr. Young, of Boston, whose name is George P. Bryant. I have also heard him spoken of by a great many other people, merchants of New York, as a pirate of patents, as a man of no commercial credit, as a liar, as a man given to women very extensively, as a thorough unmitigated scamp in every and any capacity; the commercial part I have taken some pains to ascertain about, and learn by report from McKillopp, Sprague & Co., and R. G. Dun & Co., that he and Selegman, husband of his nominal partner, are both of them without credit, and they recommend to sell them goods C. O. D.

(Last part of answer objected to as irresponsive.)

26. X Q. About how much time did you see the junior partner of the firm of S. A. Castle & Co. present at examinations in this cause?

A. In recalling that part of my testimony, and thinking of it more maturely, I am satisfied that I never saw the said junior partner at any of these hearings; that when I saw him, it was at the time we were before the court, in Chambers street, on application for a preliminary injunction.

27. X Q. Did you see Mr. Fitzpatrick there on any days except those on which himself and wife were examined as witnesses?

A. I think I did, on one or two days, when neither himself or wife were examined.

28. X Q. How often have you seen Mr. Philip Lippmann there except on days when he was examined as a witness?

274 A. I should say two or three days, but not all of the time each and every day.

29. X Q. Did you ever see him at any of such examinations previous to the day before his examination as a witness?

A. I saw him at this office on a day previous to his examination in this case.

30. X Q. Do you mean by your answer to question 11, to be understood that corset springs are better for being riveted rigidly through the centre?

A. I did not mean to say anything in reference to it whatever.

31. X Q. Where is the shop at which you manufacture corset steels?

A. Waterbury, Connecticut.

32. X Q. Do you manufacture corset steels there?

A. Barnes & Cruttenden have corset steels manufactured there.

33. X Q. Do Barnes & Cruttenden manufacture them, or are they manufactured by other manufacturers, and purchased of such parties by Barnes & Cruttenden?

A. They are manufactured for Barnes & Cruttenden at stipulated prices, out of stipulated material, and of stipulated workmanship.

34. X Q. Then you don't yourself manufacture any, do you?

A. Then we do ourselves manufacture them, as I understand it, and as is under stoodby manufacturers, and commercial men, and merchants.

35. X Q. But you buy them all at fixed prices, do you not, of parties who make them from their own materials?

275 A. I have fully answered that question, and stated all the facts, and used the best language that I am capable of, and you may call it what you like.

36. X Q. Has Mr. Marston or Mr. Meyer ever told you that they have put their time, and money, knowledge and influence together for the purpose of breaking down the complainant's patent?

A. Mr. Marston and Mr. Meyer have both made an affidavit, which was used on a motion before his honor, Judge Blatchford, in which they swear that they had given some two months' time to this particular purpose of hunting up evidence. Mr. Marston has stated, as I am informed and believe, to Mr. Charles H. Leonard, here present, that he is paying the expenses of this suit, in connection with Mr. Meyer. I also get it from general rumor from parties who are interested in the corset steel business, that they understand that these men, Mr. Marston and Mr. Meyer, are putting their time and money together, with all others, for the purpose of defeating plaintiff in this case; that it is generally understood, throughout commercial circles, that Disston, Morss & Co. are very wealthy, and that they will be able to beat the plaintiff with their money.

(Answer objected to, as irrespective and .)

37. X Q. Question repeated.

A. They have not.

38. X Q. You say, in your answer to question 8, that you believe from what Mr. Lippmann has told you, &c.; then you do believe Mr. Lippmann when he is not under oath, do you?

276 A. No, sir; I do not, unless I am sure that it is for his interest, in a monied sense, to tell the truth. I have never known a man whom I believe to be so bad a liar as this man Lippmann.

39. X Q. Did you ever know, of your own knowledge, by any personal dealings with Mr. Lippmann, that he was the character you represent him to be?

A. I never had any dealings with Mr. Lippmann; the testimony respecting him and his character is derived from the specific sources before given, which is more or less corroborated by nearly the entire trade in bustles, corsets, hoop-skirts, belts, and other articles; I never heard any one say any good of him; there is but one sentiment, and that

more or less black, wherever I have heard any man or woman speak of him with reference to his character or reputation.

40. X Q. Were you present at the examination of Mr. Ten Broeck in this case?

A. I was.

And being further examined by Mr. WITTER, he says:

41. Re D. Please read cross-question 19 and continue the story.

A. Mr. Lippmann said that he would show the steel and state the facts respecting it to Mr. Gifford, and a time was appointed, and Mr. Lippmann failed to come to time; he never renewed his request for such an interview to me, neither did he to Mr. Gifford, as I am informed and believe; Mr. Lippmann's next interview and talk, respecting
277 this corset steel, was on Broadway, as I have previously testified, in which he threatened to burst up our patent and destroy our business, unless I called at his office and made terms with him on the day succeeding.

42. Re D. Then your answer to cross-question 39 was not exactly correct, in which you say you never had any dealings with Mr. Lippmann, which gave you a personal knowledge of the character which you have represented him to bear?

A. When I said that I had had no dealings, I meant that I had never bought anything of him, or sold anything to him, or done anything else to make money out of him.

GEORGE CRUTTENDEN, JR.

Subscribed and sworn to before me this 3d day of April, 1873.

JOSEPH GUTMAN, JR.,
Examiner.

Adjourned to April 4, 1873, at 11 a. m.

NEW YORK,
April 4, 1873—11 a. m.

Present: Counsel for the parties, as before.

WILLIAM B. BENNETT, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, counsel for complainant, says:

278 1. Q. What is your name, age, residence, and occupation?

A. My name is William B. Bennett; I am forty-one years old; I reside at Brooklyn, New York; I am a manufacturer of hoop-skirt wire.

2. Q. Are you acquainted with Philip Lippmann, of this city, member of the house of P. Lippmann & Co.?

A. I am.

3. Q. Are you acquainted with his reputation for truth and veracity?

A. Yes.

4. Q. What is his reputation in this community for truth and veracity?

A. It is very generally bad among the people that I have any business with.

5. Q. Would you believe him under oath?

A. Not if he was an interested party.

6. Q. From your observations, and from what you hear and know,

what do you consider to be the principal part of his business or occupation?

(Objected to as irrelevant.)

A. As far as I know his principal business is infringing patents held by others.

7. Q. What have you understood to be his character for honesty and fair dealing among merchants?

(Objected to as incompetent.)

A. Bad.

8. Q. How long have you been acquainted with Mr. Lippmann, and his character in these particulars?

279 A. Since March, 1871, about.

And being cross-examined by Mr. HOWE, he says:

9. X Q. Have you ever had any personal dealings with Mr. Lippmann?

A. Yes, sir; I have had personal dealings with him, but not in buying and selling goods.

10. X Q. And have you had difficulty with him?

A. I suppose that that is rather a vague question—if you mean difficulties, Mr. Lippman and I are friendly; he always asks me to take dinner with him, or a drink with him when I meet him.

11. X Q. And you do so, I suppose?

A. I never did.

12. X Q. Have you ever had any difficulty, in any respect, with Mr. Lippmann?

A. I am assignee of a patent which he is infringing.

13. X Q. What patent?

A. De Forest and Gilbert patent for hoop-skirt wire.

14. X Q. Isn't he operating under a patent of older date, granted to John T. Loft, under which he has received a license in making hoop-skirt wire?

A. To the best of my knowledge, Mr. Loft never had a patent for making hoop-skirt wire.

15. X Q. Have you sued Mr. Lippmann for such infringement?

A. He has been sued, but not in my name.

16. X Q. Has there been any decree against him in that suit?

A. Not a final one.

280 17. X Q. Have you ever known of a final decree to have been entered against Mr. Lippmann for an infringement of a patent?

A. I know of no law business connected with Mr. Lippmann's affairs except that in which I am interested.

WM. B. BENNETT.

Subscribed and sworn to before me this 4th day of April, 1873.

JOSEPH GUTMAN, JR.,
Examiner.

Adjourned to April 4th (same day), at 3 p. m.

JOSEPH GUTMAN, JR.,
Examiner.

NEW YORK, *April 4th*, 1873—3 p. m.

Present: Counsel for the respective parties as before.

ALBERT D. NASON, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to

testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. WITTER, says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Albert D. Nason; I am thirty-one years old; I reside at Boston, Mass.; I am a salesman.

2. Q. Are you acquainted with Philip Lippmann of the firm of Lippmann & Co., of this city?

A. Yes, sir, I am; I suppose his name is Philip; I don't know; I know his name is P. Lippmann.

281 3. Q. Are you acquainted with his reputation for truth and veracity?

A. I am.

4. Q. What is his reputation for truth and veracity in this community?

(Objected to on the ground that the proper foundation has not been laid for the question.)

(Question withdrawn.)

5. Q. What is his reputation for truth and veracity in this community, if you know?

A. Very bad.

6. Q. Would you believe him under oath?

A. Well, if you state that where he is an interested party, no, sir, I would not.

7. Q. You mean that if it was for his interest to tell the truth financially, and you knew it, you might possibly believe him; is that so?

(Objected to as leading.)

A. Well, I might; yes, I would believe him. If it was for his interest financially to tell the truth I think he would; otherwise I would not.

8. Q. What do you consider his character for honesty and fair dealing?

(Objected to as incompetent.)

A. Notoriously bad.

9. Q. What do you consider his character as a respecter of letters patent?

(Objected to as irrelevant.)

282 A. Mr. Lippmann has told me himself personally that he had no respect for any patent issued by the United States on bustles.

10. Q. How long have you known him and his character in these particulars?

(Objected to so far as the question calls for anything except the character of the said Lippmann for truth and veracity.)

A. Since April, 1871.

11. Q. During these years have you ever heard any man speak well of him?

(Objected to as incompetent and irrelevant.)

A. No, sir; I have not.

And being cross-examined by Mr. HOW, he says:

12. X Q. What was the occasion of you first becoming acquainted with Mr. Lippmann?

A. I first met Mr. Lippmann in connection with a patent suit in the month of April or May, 1871.

13. X Q. What patent suit?

A. P. Harderman versus the firm of Thompson, Langdon & Co. I think that was the suit.

14. X Q. Were you interested for either of the parties in that suit?

A. No, sir; not directly.

15. X Q. Were you indirectly?

A. Allow me to ask a question. Do you mean by indirectly for myself or my own personal interest?

16. X Q. Were you indirectly in any manner connected with that suit?

283 A. Only to produce evidence for the defendants.

17. X Q. What was the object of your call on Mr. Lippmann at that time?

A. I did not call on Mr. Lippmann; I did not understand your first question to be to that effect, but met him at divers times during the month of May, 1871, in the United States circuit court.

18. X Q. How did Mr. Lippmann happen to appear there in the United States circuit court in that case?

A. He was acting for the plaintiff, or supposed to be.

19. X Q. And in that case he did respect United States letters patent, did he?

A. I presume he did at that time, but since that trial, in which suit he was beaten, he has told me that he had no respect for any patent ever issued by the United States Government on bustles, and that he should make any style of bustle that he wanted to whether there was a patent on it or not, or words to that effect.

(Last part of answer objected to as irresponsive, and not called for by the question.)

20. X Q. Did it ever occur to you that the result in that suit had a tendency to lead Mr. Lippmann to doubt the paramount authority of letters patent for inventions irrespective of the state of the art?

A. I am not competent to answer that question.

21. X Q. You were at one time connected with A. K. Young & Co., of Boston, were you not, of which Mr. Jason B. Loomis was a partner?

284 A. Yes, sir.

22. X Q. Are you still connected with that firm?

A. No, sir.

23. X Q. How long since you were?

A. Since November 19, 1872.

24. X Q. That is now a joint stock company, isn't it?

A. It is an incorporated company.

25. X Q. Are you connected with that incorporated company?

A. What incorporated company do you refer to?

26. X Q. The incorporated company mentioned in your last answer.

A. My last answer was given before I understood the nature of the question.

27. X Q. What did you understand the nature of the question to be when you made the answer?

A. To refer to the firm—to the company—that I am connected with at the present time.

28. X Q. That company is the successor of A. K. Young & Co., is it not?

A. They succeed to the business of the late firm of A. K. Young & Co.

29. X Q. During the time that you were connected with A. K. Young & Co., that firm, or a member of it, brought suit against Philip Lippmann, did it not?

A. For what purpose?

30. X Q. Question repeated.

A. Not to my knowledge; there was a suit brought by a party

wherein the interest of A. K. Young was connected, but I don't know in whose name it was brought.

285 31. X Q. That suit was an infringement of a patent, was it not?
A. I believe it was.

32. X Q. And a preliminary injunction was granted against Mr. Lippmann in that case, was there not?
A. I think there was.

33. X Q. And that injunction was afterwards dissolved, was it not?
A. I think so, but I couldn't swear to it.

A. D. NASON.

Sworn and subscribed to before me this 4th of April, 1873.

JOSEPH GUTMAN, JR.,
Examiner, etc.

Adjourned to April 5, 1873, at 11 a. m.

SATURDAY *April 5th*, 1873—11 a. m.

Counsel present: For the complainant, G. Gifford, esq.; for the defendant, T. P. How, esq.

ALBERT KOMP, a witness of lawful age, produced on the part of the complainant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. GIFFORD, counsel for complainant, deposes and says as follows:

1. Q. What is your name, age, residence and occupation?
A. My name is Albert Komp; I am forty-one years old; I reside in New York City; I am a machinest.

286 2. Q. Are you acquainted with the reputation of Philip Lippmann for truth and veracity?
A. Yes.

3. Q. Is his reputation for truth and veracity good or bad?
A. It is bad.

A. KOMP.

Sworn to before me,

JOSEPH GUTMAN, JR.,
Examiner, etc.

287 U. S. circuit court for the southern district of New York.

FRANCES LEE EGBERT, AS EXECUTRIX,
vs.
SAMUEL A. CASTLE, RUFUS HITCHCOCK, AND Henry S. Magrane.

Testimony taken on the part of the defendants for final hearing under the 67th rule of the Supreme Court of the United States. In equity.

WEDNESDAY, *February 19th*, 1873.

Present: Thomas P. How, esquire, counsel for defendants; W. C. Witter, esquire, counsel for complainants.

JEANETTE CARGILL, called and sworn as a witness on the part of the defendants:

Q. 1. What is your name and residence?
A. Jeanette Cargill; residence, Waterbury, Conn.

Q. 2. Have you a son by the name of Edward C. Cargill?

A. I have.

288 Q. 3. Did you ever know of his making a pair of double corset steels or clasps, and if so, when first, and what use, if any, were made of them?

(Objected to as leading.)

A. I know of his making some—first in 1863; they were given to Miss Emma Doolittle to wear in a pair of corsets as a test.

Q. 4. Please look at the corset steels or clasps now shown you, and state how they compare in construction with the steels or clasps he then made, which, as you say, were given to Miss Doolittle?

A. I could not say whether they were like these or not, only these are double and those are double.

(Counsel for defendants offers said pair of steels or clasps referred to in the last question and answer, and the same were marked Defendants' Exhibit 1. R. E. S., Ex'r.)

Q. 5. State what knowledge, if any, you have in regard to Miss Doolittle having worn the steels or clasps which your son made, as you have testified?

A. I recollect that Mr. Cargill gave them to her to wear in the fall or winter of 1863; she used them for a length of time; I couldn't say how long.

Q. 6. About how long, as near as you can recollect?

A. Three or four weeks; perhaps it might have been longer.

Q. 7. Did you understand from her whether they were satisfactory?

A. I think they were; excepting, perhaps, too rigid—too stout for her—too strong.

Q. 8. Do you know why these steels were made double?

A. For the purpose of making them stronger, I suppose.

Q. 9. What led your son to make these steels or clasps stronger by doubling them, if you know?

(Objected to as leading.)

289 A. I think there was often a call for those that were strong.

Cross-examined:

X Q. 10. Did you yourself see Mr. Cargill give those springs to Miss Doolittle?

A. I think I did.

X Q. 11. Where did it take place.

A. In our sitting room at Waterbury.

X Q. 12. Name all the persons who were present.

A. Mr. Cargill, Miss Doolittle, and myself; there might have been others.

X Q. 13. Do you remember any others who were present?

A. I do not.

X Q. 14. On what day was it—I mean of the week?

A. I couldn't tell.

X Q. 15. Can you tell whether it was Sunday or a week day?

A. I couldn't tell.

X Q. 16. What part of the day was it, if you remember?

A. I couldn't tell.

X Q. 17. Was there snow on the ground?

A. I am not able to say.

X Q. 18. What made you think it was fall or winter?

A. Because she was staying with us at that time.

X Q. 19. Is that your reason for thinking it was in the year 1863?

A. Yes.

X Q. 20. When did she come to stay with you?
A. In the fall of 1863.
X Q. 21. When did she leave your house?
A. She left our house when she commenced teaching; the date I do not know.
X Q. 22. About how long did she stop in your family?
290 A. She was in our family perhaps three or four weeks before her school commenced, and occasionally afterwards when she had leisure.
X Q. 23. When did she leave Waterbury, if you know?
A. I don't know.
X Q. 24. About how long did she continue to visit your family occasionally?
A. Through her school term she was there occasionally.
X Q. 25. And after that not?
A. She was there occasionally. She left Waterbury, and returned and taught another term.
X Q. 26. How do you know that it may not have been on one of these latter visits that you remember giving her the steels?
A. I do not know whether it was or not. I don't remember. I don't really know whether it was before she commenced teaching school or afterwards; when she was at our house the steels were given her.
X Q. 27. How many times was she at your house after she commenced teaching school?
A. I couldn't tell. Often.
X Q. 28. You say she left Waterbury, came back and taught school another term. What year was that?
A. The summer of 1864.
X Q. 29. Did she, during this period, visit your family occasionally also?
A. No.
X Q. 30. Or afterwards?
A. No.
X Q. 31. Is you son, of whom you have spoken, living; if yes, where?
A. He is; in Waterbury.
X Q. 32. How old is he?
A. Twenty-three last August.
X Q. 33. In what house did this occurrence of the giving take place?
A. In the house where I now live in Field street.
291 X Q. 34. How do you know Miss Doolittle used these steels for a length of time?
A. I saw her sew them on her corsets.
X Q. 35. Is that all?
A. Well, I think she wore them, because I understood her to do so.
X Q. 36. In what way did you understand this?
A. By the conversation that we had about them.
X Q. 37. Have you any other source of knowledge?
A. Only as I heard her speak of their qualities.
X Q. 38. When was this?
A. At the time she was wearing them?
X Q. 39. What did she say?
A. I think she thought they were too stiff—too heavy.
X Q. 40. Where was Miss Doolittle when you saw her sewing them on the corsets?
A. In my home on Field street, in the sitting room.
X Q. 41. Was any one present except yourself and Miss Doolittle?

A. I don't remember.

X Q. 42. How came she to be staying at your house?

A. She had no home of her own—she was looking for a school; she came to our house and we helped her to find one.

X Q. 43. You are not then able to state certainly whether it was before or after she taught the school that the giving took place, are you?

A. I cannot tell whether it was before or directly after. I am speaking of her first term.

X Q. 44. About when did the first term end?

A. I cannot tell the date; it was in the early spring.

X Q. 45. And you cannot positively say whether the giving was before or directly after this date?

292 A. The giving was before. It was soon after the school commenced, or before. My impression is that it was before the school commenced.

JEANETTE CARGILL.

Subscribed and sworn to before me this 19th day of February, 1873.

R. E. STILLWELL.
Examiner.

MARIA L. HAMILTON, called and sworn as a witness on part of defendants, deposes and says as follows:

Q. 1. What is your name and residence?

A. Maria L. Hamilton; residence, West Cheshire, Conn.

Q. 2. Please look at the corset steels or clasps now shown you, marked Def't's Ex't 1, R. E. S., Ex'r, and state when you first saw them, if ever?

A. I think I have seen them in 1863.

Q. 3. Where?

A. In Waterbury, Conn.

Q. 4. State whether you had any knowledge of their being used, and if so, by whom, and when.

A. I do not know whether they were used or not. I know they were made at Mr. Cargill's factory by his son in 1863.

Q. 5. After they were made, where did you next see them?

A. I could not say.

Q. 6. Do you know whether these clasps were given to any persons to use, and if so, to whom?

A. I don't know, only what Mr. Cargill's folks say, that they gave them to Miss Emma Doolittle.

(What Mr. Cargill's folks said is objected to as hearsay.)

293 Cross-examined:

Q. 7. Who told you these steels were made in Mr. Cargill's factory?

A. I know they were made there.

Q. 8. How?

A. By the rivetting—the way the hooks are fastened on.

Q. 9. How does that enable you to tell?

A. Well, because we rivetted them by hand, by striking them; this would make the rivet different from any machine used at that time.

Q. 10. Would it make the rivets different from any other rivetting by hand?

A. I could not say as to that. I don't think there was any other used at that time like that.

X Q. 11. Any other what?

A. Die that we used to head the rivets down.

X Q. 12. How can you distinguish between a rivet that is headed down with a die and one headed down with a hammer?

A. A rivet headed down with a hammer would naturally be flat; one headed down with a die would be round, unless there was die made in a hammer so as to strike and make a round head.

X Q. 13. And then you would not be able to distinguish them, would you?

A. I don't think it would make a head like that if there was.

X Q. 14. Why not, if the die in the hammer was the same shape?

A. Because the die we put on would slip sometimes and make the head imperfect, different to those riveted other ways in other machines.

X Q. 15. Is it by this imperfection of the rivets that you recognize that?

A. By the width of the steels is one thing, and the way the pieces are put on to make them double; that's all.

X Q. 16. Did you work in this factory of which you have spoken?

A. Yes, sir.

294 X Q. 17. Where was it?

A. On Field street, in Waterbury, Conn.

X Q. 18. Distinct from Mr. Cargill's residence?

A. It is close by.

X Q. 19. How close?

A. I might say it was in the same building.

X Q. 20. It was the garret, wasn't it?

A. Yes, sir.

X Q. 21. Did you live in his family at the time, or board there?

A. Boarded in his family.

X Q. 22. For how long?

A. I couldn't say how long; a year and a half or so.

X Q. 23. When did you go there?

A. In 1863.

X Q. 24. What leads you to think it was in 1863 when they were made?

A. It was soon after I went there.

X Q. 25. State particularly when you went there.

A. I couldn't tell the day of the month; it was in February; the middle of February, or somewhere about there.

X Q. 26. Where had you been immediately preceding that February?

A. I had been to my sister's; stopping at my sister's.

X Q. 27. In Waterbury?

A. No, sir.

X Q. 28. Where?

A. In Prospect, Conn.

X Q. 29. Had you been there long?

A. About six weeks.

X Q. 30. What is the sister's name of whom you speak?

A. Harriet Munson.

X Q. 31. Where is she now?

A. In the same place.

X Q. 32. You will excuse me if I enquire your age?

A. Yes, sir.

295 X Q. 33. Please state your age to the examiner.

A. Thirty five.

X Q. 34. Could you distinguish that pair of steels, Defendants' Exhibit I, from another pair made exactly like it?

A. Well, I don't know if anybody could, if they were made exactly like them.

X Q. 35. Have you had this pair in your possession ever since it was made?

A. I havn't had it in my possession at all.

X Q. 36. How do you know, then, that pair before you may not have been made after the time you state, but of the same width of steel, the same character of everything, &c.?

A. Because I think that was the only pair that was made at that time.

X Q. 37. What makes you think so?

A. Because it was the only pair I saw of the kind.

MARIA L. HAMILTON.

Subscribed and sworn to before me this 19th day of February, 1873.

R. E. STILLWELL,
Examiner.

Adjourned to 20th inst., at 11 a. m.

NEW YORK, *February 20th*, 1873.

Examination of witnesses on the part of the defendants, Thursday, February 20, 1873, at the office of Thomas P. How, No. 16 Murray street, city of New York.

Present: Thomas P. How, counsel for defendants; W. C. Witter, counsel for the plaintiff.

296 WILLIAM B. CARGILL, a witness produced and sworn on behalf of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. William B. Cargill; 53 years; Waterbury, Connecticut; manufacturer.

(It is agreed between counsel that this witness may be recalled upon any facts not examined upon at this sitting.)

Q. 2. Please look at the corset steel or clasp, now shown you (Def'ts' Exhibit 1, R. E. S., examiner), and state when you first saw it, and where.

A. I first saw these clasps in the year 1863, at my factory in Waterbury; as near as I can recollect, it was in the latter part of the summer.

Q. 3. State the circumstances under which you first saw them.

A. They were handed me by my son, Edward Cargill; he handed them to me, and asked me if I thought those clasps would be stiff enough.

Q. 4. State if you know who made that Exhibit 1.

A. Edward E. Cargill.

Q. 5. What, if you know, led him to make it?

A. I don't know that I ever heard him express or say what prompted him to make it, any more than I suppose that it was to supply at that time a limited demand for something stouter than we were then making.

Q. 6. State whether or not, at that time, any one claimed to be the inventor of this pair of corset steels or clasps; and if so, who?

A. Not to my knowledge; no one. I wish to be understood here that no one made any clasps like these before my son made these, or claimed my patent on them, to my knowledge.

Q. 7. Who invented the clasps, Exhibit 1?

A. My son, Edward E. Cargill.

297 Q. 8. What was done with those clasps, Exhibit 1, after your son handed them to you, as you have stated?

A. Some short time after that, at what time I don't remember, I handed them to a young lady by the name of Miss Emma Doolittle, and asked her if she would place them in her corsets, for the purpose of testing them.

Q. 9. State, if you know, whether she did so.

A. To my best knowledge and belief she did.

Q. 10. Have you any knowledge as to how long she wore them?

(Objected to, as the witness has not testified that she wore them, also as leading.)

A. Not definite; I have not; she might have worn them a month, and she might have worn them longer.

Q. 11. State how satisfactorily those clasps operated, if you know.

(Objected to, as the witness has not testified whether they operated at all, much less whether they operated satisfactorily; objected to as leading.)

A. She expressed herself to me that she was well pleased with them.

(Answer further objected to as hearsay evidence.)

Q. 12. State what became of those clasps, Exhibit 1, after Miss Doolittle had used them as you have stated.

A. She returned them to me; I took them into my possession and kept them.

Q. 13. Till how long since were they in your possession?

A. Until I delivered them to Charles W. Gillett, or Judge Gillett, some two or three weeks since.

298 Q. 14. Were they shown to any other person at the time they were made, or during that year, besides Miss Doolittle?

A. I am aware that others saw them, but I did not take particular pains to advertise them, but was willing that the public should see them; they were not kept private at all.

Q. 15. What other persons do you now remember to have been them during that year?

A. There was Mrs. Hamilton; was in my employ at that time, and she must have seen them; also a Miss Hine; that, at that time, was all the help I had in the factory besides my son; there were only four of us in the factory; others might have seen them in the house; I have no direct knowledge that any one saw them in the house, unless it was my wife.

And being cross-examined, the witness says as follows:

X Q. 16. Your factory was in the garret of your house; was it not?

A. At first it was.

X Q. 17. What do you mean by at first? state what period that covers.

A. I mean that when I first commenced business it was in the winter and spring of 1863; that period covers from some time in January, 1863, until the 1st of April, 1863.

X Q. 18. Do you mean that after the 1st of April, 1863, you did not use your garret for any of the purposes of manufacturing?

A. I do; I did not use it for manufacturing after the 1st April, 1863.

X Q. 19. Where and what was your factory, if you had any, immediately after April 1st, 1863?

A. I had a small shop, which was built on the same lot or enclosure that my house was in—a short distance from the house.

X Q. 20. How soon after April 1st, 1863, was this shop completed?

A. Within two or three days after the 1st of April, 1863.

299 X Q. 21. What is your business?

A. At present I am a manufacturer of corset clasps.

X Q. 22. How long has that manufacture engaged your attention?

A. Since about the 1st of January, 1863.

X Q. 23. Did you ever have any dealings with the firm of Barnes & Cruttenden or any one on their behalf, or Mr. Cruttenden, here present, looking to the manufacture by you of corset steels of any kind?

(Objected to as not proper cross-examination.)

A. Not directly; I have at one time assisted Mr. Cruttenden in getting clasps manufactured by other parties.

X Q. 24. When was that?

A. I have not the means at present of fixing that date; to the best of my recollection it was four years ago this coming spring.

X Q. 25. Were you at that time actually manufacturing yourself in this line of goods?

A. Not just at that time, I was not.

X Q. 26. Had you been?

A. I had been previously manufacturing corset clasps.

X Q. 27. And have been since, I believe?

A. I have been manufacturing corset clasps since then.

X Q. 28. State what you mean when you use the word corset clasps.

A. I mean two pieces of steel, or more, that can be attached to each other by fastenings, or detached—like this, Exhibit 1.

X Q. 29. Narrate the travels and stopping places of this Exhibit 1, from the time you first saw it till the time you last saw it.

(Objected to, as already answered.)

A. This pair of steels have been in my possession from the time
300 they were made, with the exception of the time they were in the possession of Miss Doolittle, until the time they were delivered to Judge Gillette, some three weeks since.

X Q. 30. Whereabouts in your possession have you kept them?

A. In my factory.

X Q. 31. Whereabouts in your factory?

A. In no particular place; they were sometimes laying upon the girths of the building, and sometimes upon the benches in the factory.

X Q. 32. Which building are you speaking of?

A. I am speaking of the building that I had erected, and moved into about the 1st of April, 1863.

X Q. 33. Who put them upon the girths of the building?

A. I am unable to say that, who did.

X Q. 34. How long did you use that building as a factory, in the corset clasp business?

A. It has always been used for that, and for no other purpose.

X Q. 35. Has it not been vacant for a period of any time?

A. It has. Do I understand that the questions asked is that the shop has been entirely vacant, and nothing in it, or that there has been a time that there was no manufacturing there?

X Q. 36. The latter.

A. There has been such period.

X Q. 37. Was this pair of clasps there during this period?

A. They were.

X Q. 38. Was there more than one such period?

A. There was not.

X Q. 39. Where did you find it when you gave it to Judge Gillette, as you have stated?

A. I found them in my desk.

X Q. 40. When?

A. At the time that I got them to give to Judge Gillette.

X Q. 41. How long had they been in this desk?

301 A. Something over two years.

X Q. 42. Where was the desk?

A. In my factory.

X Q. 43. Do you mean the little shop to which you have referred, or to one built since that?

A. To one built since the little shop was built or the first one.

X Q. 44. Who is Miss Hine, where did she come from to you, and where is she now to your best knowledge?

A. She was a young lady who applied to my shop for work, coming from a family of the name of Bronson, in Waterbury; the last that I knew of her she started for California.

X Q. 45. Was the first name Eliza?

A. No; it was Delia F. Hine.

X Q. 46. Describe as nearly as you can the desk in which you kept this Exhibit 1.

A. It is an old fashioned desk with book-case standing upon the top of it; nothing peculiar in its construction that I know of.

X Q. 47. Did you use it during the two years that this exhibit was kept in it continuously?

A. I did.

X Q. 48. Did you carry the key or keys yourself, if there was any?

A. There were no keys to it.

X Q. 49. What was done with these clasps next after Miss Doolittle, as you say, returned them to you?

A. The next that I have any recollection of them was of their being in the factory.

X Q. 50. Whereabouts in the factory, if you please?

A. I can't answer that question definitely; they might have been upon the bench, or they might have been upon the girth that I have already spoken of.

X Q. 51. When was this?

A. It must have been the fore part of the winter of 1863.

302 X Q. 52. What did you do with them, if anything?

A. Made no particular disposition of them.

X Q. 53. Did you move them to any place at that time?

A. Not that I have any recollection of.

X Q. 54. When did you next see them that you remember, and where?

A. I might have seen them a dozen times a day; I can't answer that question definitely.

X Q. 55. I call to your attention questions 8 & 9 and answers, and ask you upon what you found the "best knowledge and belief" there addressed to.

A. Upon what I consider her truthfulness.

X Q. 56. Do you own, or are you interested in any patent or patents for clasps for corsets or steels?

(Objected to as new.)

A. I am.

X Q. 57. Double steels.

A. I am.

X Q. 58. Who was Mrs. Hamilton before she was married?

A. I have known, but do not recollect. She has been a married woman ever since I have known her.

X Q. 59. You say Miss Doolittle returned this exhibit to you. Where did this transfer take place?

A. In my house.

X Q. 60. Whereabouts in the house?

A. I think it was in the sitting room; I am not positive as to the exact location.

X Q. 61. Do you remember the day of the week or the time of the day?

A. I do not.

Redirect.

X Q. 62. When the pair of clasps, Exhibit 1, were lying upon your girths and benches, as stated in your answer to X Q. 31, were
303 they or not where any person coming into the factory could steal them?

A. They were.

X Q. 63. What was the fact in regard to persons in business being in the habit of coming in there?

A. My shop was open to the public—I kept no closed doors—any one had a right to come and go as they felt disposed, and did do so.

W. B. CARGILL.

Adjourned to 9 o'clock, a. m., Friday, February 21st, 1873.

FRIDAY, *February 21st*, 1873.

Present: Counsel as before.

EDWARD E. CARGILL, being called and sworn as a witness on part of defendants, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Edward E. Cargill; age 23 years; residence, at Waterbury, Conn.; occupation, engineer.

Q. 2. Look at the pair of corset steels or clasps now shown you, marked Deft's Ex. 1, R. E. S., Ex'r, and state if you know who made them, and when.

A. I made them in 1863; it was either in the spring or fall.

Q. 3. Are you positive that those are the identical corset steels or clasps made by you, as you have stated, in 1863?

(Objected to as leading.)

A. I am.

Q. 4. How do you know them to be the same identical steels or clasps?

A. By the rivetting.

304 Q. 5. What led you to make those steels or clasps?

A. To make them stiffer.

Q. 6. Why did you want to make them stiffer?

A. Because the young lady wanted a pair that was stronger and stiffer.

Q. 7. After you made them, what was done with them, if you know?

A. I think my father took them and gave them to her—Miss Doolittle.

Q. 8. Do you know what she did with them?

A. I do not—not at the time.

Q. 9. Did you know at any time what she did with them; and if so, how did you know?

A. The next I saw of them I saw them taken out of her corset.

Q. 10. Have you any knowledge as to whether they worked satisfactorily?

A. I couldn't say whether they did or not, for certain.

Q. 11. Where have these corset steels been since that time?

(Objected to, as it does not yet appear that he knows.)

A. In the shop.

Q. 12. Till how long since?

A. Well, I should think it was three weeks ago, or four weeks.

Q. 13. Whereabouts in the shop?

A. Well, they were around in different places.

Q. 14. Were they generally concealed or exposed to view, so that any one could see them?

(Objected to as leading.)

A. They have always been where folks could see them.

Q. 15. Do you know whether or not persons coming into the shop did see them?

A. I think they have; I couldn't say for certain.

305 Q. 16. Who invented these corset steels or clasps? (Exhibit 1.)

A. I did.

Q. 17. Did you make any application for a patent for this invention; and if not, why not?

A. I did not, because I didn't have the means.

Cross-examined by W. C. WITTER, Esq., counsel for complainant:

X Q. 18. How long have you been engineer, and of what are you engineer?

A. I have been an engineer for the last ten years, of railroad and stationary engines.

X Q. 19. On what road or roads a railroad engineer, and at what places or shops, engineer of stationary engines?

A. On the Canal Railroad; I have run an engine for J. Strouse & Co.; I have run for J. D. Burdick & Co.; I have run for H. J. Atwater & Co.; I run the Stockenette factory in Plainfield; I run for the Plymouth Granite Co. and for my father.

X Q. 20. How long engineer on Canal road?

A. I couldn't tell you just how long. Well, I might have been there five or six months; I don't think I was over.

X Q. 21. Where was this?

A. It runs from New Haven to Northampton and Williamsburg.

X Q. 22. Does it run through Waterbury?

A. No, sir.

X Q. 23. When was this?

A. About three years ago.

X Q. 24. When, where, and how long did you run a stationary engine for J. Strouse & Co.?

(Objected to as immaterial.)

A. Run for J. Strouse & Co. twenty-six months, in 1865, I think, on Union street, New Haven.

X Q. 25. Same question as to J. D. Benedick & Co.

(Same objection, and as irrelevant.)

306 A. About four weeks; I think it was about '66, on Union street, New Haven.

X Q. 26. Same question as to H. J. Atwater & Co.

(Same objection.)

A. I was there about three months, about 1866; that was corner Union and Court streets, New Haven.

X Q. 27. When and how long the Stockenette factory at Plainville?

(Same objection.)

A. I was there about four or five months; in 1867, I think.

X Q. 28. In what business were I. Strouse & Co. engaged while you were with them?

A. Corset business.

X Q. 29. What wages or salary did you get with I. Strouse & Co.?

(Same objection.)

A. Sometimes I got more and sometimes I got less.

X Q. 30. How much was it when you got more?

(Same objection.)

A. It might have been $4.00, and it might have been $5.00.

X Q. 31. A week.

(Same objection.)

A. No, a day.

X Q. 32. Did you live in New Haven while engineering there?

A. Yes, sir.

X Q. 33. Likewise in Plainville?

A. Yes, sir.

307 X Q. 34. Did your abilities bring you as good wages in the other situations you have mentioned, as with I. Strouse & Co.?

(Objected to as immaterial and irrelevant.)

A. About the same.

X Q. 35. Is Wm. B. Cargill, who has been examined herein, your father, and Jennette Cargill your mother?

A. They are.

X Q. 36. Did your father own the house and factory in Field street, in 1863?

A. He did not.

X Q. 37. Or afterwards?

A. No, sir.

X Q. 38. Did your father also work for I. Strouse & Co. in New Haven; if yea, when and how long?

(Objected to as new matter, and as immaterial and irrelevant.)

A. He worked there twenty-six months; he went there the same time as I did, and left at the same time.

X Q. 39. Did he also live in New Haven during this period?

(Same objection.)

A. He did.

X Q. 40. With his family?

(Same objection.)

A. Yes, sir.

X Q. 41. Who occupied the house and shop in Waterbury during this period?

A. We occupied the shop; a man by the name of Espe lived in the house, and another man by the name of Allen.

X Q. 42. In what way did you, as you say, occupy the shop during these months you lived in New Haven?

A. As a storehouse—kind of a storehouse.

308 X Q. 43. Storehouse for what?

A. Well, we stored some of our goods in there—household goods.

X Q. 44. Keep it locked most or all of the time?

A. I think Mr. Allen had the keys; I don't know; I think he did; I wasn't there to see whether it was kept locked or not.

X Q. 45. Where was Exhibit 1 during this period?

A. It was in that shop.

X Q. 46. What makes you think Exhibit 1 was made in the spring or fall?

A. Because that is the time that lady come there.

X Q. 47. What wages did your father receive at J. Strouse & Co.?

(Objected to as immaterial and irrelevant.)

A. I don't know; you will have to ask him that.

X Q. 48. When did he first take out a patent for any invention, if you know?

(Objected to as new matter.)

A. I don't know when it was.

X Q. 49. Tell as near as you can.

A. I know he took out one while he was with Strouse, or at least tried to.

X Q. 50. Did you live with him then?

A. I did.

X Q. 51. What was that patent for?

(Same objection.)

A. I don't know whether it was on a steel, or on the trimmings.

X Q. 52. It was some way connected with corset steels, was it?

A. Yes, sir.

X Q. 53. Has he taken out, or tried to take out, more than one patent on this subject matter?

(Same objection.)

A. I think he has.

309 X Q 54. Any on other subject-matter?

(Same objection.)

A. He did on cotton-picker.

X Q. 55. When, about?

A. I couldn't tell you.

X Q. 56. Some time ago?

A. Yes, sir, some years ago.

X Q. 57. Any other?

(Same objection.)

A. I don't know.

X Q. 58. Who do you say took Exhibit 1 out of Miss Doolittle's corset?

A. I think she did.

X Q. 59. What makes you think so?

A. Well, for the reason she fetched them down stairs.

X Q. 60. Was it after they were out that she fetched them down stairs?

A. No, sir; she fetched them down stairs and took them out, or they was took; I won't say she did; I was so young I can't remember.

X Q. 61. Can you remember whether they were taken out up stairs or down stairs?

A. They were taken out down stairs.

X Q. 62. Who were present at the taking out?

A. My mother.

X Q. 63. Is that all.

A. No; I think there was a washwoman there.

X Q. 64. Anyone else?

A. No one but myself.

X Q. 65. When was this taking out?

A. It was taken out, I think, in the fall, 1863.

X Q. 66. Describe the peculiarity of the riveting which enables you to identify Exhibit 1?

A. It was done with a hammer, and set.

X Q. 67. Have you any other means of identification?

A. I have, in the peculiar way they are headed.

310 X Q. 68. Is that all?

A. I believe it is.

EDWARD E. CARGILL.

Subscribed and sworn to before me this 21st February, 1873.

R. E. STILWELL
Examiner, &c.

JOHN L. FITZPATRICK, a witness produced and sworn on behalf of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is John L. Fitzpatrick; age, twenty-six the 23d day of next May; residence, Waterbury, Connecticut; occupation, steel temperer.

Q. 2. Please look at the pair of corset steels or corset clasps now shown you, and state if you know who made them and when?

A. I made them; I made them in 1865, between the first of January and April.

Q. 3. Where?

A. In Waterbury.

(Counsel for defendants offers said pair of corset steels or corset clasps, testified of by the witness, and the same is marked Defendants' Exhibit 2, R. E. S., Examiner.)

Q. 4. State whether or not you at that time made any other corset steels; and if so, whether they were like or unlike Exhibit 2.

A. I made three or four pairs similar to those, and some not similar.

Q. 5. In whose possession has the corset steels (Exhibit 2) been since you made them, as you have stated?

A. They have been in my possession.

311 Q. 6. Have any of the corset steels made by you at the same time or soon after, been used to your knowledge; and if so, by whom?

A. There have been used one pair; Miss Jennie E. McNulty was the party that wore them; that was her name at the time I gave them to her; she is now my wife.

Q. 7. State how said corset steels or clasps, worn as you state by Miss McNulty, corresponded with or differed from Exhibit 2?

(Last part of the answer objected to as hearsay.)

A. They were the same as this set of springs here; she stated that she wore them satisfactorily.

Q. 8. When did she so wear them?

A. In the fall of 1865.

Q. 9. When did you make those corset steels or clasps which you gave to Miss McNulty, as you stated?

A. Made them in New Haven, in the spring of 1865.

Q. 10. What has become of those corset steels or clasps worn by Miss McNulty, as you have stated?

A. I don't know.

Q. 11. When did you last see them?

A. When she was sewing them into her corsets.

Q. 12. Have you any knowledge as to how long she wore them?

A. She told me that she wore them until her corsets gave out.

(Answer objected to as hearsay.)

Q. 13. Please look at the pair of corset steels or clasps now shown you, and state if you know who made them, and when?

A. I made them; made them in New Haven, in 1866, during the summer.

(Counsel for defendants offers said corset steels referred to in
312 the last answer in evidence, and the same are marked Defendants' Exhibit 3, R. E. S., Examiner.)

Q. 14. In whose possession have the steels, Exhibit 3, been since you made them?

A. Been in my possession.

Q. 15. Please look at the pair of corset clasps now shown you and state if you know who made them, and when?

A. I made them; made them in New Haven in 1865, with the exception of this piece of brass sliding on each spring.

(Counsel for defendants offers the corset clasps referred to in the last answer of this witness in evidence, and the same are here marked Defendants' Exhibit 4, R. E. S., Examiner.)

Q. 16. Where did Miss McNulty reside when she wore the corset clasps made by you, as you have stated?

A. 289 Hamilton street, New Haven, Connecticut.

And on cross-examination the witness says as follows:

X Q. 17. In whose employ are you?

A. Carrington Manufacturing Company, Waterbury, Connecticut.

X Q. 18. What is their business?

A. Manufacturers of corset steels and carriage trimmings.

X Q. 19. How long have you been in their employ?

A. Four years the 15th day of last December.

X Q. 20. In whose employ was you before that?

A. In the employ of J. Strouse & Co.

X Q. 21. What do they do?

A. Manufacture corsets and corset springs.

X Q. 22. Did they then?

A. They did.

X Q. 23. How long were you in their employ?

313 A. From April 11th, 1865, to December 16th, 1868.

X Q. 24. What was your employment from January 1, 1865, to April 11, 1865?

A. I worked in the trapp company of Waterbury, Connecticut, which manufactured animal traps.

X Q. 25. Are you a patentee of any patent for corset steels?

A. I am.

X Q. 26. Give the date of the patent as near as you can?

A. I think it was in 1869.

X Q. 27. Was it issued to you personally?

A. It was.

X Q. 28. Who owns it now?

A. I do.

X Q. 29. Entirely?

A. Yes, sir.

X Q. 30. For whom do Carrington Manufacturing Company make corset steels for now?

(Objected to as new matter, and as immaterial and irrelevant.)

A. They made them for the market and for Barnes & Cruttenden.

X Q. 31. Where in Waterbury did you make Exhibit 2?

A. In the trapp company.

X Q. 32. What is the full name of that company?

A. I don't know. I learn from Mr. Cargill, here present, that it was Blake, Lamb & Co.

(Witness made the enquiry with consent of counsel on both sides.)

X Q. 33. Of what material is Exhibit 2 constructed?

A. It is constructed of steel and brass and iron.

X Q. 34. Where did you procure those materials?

A. I procured them in Waterbury.

314 X Q. 35. Of whom?

A. I picked them up around the shop.

X Q. 36. Do you consider that article an animal trap?

(Objected to.)

A. It doesn't look much like it.

X Q. 37. To make what sort of traps were materials such as those of which Exhibit 2 is composed employed?

A. They didn't make traps out of that material.

X. Q. 38. Then please explain how you were able to pick up these materials around the shop?

A. Mr. William B. Cargill was in the corset spring business at that time in Waterbury, and he used to have his tumbling done at the trap company.

X Q. 39. Is that all the explanation you can give?

A. At the time I picked those up he had a good deal of material around there; I picked them out of material that he had there.

X Q. 40. Did any one see you at work upon this pair of springs?

A. I don't know.

X Q. 41. Did any one see them after they were done, and while you were still in Waterbury?

A. I can't say whether they did or not; I had them around the shop.

X Q. 42. What did you make them for?

A. To see if it would make them stronger.

X Q. 43. Why did you wish to make them stronger?

A. Because I had an idea that they were too light.

X Q. 44. What were too light?

A. The mainspring.

X Q. 45. Where did you get this idea, that they were too light.

A. In my head.

X Q. 46. Had you had any acquaintance with the manufacture of corset steels before this?

A. I had.

315 X Q. 47. Where, and for how long, and in what did it consist? State fully.

A. Mr. Cargill was in the business in Waterbury, and his place where he used to do part of his work was close to the factory that I worked in; I used to go up there considerable during shop hours; also assisted doing some of his work in the trap shop; for two years previous to this time—I think it was about two years—I had acquaintance with the manufacture of corset steels.

X 48. Have you any knowledge of Miss McNulty's wearing the corset steels referred to in your direct examination, except from her statements to you? If you have, state what it is?

A. I saw her put them in her corsets, and she told me she wore them and liked them.

(Answer objected to as not responsive.)

X 49. Cross question 48 repeated.

A. All that I know is that I saw her put them in the corsets; she told me afterwards that they were good; I asked her the question, and that was her answer.

(Same objection.)

X 50. Explain fully this process of putting them into the corset which you say you saw in 1865?

A. I was down to her house, and she was taking out a broken pair out of her corsets, and I gave her those to put in; she got them in and sewed them up.

X 51. How did she get them in?

A. With her fingers, as near as I can tell; it was a very simple process.

X 52. Have you any further knowledge of that process?

A. Nothing; only she sewed them in as I told you.

X 53. Did you make any other corset steels in every way like Exhibit 2, while in Waterbury—that is, before you went to New Haven?

316 A. I made some; I don't know they were just the same or not; there might be some point different.

X. What has become of them?

A. I guess some of them are in New Haven, out on J. Strause's farm, in the scrap that was carried out there.

X 55. How happened you to preserve Exhibit 2, and not the others?

A. Because I picked them up around the shop and carried them home one afternoon.

And on redirect examination the witness says as follows:

Re-D. 56. While the corset clasp (Exhibit 2) were around the shop in Waterbury, as you have stated in your answer to cross-question 41, what was the fact in regard to their being where they could be seen by any persons coming into or being around the shop?

A. After I put them together I threw them on the bench, and there was lots of this work scattered around there, and like those put pieces of broken springs and good springs.

Question again read to the witness, and he answers, "that is correct."

Re-D. 57. State whether or not any person coming into the shop, or being around the shop, could see those springs where they laid there?

A. They could.

Re-D. 58. State whether the corset steels, referred to in your answer to cross-question 53, were made of one plate of metal each or of two plates each?

A. They were two plates of steel each.

Re-D. 59. How early did you make any of these corset steels referred to in your answer to cross question 53, having two plates each?

A. Between the first of January, 1865, and April.

317 Re-D. 60. Were those the first corset steels or clasps having two plates each which you made at Waterbury?

(Objected to as not confined to matter of cross-examination.)

A. Those were the first.

Re X 61. Where is your wife now?

A. 289 Hamilton street, New Haven.

JOHN L. FITZPATRICK.

Subscribed and sworn to before me this 21st February, 1873.

R. E. STILWELL,
Examiner, &c.

JOSEPH MYERS, a witness produced on behalf of the defendants, deposes and says:

Q 1. What is your name, age, residence, and occupation?

A. My name is Joseph Myers; age, thirty-eight; reside at New Haven, Connecticut; am a corset maker.

Q. 2. Do you know John L. Fitzpatrick, the last witness?

A. I do, sir.

Q. 3. Please look at the pair of corset clasps, or corset steels, Defendants' Exhibit 2, now shown you, and state whether you ever saw them before; and, if so, where first?

A. I don't know I have seen the same pair, but a pair similar like it. I have seen them first—Mr. Fitzpatrick showed them to me. He showed them to me in Union street, New Haven, Connecticut.

Q. 4. When was this?

A. I can't exactly tell the time.

Q. 5. Where, if you know, was Mr. Fitzpatrick employed at that time?

A. He was employed by J. Strouse & Company.

Q. 6. How long had he been at work there when he showed you these steels?

A. I can't exactly tell; I think it was but a short time.

318 Q. 7. Well, about how short?

A. Well, I won't be positive, it might have been three or four months; I can't exactly tell.

Q. 8. Did you at that time mention to any one, that you had seen those steels or clasps?

A. I did.

Q. 9. To whom?

A. Mr. Wm. B. Cargill. I told him Jack Fitzpatrick got up something new.

Q. 10. Can you see any difference between these corset clasps, Exhibit 2, and the one you saw?

A. I don't think I can.

And in answer to cross-questions, the witness answers as follows:

X Q. 11. Were you a member of the firm of J. Strouse & Company?

A. I was.

X Q. 12. And are you now a member of the firm of Jacobs, Strouse & Company?

A. I am not.

X Q. 13. Were you ever?

A. No, sir.

X Q. 14. Are you in their employ?

A. I am in the employ of Jacobs, Strouse & Company, yes, sir.

X Q. 15. That house, or I. Strouse & Company made for Ferdinand Strause the corset steels which were the subject of an action a short time since, did they not?

A. I do not know; I left that company, I. Strouse & Company, before they dissolved, I believe a year before.

X Q. 16. What do you think about that?

(Objected to as incompetent.)

A. I have nothing to do with the steel department, and never had.

X Q. 17. Were you not aware of the progress and termination of that suit?

319 A. I believe I heard it when they started it; but in the mean-

time I went out of the business, and afterwards didn't hear no more about it.

X Q. 18. Don't you know or believe that that house made those sheets for Ferdinand Straus?

(Objected to as incompetent.)

A. I did know it.

X Q. 19. What is your business now?

A. Making corsets.

X Q. 20. Didn't you know that Ferdinand Straus was beaten in that suit?

A. I did not.

X Q. 21. When did you first learn it?

(Objected to as immaterial.)

A. I told you before that I didn't know Straus was beaten in that case.

X Q. 22. And you never heard it, did you?

A. I don't think I did.

X Q. 23. Are you a Hebrew?

A. I am, sir.

X Q. 24. Are you related in any manner to any member of the firm of Jacobs, Strouse & Co.?

A. I am.

X Q. 25. How?

A. Max Adler, of the firm of Jacobs, Strouse & Company, is brother-in-law of mine.

X Q. 26. Are all the members of that firm Hebrews; if not, which are?

(Objected to as immaterial and irrelevant.)

A. I don't know anything about their religion whatever.

X Q. 27. What do you understand them to be?

(Objected to as immaterial and incompetent.)

A. I never asked any question.

X Q. 28. Question repeated.

(Same objection.)

320 A. I don't know anything about their religious belief.

(Counsel for defendant suggests to counsel for complainant that it is not proper or good practice to draw into the record of a patent suit the question of the religious belief of persons not being parties to the suit who happens to be mentioned by witnesses in the cause.

Counsel for complainant inquired as to their nationality.)

X Q. 29. Are you aware that the firm of Jacob Strouse & Company were sued by Frances Lee Barnes for the manufacture of corset steels?

A. I was, last night.

X Q. 30. Did you never know it before?

A. I don't think I did.

JOSEPH MYERS.

Subscribed and sworn to before me this day of February, 1873.

R. E. STILWELL,
Examiner.

WILLIAM B. CARGILL, a witness produced on behalf of the defendant, deposes and says:

Q. 1. Please look at the corset clasp, Defendant's Exhibit 2, now shown you, and state whether you ever saw it before; and, if so, state when, first, and where?

A. I think that I have seen those same clasps before, or so near like

them it would be difficult for me to distinguish the difference; it was in the year 1865; New Haven, Connecticut.

Q. 2. State the circumstances which led to your first seeing them.

A. My attention was called to the clasps that John L. Fitzpatrick had made by Joseph Myers; I immediately called Mr. Fitzpatrick and questioned him in regard to the clasps; I asked John L. Fitzpatrick if he had made a clasp something different from what had been
321 made; he informed me he had, and produced a pair of clasps which I am very confident was this pair.

Q. 3. About what time in the year 1865 did this take place?

A. Well, as near as I can recollect, it was in June, or July; I recollect it was in warm weather.

W. B. CARGILL.

Subscribed and sworn to before me this day of February, 1873.

R. E. STILWELL,
Examiner.

Adjourned to Monday, February 24, 1873, at eleven o'clock a. m.

MONDAY, *February 24th*, 1873.

Present, counsel as before.

JENNIE E. FITZPATRICK called and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, and residence?

A. My name is Jennie E. Fitzpatrick; 289 Hamilton street, New Haven.

Q. 2. Please look at the corset clasps, or corset springs, now shown you, marked Defendants' Exhibit 2, and state if you ever saw a pair like them, and, if so, when first, and where?

A. Those are like the ones Mr. Fitzpatrick gave me, in 1865, in New Haven.

Q. 3. Do you see any difference between them and the ones Mr. Fitzpatrick then gave you?

A. I do not.

Q. 4. What is Mr. Fitzpatrick's Christian name?

A. John L.

Q. 5. What time in the year 1865 did Mr. Fitzpatrick give you these springs you speak of?

322 A. I don't remember whether it was in the summer or the fall; I know it was a short time after I became acquainted with him.

Q. 6. What did you do with the corset clasps or springs which Mr. Fitzpatrick gave you, as you have stated?

A. I sewed them in my corsets and wore them?

Q. 7. How long did you wear them.

A. I wore them until my corsets were all worn out. Well, I should think it was about eight or nine months.

Q. 8. How did they answer the purpose?

A. Very well.

And on cross-examination, the witness answered as follows:

Q. 9. Enumerate the particulars in which Exhibit 2 is like the pair of corset steels given you by Mr. Fitzpatrick, and in making this answer you will please not look at the exhibit.

(Last part of the question objected to as improper.)

A. It was like it because there was a long piece of steel on the underside.

Q. 10. Do you recall any other point of similarity without the use of the exhibit to help your recollection?

A. No; only that it was a double spring.

Q. 11. Have you any recollection when you discovered the worn-out corsets spoken of?

A. No; I have not.

X Q. 12. When were you married to Mr. Fitzpatrick?

A. In June, 1867.

X Q. 13. Do you remember in what way the "long piece of steel, on the under side," was secured to the upper plate in the pair of steels given you by Mr. Fitzpatrick in 1865?

A. Yes; I remember they were riveted at the ends.

X Q. 14. What for?

323 A. Why, to keep them together.

X Q. 15. What was the object of keeping them together, if you know?

A. So I should judge to form a strong clasp.

X Q. 16. Were the upper and under plates rigidly fastened together at the center, or not, of the springs he gave you?

A. No.

X Q. 17. Then do I understand you that they were so fastened at each end only?

A. Yes.

X Q. 18. What has become of that pair of springs?

A. That I couldn't tell.

X Q. 19. Did you show them to anybody else?

A. No; not as I know of?

X Q. 20. Do you remember the style of the rivet, or the character of the riveting in that pair of sheets?

A. No; I don't remember whether it was a small one or a large one.

X Q. 21. Were they large enough to hold the springs rigidly together; do you remember that?

A. Yes.

X Q. 22. Do you remember that as to both ends of the springs?

A. Yes.

X Q. 23. Were you engaged to be married at this time, in 1865?

A. I was not.

And in answer to redirect examination, the witness answers as follows:

Re-D. Q. 24. Do you remember whether the long pieces, put on the locks of the main spring, were riveted down tightly at both ends, or left so as to play at one end, as shown in exhibit?

(Objected to as leading, both by reason of the question and the exhibition to the witness of the exhibit, and because the witness
324 has said that she has enumerated all the points of similarity between the two objects of comparison that she can recollect.)

A. Yes, I remember they were riveted at both ends.

Re-D. 25. My question was not intended to enquire whether or not they were riveted at both ends, but I simply meant to ask whether the riveting was such as to allow one end to slide a little, as shown in Exhibit 2, or whether both ends were so riveted down that neither end could slide lengthwise?

(Objected to as leading, both by reason of the question and the exhibition of the exhibit to the witness, and because the witness has said that she has enumerated all the points of similarity between the two objects of comparison that she can recollect.)

A. Well, they couldn't slide because they were riveted down, and there were two pieces to each steel.

R. D. 26. Was there any difference between the way these steels were riveted and the way the ones now shown you (Defendant's Exhibit 2), are riveted?

(Objected to as a persistent leading of the witness, both by reason of the question and the exhibition of the exhibit to the witness, and because the question has been already answered.)

A. No, I think not.

Mrs. JENNIE E. FITZPATRICK.

Sworn and subscribed to before me this 24th day of February, 1873.

R. E. STILWELL,
Examiner.

TUESDAY, *February* 25, 1873.

Present, counsel as before.

JOHN L. FITZPATRICK, recalled as a witness on the part of the defendants, deposes and says:

Q. 1. When you made the corset steels, Defendants' Exhibit 2,
325 or about that time, did you take any steps towards obtaining a patent for it, and if so, what?

A. I did. In 1865 I went to Mr. John E. Earle, Chapel street, New Haven, and asked him in reference to getting out a patent on a pair similar to those. I also at that time gave him five dollars as a portion of his fee in reference to getting a patent, and I then dropped the matter, owing to the fact that I didn't have funds enough at that time to procure a patent or letters patent.

Q. 2. From that time to 1867 or 1868 what were you doing?

A. I was working on corset clasps for the firm of I. Strouse & Co.

Q. 3. What wages were you getting?

A. I had a contract with I. Strouse & Co., and earned from eighty to one hundred and ten and twelve dollars a month.

Q. 4. When did that contract begin?

A. I think it began in the fall of 1865.

Q. 5. At the time you went to Mr. Earle, what wages were you getting?

A. Two dollars or two and a quarter a day; I don't remember exactly which I was getting.

Q. 6. Had you any other property?

A. I did not have any.

JOHN L. FITZPATRICK.

Subscribed and sworn to before me this 25th day of February, 1873.

R. E. STILWELL,
Examiner.

At half-past eleven o'clock, and on the 25th Feb'y, A. D. 1873, the defendant's counsel, Charles F. Blake, esq., served George Cruttenden with a subpœna, marked X. R. E. S., and tendered him three dollars and a half witness' fees and attendance, which said Cruttenden accepted.

Counsel for defendant consents that witness may have time to consult his counsel in regard to the subpœna and to get his papers.

Adjourned to Feb'y 25, 1873, at two o'clock.

326 TUESDAY, *February* 25, 1873—two o'clock p. m.

Present, counsel as before.

GEORGE CRUTTENDEN, a witness called for defendants, being sworn, deposes and says:

Q. 1. What is your name, age, residence, and business?

A. George Cruttenden, jr.; forty years of age; reside at Mount Clare, New Jersey; am manufacturer and dealer in corset steels.

Q. 2. Are you a partner of the plaintiff in that business?

A. I am.

Q. 3. How long have you been in partnership with her?

A. Since the 19th day of September, 1867.

Q. 4. When did she marry Mr. Egbert?

A. I do not recollect.

Q. 5. Will you produce and put in evidence a copy of your partnership agreement?

A. I will.

Q. 6. Since forming that partnership has she sold the patent mentioned in the article, or has she granted any licenses under it?

A. Not to my knowledge.

Q. 7. Does your firm pay her any license money under that patent?

A. She has drawn from time to time sums of money equal to that which I have drawn, in accordance with our articles of agreement.

Q. 8. Do I rightly understand by your last answer that your firm has not paid her any license fee as such, or that you have not under the patent?

A. Neither the firm nor I have paid a license fee, as such, over and above the amounts alluded to in the last reply, so far as I have any knowledge.

Q. 9. In the course of your business could such payments be made without your knowledge?

A. It might and might not; could not possibly state.

327 Q. 10. Have you or your firm now, or have you ever had, any agreement with her, verbal or otherwise, entitling her to receive any other moneys for the use of said patent other than as provided in your said articles of copartnership?

A. I do not recollect any arrangement other than the articles of copartnership.

Q. 11. Then, to the best of your knowledge and belief, you have no such contract with her now; is that so?

A. Yes; I have no such contract.

Q. 12. Are the expenses of this suit defrayed by her or by your firm?

A. By the firm.

Q. 13. Do the moneys recovered in suits for infringement belong to her or to the firm?

(Objected to, as it has not been shown that any moneys have been recovered in any suits for infringement, or that the witness has any means of knowledge as to whom such recoveries, when obtained, would belong.)

A. I don't know.

Q. 14. Do you understand that moneys recovered in suits for infringement should, under your articles of agreement, belong to her or to the firm?

(Objected to, as the agreement has been called for by the defendant's counsel and produced, and is the proper evidence of the matter inquired of.)

A. I can add nothing to what is said in the articles of copartnership.

Q. 15. Do you know whether the estate of the late Samuel H. Barnes has been settled?

(Objected to as irrelevant matter, and as not raised by the issues in this cause.)

A. I do not.

328 Q. 16. Have any royalties ever been paid under this patent?

(Objected to as irrelevant.)

Q. 17. You know of none since your copartnership has been formed?

A. I don't know of any.

Q. 18. Does Mrs. Egbert take an active part in the conduct of the business of the firm?

A. Sometimes she does; sometimes she does not.

Q. 19. Who has directed and superintended the conduct of this suit?

A. George Gifford.

Q. 20. Who beside counsel has aided in its preparation and conduct?

A. Not being a lawyer, I could not state, as I do not know what aid and assistance is according to a lawyer's understanding of aid and assistance.

Q. 21. According to your own understanding of what aid and assistance are, who besides counsel has directed and supervised the conduct of this suit?

A. I don't know of any one.

Q. 22. Haven't you been present at all of the examinations of witnesses in this suit?

A. I think not.

Q. 23. Haven't you been at most of them?

A. I couldn't say.

Q. 24. How many of them have you been at?

A. Seven, I think.

Q. 25. Haven't you advised with counsel with regard to this suit during adjournments?

A. I have talked with counsel during these adjournments.

Q. 26. Has Mrs. Egbert taken an equal share with you in the consultations and directions of this suit?

A. I don't know.

Q. 27. What do you think?

A. I think I don't know.

Q. 28. Do you think she has taken more than you?

329 A. Well, I can't say. I don't know whether she has ever been in Mr. Gifford's office or not.

Q. 29. Did Barnes & Cruttenden print and circulate the circular, marked Defendant's Exhibit 6?

A. I could not say whether they did or not. They printed a circular on or about this time, to wit, August 12, 1872, circular very much like this.

Q. 30 Who wrote the circular which you say they printed about August 12, 1872?

A. I think I did.

Q. 31. Wherein do you think this circular, Exhibit 6, differs from that circular?

A. I could not say whether it does not differ from the circular; I do not recollect the contents of that circular so that I can state positive.

Q. 32. Are you willing to swear that you have any serious doubt that that is a copy of the circular printed by you about August 12, 1872?

A. I am not willing to swear to anything more or less than I have already sworn to on that question.

Q. 33. Now please answer the last question.

A. I doubt anything presented by the counsel for the defendants; I have no confidence in their integrity or their fairness.

Q. 34. Do you decline to make any further answer to question 32? If not, please answer it.

(Counsel for complainant suggest that the question alluded to has been substantially answered.)

A. I decline to make any further statement to that question.

Q. 35. Are the statements of fact in the circular, Exhibit 6, true?

(This entire line of examination objected to as irrelevant to any issue raised by the pleadings.)

A. In the main I consider them true.

Q. 36. Was it true in the month of August, 1872, that you had said to already begun against the double extension and improved
330 everlasting steels?

A. I had so ordered, and did believe then, and do believe now.

And in answer to cross-questions propounded, answers as follows:

X Q. 37. Has Mrs. Egbert such health as permits her to take an active part in the affairs of the firm of Barnes and Cruttenden?

A. I think not.

X Q. 38. You may give some further account of the doings of the firm of Barnes and Cruttenden, pertaining to the corset steel business, including in your narrative the obstacles which they have met, and giving some idea of the expenditures which they have made to overcome them.

(Objected to as incompetent and irrelevant.)

A. In the year 1867 I attempted or undertook the manufacture and sale of the corset spring now known to the trade as "Cantbreakem" corset steel; they were then entirely unknown to commerce, and in all my efforts I met with constant and every influential opposition; nearly all of the manufacturers of corset steels in this country stated to me that the enterprise must be an inevitable failure, and discouraged me at every step in the undertaking. The large and influential merchants, like A. T. Stewart & Company, H. B. Claflin & Company, and other houses doing a larger business than they in this line of goods, also told me that I could never succeed in selling these goods. They could not be persuaded to buy them. They would not receive them into their establishment on commissions. They refused to keep a sample of them or have anything to do with them. I was therefore compelled to peddle them out in small quantities, to small dealers, and women. By long and persistent effort; by advertising extensively throughout the greater portion of the
331 United States, I succeeded in or about the year 1869 in making them the most popular steel sold in this country. About that date Ferdinand Straus got out an infringing steel and put it upon the market, and persistently undersold me or us, and damaged our reputation still further by making inferior goods which were sold by the traders, and represented to be the "Cantbreakems." At great expense of time and money we succeeded in getting an injunction restraining him from manufacturing. This took nearly three years of time. There were other manufacturers who also manufactured and put upon the market other double steels, which from self-protection we were compelled to sue and restrain, and we did succeed in restraining two of them. Several other infringers have also introduced to the market and are now selling infringing goods, amongst them the firm of Jacobs, Strouse & Company, who formerly sold, and I believe owned an interest

in the Straus steel, aforesaid. In a few days after the injunction was granted by the court, restraining the manufacture of the Straus steel, the said firm of Jacobs, Strouse & Company commenced selling a steel having the same general appearance that the Straus steel had; was in fact like it in every particular except that the Straus steel was rivetted rigedly at the centre, and those manufactured since the injunction was granted are not rigidly rivetted through both the plates, and they are selling these inferior goods throughout the country at prices very largely less than ours, and can do so, because for one reason that the material is far inferior to ours. There is also the defendants in this suit, who are making and selling inferior goods at lower prices, greatly to our detriment and damage, in repute and money, for their goods and the others are sold by merchants who call them "Cantbreakems," and they are bought by thousands of people for "Cantbreakems," supposing them to be such. In thus introducing, building up and establishing our business, we have expended five years of valuable time, fully fifty
332 thousand dollars in money, and are now daily being robbed of this expenditure of time and money, and the sacred rights intended to be ours through the letters patent, and our business is to-day, and has been for a long time past, without profit to ourselves. I wish further to state that we intend sueing the firm of Jacobs, Strous & Company, before alluded to, as soon as we can procure the legal evidence that they have infringed; they being constantly on the alert to prevent us from getting said evidence. There is another firm making and selling a corset steel, which is also an infringement—that firm being P. Lippman & Co. Mr. Lippman of that firm told me on Thursday last, I think, that he would burst up our patent and destroy our business, unless we called at his office and made terms with him, on or before eleven o'clock the succeeding day. I am informed, and believe, that there are some twenty-five or thirty patents on file or issued by the United States Patent Office, all of which we believe to be infringements upon our rights, and which, we also believe, will be put upon the market, should this suit be long delayed in its decision. I wish also to state that by the mere force of the superiority of principal of our steel, the manufacture and sale of the said steel has been extended all over Europe, and, we believe, other countries.

(Counsel for defendants objects to the whole of the foregoing answer, and respectfully protests against the waste of time and money which such testimony as the foregoing entails upon the defendants.)

X Q. 39. You were subpœnaed to testify, were you not, by the counsel in person who dictated the above objection?

A. I was; in person.

X Q. 40. Has any representative of Jacobs, Strouse & Co. been present during most, if not all, of the testimony for the defence herein; if so, and you know it or any part of it, please give his name?

333 A. Mr. Mayer, or Myer, I believe it is, here present, has represented himself to me to be a member of the firm of Jacobs, Strouse & Co., and I have noticed that he has been here through all the examination of nearly all the witnesses, and has taken an active part, apparently, in consultations and suggestions to and with the counsel for defence.

X Q. 41. Did Mr. Lippman aforesaid say he would smash the Barnes patent by giving or procuring evidence in this suit unless you made terms with him, or words to that effect?

(Objected to as incompetent and irrelevant.)

A. He did.

X Q. 42. Do you mean, by any language you may have used, that any other person or firm other than the complainant has any title to or ownership of the patent herein sued upon?

(Objected to as leading and incompetent.)

A. There is no one having an ownership in the patent of the plaintiff besides herself, so far as I know.

X Q. 43. What do you understand to be the nationality of the partners of Jacobs, Strouse & Co., including Mr. Mayer, or Myer, here present?

(Counsel for defendants calls Mr. Witter's attention to the discourtesy and impropriety to the court, as well as others, and to the illegality of introducing into the discussion of a cause the religious belief of any person, or his nationality, and requests Mr. Witter to withdraw his question.

Mr. Witter states, in answer to the question whether the X Q. 43 is withdrawn, that he desires the examination to proceed.

Counsel for defendants objects to the question as illegal and immaterial.)

A. I understand them to be Hebrews.

334 X Q. 44. Please answer the same question as regards Mr. Lippman and Ferdinand Straus.

(Same request and objection.)

A. I believe that Mr. Lippman and Mr. Straus alluded to are also Hebrews.

X Q. 45. Is this Mr. Lippman the man who has heretofore graced the calendars of the court as an infringer?

(Objected to as immaterial.)

A. I am informed and believe that Mr. Lippman has graced, if that be a proper term, many different courts and calendars as an infringer.

GEORGE CRUTTENDEN, JR.

Subscribed and sworn to before me this 25th day of February, 1873.

R. E. STILLWELL,
Examiner.

Counsel for defendants puts in evidence a true copy of the articles of copartnership between the plaintiff and Cruttenden, which has been made by the examiner, and which is certified by him as correct, which is marked Exhibit 5.

Counsel for defendants also puts in evidence a certified copy of the last will and testament of Samuel H. Barnes, marked Exhibit 7.

The reception of this document (Exhibit 7) objected to as irrelevant matter, and as incompetent matter.

335 *Defendant's Exhibit* 5.

Articles of copartnership, made this 18th day of September, 1867, by and between Frances Lee Barnes, of the first part, and George Cruttenden, jr., of the second part, both of the city of New York, witnesseth:

That the said parties hereby agree to form, and do form, a copartnership for the purpose of manufacturing and selling patent corset springs, to be manufactured under the patent for Barnes' patent excelsior duplex corset springs, belonging to the party of the first part, and bearing date the 1st day of July, 1866, and known as number 56345 in the records of the Patent Office, on the following terms and articles of agreement, to the faithful performance of which they mutually engage and bind themselves to each other.

The style and name of the copartnership shall be Barnes & Crutten-

den, and shall commence on this 19th day of September, 1867, and continue until the 17th day of July, 1882, unless sooner dissolved, as hereinafter provided.

The party of the first part agree to contribute to the funds of the partnership the sum of one hundred and fifty dollars, which should be paid on or before the first day of January, 1868, and to furnish for the use and benefit of the partnership business one set of dies made for the purpose of manufacturing the said corset springs; but the amount of time which she shall devote to the care and superintendence of the business shall be entirely at her own option.

The party of the second part agrees to contribute to the funds of the partnership whatever amount of money may be needed for carrying on the business, in addition to the amount contributed by the party of the first part, and the profits of the business, which shall not be withdrawn, as hereinafter provided, which amount shall not be less than one thousand dollars, and shall be paid in as soon as the interest of the business may require, and to devote and give all his time and attention to
336 the business and to the care and superintendance of the same.

All profits which may accrue to the said partnership shall be equally devided, and all losses happening to the said firm and all expenses of the business shall be borne by the said parties equally.

All the purchases, sales, transactions, and accounts of the said firm shall be kept in regular books, which shall be always open to the inspection of both parties and their legal representatives, respectively.

An account between the parties shall be settled as often as once a year, and as much oftener as either party may desire and in writing request.

Neither of said parties shall subscribe any bond, sign or endorse any note of hand, accept, sign, or endorse any draft or bill of exchange, or assume any other liability, verbal or written, in the name of the firm, for the accommodation of any other person or persons whatsoever, without the consent, in writing, of the other party; nor shall either party lend any of the funds of the partnership, or hire or borrow money in the firm-name, or sell any goods on credit, without such consent of the other party.

No transaction out of the usual course of the business shall be undertaken by either of the parties without previous consultation with and the approbation of the other party.

Neither party shall withdraw from the joint stock at any time more than his or her share of the profits of the business then earned, nor shall either party withdraw the profits when such profits shall be needed for carrying on the business; but when the profits are not needed in the business, they may be withdrawn by each party in equal amounts.

The party of the first part shall not sell the said patent nor any right to manufacture under the same to any other party or parties during the existence of this partnership; and in case a dissolution of this partnership shall take place before the 17th day of July, 1882, then the said patent and all the right, title, and interest which the party of the
337 first part has in and to the same, and all the partnership effects except the debts due the firm, shall be sold at public auction, at which both parties shall be at liberty to bid and purchase as other individuals, and the proceeds shall be divided, after the payment to each party of the amount of capital contributed by them respectively, and of the debts of the firm, in the proportions aforesaid: Provided, however, That for the purpose of securing the performance of the foregoing agreements, it is agreed that either party, in case of any violation of

them or either of them by the other, shall have the right to dissolve this copartnership forthwith, on his or her becoming informed of such violations, and shall thereupon become vested with and become the sole owner of the aforesaid patent, and of the exclusive right to manufacture under the same.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above mentioned.

FRANCES LEE BARNES. [L. S.]
GEORGE CRUTTENDEN, JR. [L. S.]

Signed, sealed, and delivered in presence of—
GEORGE MCLAUGHLIN.

[Five 5-cent revenue stamps, cancelled.]

338 *Defendants' Exhibit* 6.

TWO MORE VICTORIES FOR THE CANTBREAKEM.

NEW YORK, *August* 12, 1872.

GENTLEMEN: On the 8th inst. we obtained preliminary injunctions restraining the manufacture, sale, or use of the corset steels called the climax and indestructible. These injunctions are our reply to the talk of proprietors and their agents.

The proprietors of the monitor have voluntarily stopped making, and we believe the same of the Lipmann steels.

We shall press the suits already began against the double extension and improved everlasting as fast as possible, and bring suit against any and all double steels that may be offered for sale. Meantime we warn all whom it may concern that we shall continue to procure the evidence necessary against those who sell any double steel other than ours, or those licensed by us, and, in due time, prosecute for damages. With these facts before you, would it be "business" or morally right for you to sell infringing goods?

Respectfully,

BARNES & CRUTTENDEN,
Proprietors of the "Cantbreakem Corset Steel."

339 *Defendants' Exhibit* 7.

STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Morgan A. Dayton, jr., clerk to the surrogate's court of said county, do hereby certify that I have compared the annexed copy of the last will and testament of Samuel H. Barnes, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of the said original record.

In testimony whereof I have hereunto set my hand and affixed the seal of office of said surrogate, this nineteenth day of December, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S.] MORGAN A. DAYTON, JR.,
Clerk to the Surrogate's Court.

In the name of God, amen; I, Samuel H. Barnes, of the city, county and State of New York, being of sound disposing mind and memory, and mindful of my approaching mortality, do by these presents make,

publish, and declare this my last will and testament, as follows: After the payment of all my just debts and funeral charges, I give and bequeath to my beloved wife, Frances L. Barnes, all of the property of which I may die seized, both personal and real, which includes two patent rights, viz, one for tanning leather, and the other for an improvement in the manufacture of ladies' corset springs; to have and to hold, all and singular, the property hereby bequeathed, or intended so to be, unto my said beloved wife, her heirs and assigns, forever; and I do hereby constitute and appoint my beloved wife, the said Frances L. Barnes, sole executrix of this my last will and testament, hereby
340 revoking and declaring null all other and former will or wills by me heretofore at any time made.

In witness whereof I have to this my last will and testament affixed my seal and subscribed my name, this eighth day of August, eighteen hundred and sixty-six.

SAMUEL H. BARNES. [L. S.]

Signed, sealed, published, and declared by the said testator, Samuel H. Barnes, as and for his last will and testament, in the presence of us, who at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

ISRAEL BOWER, 299 *West 12th st., N. Y.*
W. C. CARPENTER, 11 *Greenwich ave., N. Y.*

Adjourned to eleven o'clock a. m., Wednesday, February 26, 1873.

341 WEDNESDAY, *February* 26, 1873—11 a. m.

Present, counsel as before.

Counsel for defendants offers in evidence a certified copy of the file wrapper and contents of the application of Frances Lee Barnes, administratrix, &c., in the matter of the reissued letters patent granted to her dated May 12, 1868, No. 2929, for improvement in corset springs, and the same is marked Defendants' Exhibit 8, R. E. S., examiner; also a certified copy of the file wrapper and contents, except the complainant's record, brief for complainant, and decision by Judge Blatchford in the matter of the reissued letters patent granted to Frances Lee Barnes, executrix, &c., dated November 5, 1872, No. 5130, for improvement in corset springs, and the same is marked Defendants' Exhibit 9, R. E. S., examiner; also a certified copy of the file wrapper and contents in the matter of the reissued letters patent, granted Frances Lee Egbert, executrix of Samuel H. Barnes, deceased, dated January 7, 1873, No. 5216, for improvements in corset springs, and the same is marked Defendants' Exhibit 10, R. E. S., examiner; also a certified copy of the reissued letters patent, granted Frances Lee Barnes, as executrix, dated November 5, 1872, No. 5130, for improvements in corset springs, and the same is marked Defendants' Exhibit 11, R. E. S., examiner; also a certified copy of the specification and drawing in the matter of the English letters patent granted to George Twigg, dated February 7, 1865, No. 349, for improvements in fastenings for stay busks, leggings, garters, and other similar articles, and the same is marked Defendants' Exhibit 12, R. E. S., examiner; also a certified copy of the specification in the matter of the English letters patent granted John Harras Elvans, dated August 13, 1861, No. 2006, for an improved steel busk or stay fastening, and the same is marked Defendants' Exhibit 13, R. E. S., examiner;
342 also the letters patent of the United States, granted to John L. Fitzpatrick, dated November 9, 1869, No. 96685, and it is con-

sented that a certified copy may be substituted therefor, to be marked Defendants' Exhibit 14, R. E. S., examiner.

Adjourned till twelve o'clock, Thursday, February 27, 1873.

THURSDAY, *February* 27, 1873.

Present, counsel as before.

EDWARD S. RENWICK, a witness called for defendants, being sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and business?

A. My name is Edward S. Renwick; I am fifty years of age; I reside at Millburn, New Jersey, my place of business being in the city of New York; I am engaged mainly in acting as an expert in the trial of patent causes in the United States courts, and in soliciting patents.

Q. 2. Have you read the reissued letters patent of Frances L. Egbert, executrix, dated January 7, 1873, and do you understand the invention therein described?

A. I have read a certified Patent Office copy of the reissued letters patent referred to in the question, and believe that I understand the invention therein described.

Q. 3. Look at Complainant's Exhibit C. Compare it with the corset springs described in the descriptive part and drawings of said reissued letters patent, and state their points of resemblance and difference.

A. I have looked at the article shown me as Complainant's Exhibit C, and have made the comparison required by the question. I find that the said Exhibit C is substantially the same, in some re-
343 spects, as the corset springs described in the descriptive part and drawings of the said reissued patent, and is, in other respects, substantially different therefrom; thus, the two are substant ially alike in the respect that each is composed of two compound springs, each of which consists of two metallic plates; also, in the respect that the two compound springs in each are combined by means of clasps, which permit the springs to be disconnected and reconnected; also, in the respect that the two plates of each compound spring are applied facewise to each other; also in the respect that the two plates of each compound spring are connected in some manner, or by some means, which prevents the one plate from being moved laterally off of the other, but, at the same time, permits more or less longitudinal movement at some portion of their length. They are substantially different from each other in the respect that the plates of the springs represented in the drawings of the patent, and described in the descriptive part thereof, are connected rigidly at their centres or thereabouts, so that no longitudinal movement of one of the plates of either of the compound springs relatively to the other plate at such central position is possible, whereas no such connection or any equivalent for it is found in Complainant's Exhibit C. They are also substantially different in the respect that in Complainant's Exhibit C the plates of each of the compound springs are so connected with each other as to permit each of said compound springs to be extended in length, or contracted in length, so as to adapt the article produced by the compound springs to corsets of different dimensions; whereas, no such means of connection permitting of longitudinal expansion and contraction exist in the Egbert spring, referred to in the question, and the means of connecting the plates of the said compound Egbert springs are such as to make such longitudi nal contraction and expansion impossible. They are also substantially different in the respect that the end clasps of the Egbert springs

344 are both combined with the same metallic plate, whereas in Complainant's Exhibit C the end clasps are combined with different metallic plates, the result of which difference is that the end clasps in the former case would prevent the longitudinal extension of the compound spring, even if the connection between the two plates of the springs permitted one of the two plates to be moved longitudinally along the other at the centre as well as its ends. They are also substantially different in the respect that the intermediate clasp of the Egbert springs is secured rigidly to both plates of each compound spring, whereas no such construction is found in Complainant's Exhibit C, but on the contrary the reverse of the intermediate clasp can be slidden or moved along the compound spring to any desired position.

Q. 4. How do the clasps of Defendant's Exhibit 15 differ in their manner of attachment, mode of operation, and in other respects from the clasps of the Egbert patent?

A. They do not differ, but are identical in all respects.

Q. 5. Make the same comparison of the clasps of Defendant's Exhibit 15 with the clasps Complainant's Exhibit C.

A. The former differ from the latter in the same respects in which the clasp of the Egbert springs differ from the clasp of Complainant's Exhibit C.

Q. 6. How long have you been acquainted with compound springs composed of two or more leaves of metal, and to what uses in the arts have you known them to be applied?

A. I have been acquainted with such compound springs as are mentioned in the question as long as I can recollect, say thirty-five or forty years. I have known them to be applied to a great variety of purposes, as, for example, to wheel carriages, to locomotives, to railroad cars, to machinery of various descriptions, as, for example, to steam engines, and to a great variety of machines for the purpose of producing 345 movements in opposition to movement effected by cams. I have also known them to be used as corset springs.

Q. 7. Excepting from your answer the cases of corset-springs, how were these various compound springs united together?

A. They were united together in such manner as to preserve the longitudinal movement of one of the metallic plates relatively to the other or others at some part of the length of the compound spring, generally either at one end thereof or at the center thereof, but so as to permit longitudinal play at other parts of their length, as the springs were more or less flexed facewise; they were also so connected in such manner as to prevent any one of the plates of the compound spring from being moved laterally off of the other plate or plates. The means of connections that I have known are various, the plates being in some cases rigidly connected at one part of the length of the spring by means of rivets; in others by bolts, in others by screwed plates, and in others by boxes in which the ends of the plates were inserted. The connections permitting the longitudinal play of the metallic plates as the spring was flexed facewise have also been of various kinds; some consisting of bolts passed through slots in the plates, some consisting of pins made fast to one plate and passed through or into slots or grooves in another plate, and some consisting of guides placed at the opposite edges of the plates.

Q. 8. How long have you known corset steels construced like Defendants' Exhibits 15?

A. I cannot state definitely how long I have known corset steels like

the said Exhibit 15, but I have known them for many years, and certainly as early as the year 1858.

Q. 9. Please compare Defendants' Exhibit 16 with the Defendants' Exhibit 12, and state whether or not it correctly represents the steel shown in the drawing annexed to Exhibit 12.

A. Upon comparing the two I find that Exhibit 16 is a correct
346 representation of the corset springs described and represented in Exhibit 12. The only difference that I notice is that there are three rivets shown in figure 2 of the drawing of Exhibit 12, which are not shown in Exhibit 16, but as the said three rivets are not represented in the other figures of Exhibit 12 and have no apparent purpose, I do not consider this slight difference of any importance.

Q. 10. Please compare Exhibit 17 with Exhibit 13 and state whether or not it is constructed substantially according to the description in Exhibit 13.

A. Upon comparing the two I find that Exhibit 17 is constructed substantially as described in Exhibit 13 in every particular.

Q. 11. Please compare the manner in which the reinforcing plate is attached to one of the springs of defendants' Exhibit 16, with the manner in which the leaves of the Egbert springs are united.

A. Upon comparing the two I find that the means of connecting the reinforcing plate with the other plate of a compound spring in each case is substantially the same in the respect that in each case the means are such as to prevent either plate of each spring from being moved laterally off of the other plate; also in the respect that the means are such as to permit a small amount of longitudinal movement at some part of the length of the compound spring. The means of connection of the two are substantially different in the respect that in the Egbert spring the two plates are rigidly connected so as to prevent any longitudinal movement at one part of the length of the spring, whereas no such rigid connection is produced by the means of connection found in Exhibit 16, in which, on the contrary, every part of the reinforcing plate can move longitudinally upon the other plate to a limited extent.

Q. 12. What are the means of connection in Exhibit 16?

A. The means of connection for the purpose of preventing lateral movement and permitting longitudinal movement are the brass
347 guides in which the reinforcing plate slides longitudinally, and the extent of longitudinal movement is limited by the pins moving in the slots of the larger plate, which thus prevent the two plates from being separated by longitudinal movement.

Q. 13. Compare the mode of uniting the reinforcing leaf of Exhibit 17 with the other members of the spring, and compare them with the means of uniting the leaves of the Egbert springs.

A. The means in each of the two things compared are substantially alike in the respect that each of the said means prevent either one of the two plates of the compound spring to be moved off of the other plate laterally, and also that some longitudinal movement at some part of the spring is permitted. They differ substantially in the respect that the means of connection in the Egbert spring secure the two plates of the compound spring rigidly to each other at one part of the length of the spring, so that longitudinal movement at such part is prevented; whereas, in Exhibit 17 the means of connection permit every part of the reinforcing plate to be moved longitudinally upon the other plate to a limited extent.

Q. 14. What are the means of connection of Exhibit 17?

A. They are stud pins whose stems are riveted into the reinforced plate and are movable in slots in the reinforcing plate.

Q. 15. How do these pins and slots differ from the pins and slots of Egbert's spring?

A. They do not differ in any respect from the pins and slots near the ends of the reinforcing plate of the Egbert spring.

Q. 16. Please compare Defendants' Exhibit 1 with the Egbert steels, and point out their resemblance and difference.

A. Upon comparing the two articles, I find that they are substantially alike in the respect that each is composed of two compound springs, each of which consists of two metallic plates. Also in the re-
348 spect that the two compound springs in each article are combined by means of clasps which permit the springs to be disconnected and reconnected. Also in the respect that the two plates of each compound spring are applied facewise to each other. Also in the respect that the two plates of each compound spring are connected by means which prevent the one plate from being moved laterally off of the other, but at the same time permit more or less longitudinal movement at some portions of their length. Also in the respect that the two plates of each compound spring are connected rigidly at the centers of their lengths, or thereabouts, so that no longitudinal movement of one of the plates of either compound spring relatively to the other plate thereof is permitted at such place of connection. Also in the respect that the end clasps of each compound spring are both secured to the same metallic plate. Also in respect that the members of the central clasp are secured rigidly to both of the plates of each compound spring. They differ only in the respect that in the Egbert spring the plates of each compound spring are connected by means of stud pins and slots, which prevent the ends of the reinforcing plate from being sprung facewise from the reinforced plate by the flexing of the spring facewise in one direction; whereas no such facewise connection of the ends of the reinforcing plates with the reinforced plate is found in Exhibit 1.

Q. 17. When Exhibit 1 is secured it its place in the corset by any of the usual means, will the ends of the reinforcing plate spring facewise from the main plate by the flexing of the spring?

A. When secured as stated in the question the ends of the reinforcing plate cannot spring facewise from the ends of the main plate to any material extent, as the same means which secure the compound springs to the corset also hold the plates of each compound spring facewise to each other.

349 Q. 18. In your judgment, are the springs Exhibit 1 complete and useful corset springs?

A. In my judgment they are.

Adjourned to 11 o'clock a. m. Friday, February 28, 1873.

FRIDAY, *February* 28, 1873.

Present, counsel as before.

Direct examination of EDWARD S. RENWICK resumed:

Q. 19. Please compare Defendants' Exhibit 2 with the Egbert steels and the defendants' steels, and state the points of resemblance and difference which you find.

A. Upon comparing these three articles together, I find that they are all substantially alike in the respect that each is composed of two compound springs, each of which consists of two metallic plates; also in the respect that the two compound springs of each article are combined by

means of clasps, which permit them to be disconnected and reconnected; also in the respect that the two plates of each compound spring are applied facewise to each other; also in the respect that the two plates of each compound spring are connected by means which prevent one plate from being moved laterally off the other, but at the same time permit more or less longitudinal movement at some portions of their length. The Egbert article and the Defendants' Exhibit 2 are substantially alike in the respect that the two plates of each compound spring are rigidly connected at one place in its length, so that movement at that place of one plate upon the other is prevented, and in this respect they are substantially different from Complainant's Exhibit C, in which
350 there is no rigid connection. Complainant's Exhibit C is substantially different from the Egbert article, and from Defendants' Exhibit 2, in the respect that in the first the plates of each of the compound springs are so connected with each other as to permit each of the compound springs to be extended in length or contracted in length so as to adapt the article to corsets of different dimensions; whereas no such means of connection permitting of the longitudinal expansion and contraction of the article exist in the Egbert article or in Defendants' Exhibit 2, and the means of connecting the plates of the last two articles are such as to make such longitudinal expansion and contraction impossible. The Egbert article and Defendants' Exhibit 2 are substantially alike in the respect that in them the end clasps are combined with the same plate of each compound spring, whereas in Complainants' Exhibit C the end clasps are combined with different metallic plates, the result of which difference is that the end clasps in the first two articles would prevent the longitudinal extension, even if the connection between the two plates of the springs was such as to permit it. The Egbert article and Defendants' Exhibit 2 are alike in the respect that the members of all of the clasps are secured rigidly to the metallic plates, and in this respect Complainant's Exhibit C is substantially different from them, as in it the members of the intermediate clasp are connected with one of the plates of each compound spring in such manner that the intermediate clasp can be slidden along the spring to various positions, as required when the article is contracted or expanded in length. The Egbert article and Defendants' Exhibit 2 are alike in the respect that in them the means of connecting the plates of each compound spring are rivets, stud pins, and slots, and in this respect they and Exhibit C differ substantially, because with or without stud pins and slots the employment of rivets as the means of connecting the metallic plates in the last named article would prevent the longitudinal contraction and ex-
351 pansion of the article, and because if the attempt were made to connect the metallic plates (Complainant's Exhibit C, by means of stud-pins and slots in place of the slips), and at the same time to permit of the longitudinal expansion and contraction, the one plate of each spring would have to be slotted almost from end to end, the effect of which would be, in my opinion, to so weaken the article as to render it practically valueless. The Egbert article and Defendants' Exhibit 2 differ from each other in the respect that in the former the plates of each compound spring are connected with each other rigidly at or about the centers of their length, so that the spring of the reinforcing spring upon the main spring by, reason of facewise flexure, takes place in opposite directions from the said central connection here, as in said Defendants' Exhibit 2, the rigid connection between the two plates is at or about on end of the compound spring, so that the play during flexure takes place wholly in one direction from the place of the rigid

connection. All of the three articles are also in the respect that material facewise separation of the plates of each compound spring is prevented at each place of connection.

Q. 20. Please compare the Defendants' Exhibit 2 with letters patent of John L. Fitzpatrick, Defendants' Exhibit 10, and state their points of resemblance and difference.

A. Defendants' Exhibit 2 as in the article described in the Fitzpatrick patent, Defendants' Exhibit 4, are substantially alike in all respects but one, namely, that in the latter article there is for each compound spring one additional reinforcing spring, which is connected with the main spring in the same manner as the reinforcing spring and main spring are connected in Defendants' Exhibit 2, and is so arranged relatively to the other reinforcing spring that the two reinforcing springs overlap each other, and these increase the strength of each compound spring at the overlapping portions.

352 Q. 21. Compare the busk described in Defendants' Exhibit 18 with the compound springs of the Egbert corset springs.

A. Upon making the comparison I find that each of the compound springs of the Egbert article is, considered by itself, substantially the same, as a whole, as one of the kind of compound corset springs described in Exhibit 18, each being a compound spring composed of at least two metallic plates, one of which reinforces the other; each having the metallic plates of which it is composed so connected as to prevent one plate from being moved laterally off of the other; each having the metallic plate of which it is composed connected with each other rigidly at the central portions of their lengths, so that play during facewise flexure takes place in opposite directions from such central rigid connection. In each article also the plates are prevented from material separation facewise, in the vicinity of the ends of the reinforcing springs, such separation at the said place being prevented, with the compound springs of the Egbert article, by means of the stud-pins, and being prevented, in the Exhibit 18 article, by the covering of leather or gut, which is secured upon the compound springs. There are other constructions of compound springs described in the said Exhibit 18 which differ substantially from the compound springs of the Egbert article; such, for example, as those which are extensible in length; but, unless specially requested, I do not propose to compare all of the forms of compound springs described in said Exhibit 18 with the compound springs of the Egbert article.

Q. 22. If to two of the La Porte busks you added the clasps of Defendants' Exhibit 1, how would the pair thus made differ from the Egbert article?

A. The pair produced by such addition would be substantially the same in all respects as the Egbert article, the former differing from the latter only in degree.

Q. 23. What is the usual way in which a corset spring is enclosed in a corset?

353 A. The corset spring is generally first covered tightly with some flexible fabric, such as muslin or leather, and then the covered spring is inserted in a tubular casing, formed of the cloth of the corset.

Q. 24. When in the corset, what functions do the pins and slots of the Egbert steels perform?

A. They are practically of no value after the application of the springs to the corset, as the covering and casing prevent the facewise separation of the ends of the reinforcing spring from the main spring by face-

wise flexure, and the rivets which connect the plates rigidly at the central portions of their lengths prevent any possible lateral sliding of one plate off of the other, and also prevent the shorter plate from creeping longitudinally along the main plate.

Q. 25. If, instead of the compound steels fastened together as in the Egbert steels, you used compound steels like Defendants' Exhibit 19, having, however, no metallic connection between them, how would they, when in the corset, differ in their mode of operation from the Egbert steels?

A. They would not differ substantially in their mode of operation from the Egbert steels in any respect; the only difference being in the degree of stiffness toward the end, assuming that the Egbert steel has the precise proportion of the reinforcing spring to the main spring represented in the drawing of the patent.

Q. 26. When Defendants' Exhibit 19, without connection by rivets are secured in corsets in the usual way, would the steels be prevented from springing apart from each other and from sliding off laterally?

A. They would.

Q. 27. Please compare Defendants' Exhibit 20 with Complainant's Exhibit C, in respect to their workmanship and material, and state which is the better steel of the two.

A. I cannot perceive any material difference between the workmanship and material of the two exhibits.

354 Q. 28. Is Exhibit 20 in any respect better than Complainant's Exhibit C?

A. It is not.

Counsel for defendant offers Mr. Renwick to the complainant for cross-examination in regard to the matters in his foregoing testimony, and suspend his further direct examination, to await the arrival of the certified copy of the original Barnes patent, which counsel have already ordered, but which has not yet arrived.

Cross-examination of this witness waived.

E. S. RENWICK.

Subscribed and sworn to before me this 27th day of February, 1873.

R. E. STILWELL,
Examiner.

WILLIAM C. HICKS, a witness called for defendants, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence and business?

A. My name is William C. Hicks; I reside at Summit, New Jersey; my age is forty-three, and my business at present is that of soliciting patents, and acting as expert in patent causes.

Q. 2. Please state somewhat at large your experience as expert in patent causes, and how long you have been engaged in the investigation of questions connected with patents.

A. My first experience in acting as expert in patent causes began in 1857. In 1860 I was engaged as expert in the trial of a cause in Baltimore, before the circuit court, the subject being sewing machines; since that time I have been frequently called to act as expert both in United States and State courts on mechanical questions. Since 1849 I have been engaged in matters connected with patents almost continually, having taken out a large number myself and having assisted others to do the same, and my whole time has been occupied in the inves-
355 tigation and practice of machinery, the most of it being of that

character which may be called improvements, or inventions which were new.

Q. 3. Have you read the reissued letters patent of Frances Lee Egbert, executrix, dated January 7, 1873, and do you understand the invention therein described?

A. I have read the re issued patent referred to, and think I do understand the invention therein described.

Q. 4. Look at Complainant's Exhibit C, and compare it with the corset springs described in the descriptive part and drawings of said reissued letters patent, and state their points of resemblance and difference.

A. I have compared Complainant's Exhibit C with the pair of corset springs represented in the drawings of said reissued letters patent, and I find that they are substantially alike in some respects, and substantially different in others. They are substantially alike, in that in the pair of springs shown in Exhibit C each member of the pair is composed of two plates of metal, combined together by means of clasps. The two plates of each member of the pair of Exhibit C are lapped one over the other in such manner that the plates may be separated or lengthened and shortened, in order to allow them to be adapted to different lengths of corsets; whereas in the pair of corset springs shown in the drawings of the re-issued letters-patent referred to, each member of the pair is composed of one principal plate, which I may call a foundation plate, having another and shorter plate rivetted nearer the centers of each of these plates in both members of the pair in such manner that the said plates cannot move one upon the other at such point of connection, but can only move in reference to each other at the different points in the length of the short plate an amount varying from the center where it is riveted, to the end of the short plate; this I consider a substantial difference. I also find in Exhibit C that the parts forming the end
356 clasps, one male and the other female, at each end of the members of the pair, are not attached in both cases to the same plate, as they are in the articles shown by the drawings in the reissued patent, but are fastened to different plates, so that when the plates composing the compound springs are drawn apart or pushed together for lengthening or shortening the pair of springs, the clasps travel with them; whereas, in the drawing of the reissued patent, if an attempt were made to lengthen the s rings forming the shorter or reinforcing plate of each member of the pair, the clasps at the end of the pair must be removed. I also find in the drawings of the reissued patent, and the description of the same, stud pins rivetted near the end of the shorter springs to what I have called the foundation plate, and passing up through a slot in the reinforcing plate near each of their ends, and then headed over in such manner as to prevent the shorter plates from rising facewise from the foundation plate. I find no such contrivance in Exhibit C, neither would such an arrangement, or one substantially the same, allow the plates to be lengthened and shortened to any considerable degree. I also find that the members of the clasps in Exhibit C are such that they can be placed in any desired positions on the springs, whereas in the drawing of the reissued patent they are fastened by rivets and cannot be changed or moved after having been once fixed. I find also in Exhibit C certain clips riveted to one end of each of the plates composing the pair by drilling a hole in the end of the spring and forcing the sheet-metal of the clip into said hole in such manner as to prevent it from disengaging from the end of the spring. These clips are also bent over

the face of its neighbor spring in such manner as to allow them to slide lengthwise on each other nearly the whole length of such springs.

Q. 5. Compare the clasps of Defendants' Exhibit 15 with the clasps of the Egbert steels and state whether or not they differ?

A. They are substantially the same.

357 Q. 6. How do the clasps of Defendants' Exhibit 15 differ from the clasps of Complainant's Exhibit C?

A. They are substantially the same, excepting that the clasps of Exhibit C can be attached to the springs without rivets, and therefore without impairing the strength of the spring.

Q. 7. How long have you been acquainted with compound springs composed of two or more leaves of metal, and to what uses in the arts have you known them to be applied?

A. I have known them since I was a boy. I have known them as applied to various kinds of machinery, and wherever it was desirable. Sometimes two springs have been fastened together at their ends by rivets or some such like contrivance, which prevented them from sliding on each other at the point of rivetting, but could change their position to each other longitudinally if required by the motion of either of the springs. Sometimes these springs have been prevented from moving off of each other laterally at the ends not rivetted, by means of pins passing through slots, as shown in the Egbert patent, at the ends of the short reinforcing springs. Sometimes a number of springs—four or five—have been combined together in boxes, both at their ends and in the middle, so that they could slide on each other as required, and not move off each other laterally. I am also familiar with springs connected together substantially as the springs of Exhibit C, so that the springs could be elongated or shortened, and yet strengthen each other mutually, a very familiar example of which may be seen in old-fashioned spectacle bows. I have also seen the same class of double springs applied to awnings and such like. I have seen compound springs used upon locomotives and steam-engines, and I may mention as an instance of the latter the springs that operate the cut-off of the Corliss engine.

Q. 8. Please state a little more fully in what machines or organizations these springs have been used prior to the date of the patent.

358 (This question objected to, in so far as it may call for evidence of a prior use of the invention patented, for the reason that the witness' name is contained in the answer.)

A. I have seen them previously to the date of the patent, frequently used for opposing the motion of cams in cotton machinery, in carpet machinery, in gun machinery, and also for steadying the motion of whipsaws; on locomotives, steam-engines, etc.

Adjourned to 10½ a. m., Saturday, March 1, 1873.

SATURDAY, *March* 1, 1873

Present: Counsel as before.

Direct examination of WILLIAM C. HICKS resumed.

Q. 9. How long have you known corset springs constructed like Defendants' Exhibit 15?

A. At least sixteen years.

Q. 10. State how the corset springs you knew, at least sixteen years ago, compared, in the means for connecting and disconnecting them, with the corset springs Defendants' Exhibit 15?

A. They were the same.

Q. 11. Please compare Defendants' Exhibit 16 with Defendants' Ex-

hibit 12, and state whether or not it correctly represents the corset springs shown in the drawing annexed to Exhibit 12 and forming part thereof.

A. I believe that Exhibit 16 is a correct representation, in metal, of the corset springs represented in the figures of the drawing referred to. I notice but one slight difference, which I do not consider material, that apparently one rivet, shown in Figure 2 at three places upon the principal plates, and for which I can see no use, is left out in the model, Exhibit 16.

359 Q. 12. Please compare Defendants' Exhibit 17 with Defendants' Exhibit 13, and state whether or not the model, Exhibit 17, is constructed substantially according to the description in Exhibit 13.

A. I have compared Exhibit 17 with the description in Exhibit 13, and I do find that it is substantially a correct embodiment, in metal, of that description.

Q. 13. Please compare the manner in which the reinforcing plate is attached to one of the springs of Defendants' Exhibit 16 with the manner in which the plates composing one of the pair of springs, described in the Egbert patent, are united.

A. In Defendants' Exhibit 16, the reinforcing plate or slide is attached to its foundation spring by what has been called clips, at three positions in its length, which prevent it from leaving said foundation spring facewise; it is also connected with its foundation spring by means of pins and slots at three points of its length, the pins being rivetted at these three points to the reinforcing plate or slide, and passing through slots in the foundation plates, in such manner as to allow said pins to play in the slots and to permit the reinforcing plate or slide to move longitudinally at all points at its length a limited distance. I find upon one foundation plate of the pair shown in the Egbert patent a reinforcing plate having pins and slots at either end of said plate, the pins being rivetted to the foundation plate and the slots being in the reinforcing plate, in such manner as to allow the ends of the reinforcing plate to creep on the foundation plate and to be prevented from separating facewise from said foundation plate by heads on said stationary pins, said creeping motion, which I have referred to in contradistinction to longitudinal sliding, being caused by the permanent connection of said reinforcing plate to its foundation spring at one point of its length.

360 Q. 14. What effect, if any, does the making of one of the springs double in the pair, Exhibit 16, have upon the other spring in the pair?

A. As the members of the pair, when united, act as a unit, whatever strengthens or sustains one member of the pair has a tendency to strengthen and sustain the other members of the pair, and particularly is this the case in Exhibit 16, as when the members are connected by the clasps the members lap each other, so that all three springs, when bent, reinforce and sustain each other.

Q. 15. Compare the mode of uniting the two plates of the double spring in Exhibit 17 with the mode of uniting the plates of the springs in the Egbert spring.

A. In Exhibit 17 there is a foundation plate, with a reinforcing slide or plate lying on it, having pins rivetted to the foundation plate at three points of the length of the reinforcing plate, playing in slots in said reinforcing plate, the construction of the pins and slots being identical with said construction shown in the Egbert patent, allowing the reinforcing plate in Exhibit 17 to slide on the foundation plate longitudinally at all portions of its length, and prevent it from moving away

from it facewise. I have already described the construction and connection of the reinforcing spring in the Egbert patent; it will not be necessary to repeat it.

Q. 16. What are the means provided for connecting and disconnecting the two springs constituting the pair in Exhibit 17?

A. There are two kinds of clasps, all of them substantially the same as those shown in Defendants' Exhibit 15 and those shown in the Egbert patent; but two of them are opened in one member of the pair, so as to permit the male portion of the clasp to slip out sidewise, without the necessity of separating the members of the pair from each other facewise.

Q. 17. Please compare Defendants' Exhibit 1 with the corset
361 spring described in the Egbert patent, and point out their resemblances and differences.

A. They resemble each other substantially in every particular, excepting in the absence, in Exhibit 1 referred to, of the pins and slots in the ends of the reinforcing plate. There is a difference in the width of the springs, but I do not consider that material.

Q. 18. When Exhibit 1 is secured in its place in the corset by any of the usual means will the ends of the reinforcing plate spring facewise from the main plate by the flexing of the spring?

A. They will not, and for the following reason: When the springs of the corset are in use on the person of the wearer all springing of the two plates will be to keep them together. The foundation spring, when in use, being bent towards the reinforcing spring, and bending it by the act of stooping or bending of the person, and the reinforcing spring hugging the foundation spring in the act of straightening the person. If, however, there was any tendency to bend the springs in the opposite directions from that above indicated the covering or the pocket which incloses the spring in the corset would prevent such separation, or any other tendency to move sidewise.

Q. 19. In your judgment are the springs, Defendants' Exhibit 1, complete and useful corset springs?

A. They are.

Q. 20. Please compare Defendants' Exhibit 2 with the springs described in the Egbert patent, and also with Complainant's Exhibit C, and state the points of the resemblance and difference which you find?

A. I find Defendants' Exhibit 2 to be substantially the same as the springs shown in the Egbert patent, in the respect that each member of the pair are composed of two springs or plates; that each member of the pair are combined together by clasps; that in each member of the pair the reinforcing spring is riveted to the foundation spring
362 at one portion of its length, so that they cannot move longitudinally at that point, and are connected together at other portions of their length by headed pins and slots; the pins being riveted into the foundation plates and sliding in slots in the reinforcing plates, so that the reinforcing springs may creep on the foundation plates as the pair is flexed. I find that the clasps in Exhibit 2 are not riveted through the reinforcing springs as they are at or about the center of the reinforcing springs in the Egbert patent. I have also compared Complainant's Exhibit C with Defendants' Exhibit 2, and I find that they resemble each other substantially in that each member of the pair is composed of two plates of metal; that the pair, as a whole, is combined by means of clasps, but I find substantially the same differences between these two exhibits as I found when comparing Complainants' Exhibit C with the corset spring described in the Egbert patent, as regards the creeping of the re-

inforcing spring upon the foundation spring, as shown in Exhibit 2 and the Egbert spring, in contradistinction to the longitudinal motion which takes place between the plates of each member of the pair in Exhibit C, when the springs are flexed, or when they are drawn apart from each other in lengthening and shortening the pair. I also find the same differences as regard the movability of the members of the clasp, and that the combined end clasps in Exhibit C travel bodily together as the members of the pair are lengthened and shortened. I also find a substantial difference, in my opinion, between these two exhibits, as I did between Exhibit C and the Egbert spring shown in the patent, in respect to the manner in which the two metallic plates are combined on each member of the spring; that in Exhibit C I have characterized by the word lapped one upon the other, somewhat as though two pairs of springs, like Exhibit 15, had been laid one upon the other for the purpose of extension, in contradiction to the construction shown in the Egbert spring de-
363 scribed in the patent and Exhibit 2, where each member of the pair is composed of what I have called a foundation spring, prepared with clasps to combine them, reinforced by additional springs shorter than the foundation spring, and riveted at some portion of their length, and therefore, necessarily, left free at some other portion of their length to allow them to be flexed, so that one spring may creep upon the other.

Q. 21. Please compare Defendants' Exhibit 2 with the letters patent of John L. Fitzpatrick, Defendants' Exhibit 14, dated November 9, 1869, and state their points of resemblance and difference.

A. I find that they are substantially alike, in that they both have the same character of foundation plates combined by the same clasps, each member of the pair being reinforced by springs riveted at one portion of their length, so that the two plates of each member of the pair cannot move on each other at that point, and are connected at some other portion of their length with said foundation plates, so that they may move on each other at and near that point, and held so that they may not spring apart from each other facewise, or move off from each other sidewise, by means of headed rivets and slots, and the only difference that I find between them is, that in the patent two of such reinforcing springs, combined with the foundation plate in the exact manner above described, are placed so as to lap each other for a portion of their length near the center of the foundation plate.

Q. 22. What is your judgment in regard to the completeness and utility of Defendants' Exhibit 2 as a pair of corset springs?

A. I think they are good springs; if they were japanned as well as those made at the present day they would look a little better, but I don't think they would therefore be any better.

Q. 23. What is your judgment in regard to the completeness and utility of Defendants' Exhibit 3 as a pair of corset springs?

364 A. I think they would be serviceable springs.

Q. 24. What is your judgment in regard to the completeness and utility of Defendants' Exhibit 4 as a pair of corset springs?

A. I think they also would be serviceable when sewn into a corset.

Q. 25. Compare the busk described in Defendants' Exhibit 18 with the compound springs of the Egbert corset spring?

A. I find in the drawing of Exhibit 18, figures 11 and 13, a busk formed of a series of plates, one fastened upon the other by a rivet passing through their centres, each plate of the series being shorter than the plate under it, the bottom plate having holes in each end, and metallic strengthening or binding upon each end. They are described

in the specification as being covered with an envelope of gut or hog's bladder. There is also described a method of elongating these busks. I do not think it important to particularly refer to that feature, as it does not appear to be clearly shown upon the drawings. This busk differs from the compound springs of the Egbert patent, and their modes of connection, only in respect substantially to the difference in connecting the ends of the reinforcing springs to the foundation plate or to each other; the pins and slots of the Egbert patent being entirely left out of the busk shown in Exhibit 18.

Q. 26. If to two of the busks, described in Defendants' Exhibit 18, you add the clasps for connecting and disconnecting the two members of the pair, which are found in Defendants' Exhibit 1, how would the pair thus made differ from the pair described in the Egbert patent?

A. They would be substantially the same; the Egbert patent describes two or more plates for forming each member of the pair.

Q. 27. What is the usual way in which a corset spring is enclosed in a corset?

365 A. Each member of the pair is generally enclosed in either a separate casing of some fibrous material, or leather, and then sewed in a pocket in the corset, provided for them, or they are sewed in said pockets without first encasing them, the members of the clasps protruding through the pockets, so that they may be connected and disconnected.

Q. 28. When in the corset what functions do the pins and slots of the E springs, described in the Egbert patent, perform?

A. As the pins and slots in the Egbert patent, when the reinforcing plate is riveted at the center of the foundation plate, do not, in my opinion, perform any function when the spring is in use in a corset, other than the negative one of allowing the reinforcing plate to move slightly at its end upon the foundation plate, for the reason that said center rivet, forming the male portion of the clasp in one member of the pair, when properly riveted, both prevents the springs from separating facewise and from sliding off each other, and in the other member of the pair, having the female part of the clasp riveted to the two plates by two rivets lying in a line in a longitudinal direction as compared with the length of the plates, entirely prevents such facewise movement, and prevents the plates from sliding off each other edgewise at any portion of the length; and as there is no tendency, when these springs are in the pockets of the corsets, for their ends to separate facewise, I think that no function is performed by the connection of the rivets and slots that would not be performed by the connections [before referred to in this answer] and the casing or pocket of the corset.

Q. 29. Then compare Defendants' Exhibit 1 and the corset springs described in the Egbert patent in regard to utility.

A. I think they are equally useful when enclosed in a corset.

Q. 30. Make the same comparison between Defendants' Exhibit 2 and the corset spring described in the Egbert patent.

A. I see no essential difference in the degree of utility between these two exhibits.

366 Q. 31. If, instead of the compound steels fastened together, as in the Egbert patent, you use compound springs like Defendants' Exhibit 19, having, however, no metallic connection between them, how would they when in the corset differ in their mode of operation from the spring described in the Egbert patent?

A. If they were firmly sewed in the pockets of the corsets, or if they were properly encased in leather or other suitable material before being

put into the corset, they would reinforce each other, but would be capable of sliding on each other in the act of flexure through their whole length, supporting all parts of each other equally instead of only partially, as shown in the Egbert patent.

Q. 32. When Defendants' Exhibit 19, without connection by rivets, are secured in corsets in the usual way, would the plates composing the spring be prevented from springing apart from each other, and from sliding off each other laterally?

A. If connected, as described in my former answer, they would.

Q. 33. Please compare Defendants' Exhibit 20 with Complainants' Exhibit C with respect to their workmanship and material, and state which is the better steel of the two.

A. As far as workmanship and material are concerned, I see no noticeable difference; but as to the question as to which is the better of the two, all the questions of their construction and operation are included, and I have no hesitation in saying that Exhibit C is far superior, and my reasons are as follows: The springs in Exhibit C are in no part of their length weakened by rivets or slots; the clasps are capable of being placed in any desired position upon said plates; the springs are capable of being lengthened and shortened; and when sewed in the corset, and in use upon the person of the wearer, this action of lengthening and shortening invariably takes place when the person bends or straightens; they also are more flexible and durable, for the
367 reason that they are not hampered at any portion of their length by fixed points, so that whatever bending in either direction, either forward or back, may take place, the springs may slide upon each other in that part of the two which are lapped in a longitudinal direction at all points thus lapped.

WM. C. HICKS.

Subscribed and sworn to before me this 3rd day of March, 1873.

R. E. STILLWELL,
Examiner.

MONDAY, *March* 3, 1873.

Present, counsel as before.

Defendants' counsel offers in evidence a spring, which is marked "Defendants' Exhibit 21," which complainants' counsel admits is a spring manufactured by Ferdinand Straus, and like the infringement in the suit against him; also a certified copy from the Patent Office of the letters patent granted Samuel H. Barnes, dated July 17, 1866, No. 56345, for extension corset springs, which is marked "Defendants' Exhibit 22."

368 Description des machines et procédés pour lesquels des brevets d'invention ou été pris sous le régime de la loi du 5 Juillet 1844, publiée par les ordres de M. le ministre de l'agriculture et du commerce. Tome premier. * * * Paris. Imprimerie nationale, MDCCCL, p. 130.

93.

Brevet d'invention de quince ans, en date du 22 Janvier 1845. Au sieur Laporte (Pierre) et demoiselle Laporte (Marguerite). Pour un busc.

Les buces pouvront être faits en acier trempé et revenu bleu, comme les ressorts de pendules, en acier galvanisé, eufer, tôle, cuivre laminés à

froid, et autres métaux seduits en feuilles, en baleine, en bois et en verre en feuilles très minces.

Ils seront garantis de l'oxydation par les moyens suivants: 1°. étant oints; 2°. reconverts par une enveloppe de boyaux quelconques et ressies de porc; 3°. étant galvanisés.

Et, de plus, enveloppes de peaux blanche ou de couleur, ou étoffes de toutes natures, cousues ou collées avec toutes sortes de colles.

Ils pouvront être employés avec avantage pour remplacer les ressorts de bandages herniaires, et à différents autres usages où on a besoin d'élasticité continuelle. Ils peuvent être cintrés ou redressés.

Pl. XXVII, fig. 11, busc côte convexe redressés, opposé au côté qui doit toucher le corps. Les cinq feuilles dont les extrémitées sont indiquées par les lettres *cc*, *bb*, peuvent varier en long'eur, larg*ue*r,
369 épaisseur et nombre; elles sont fixées au centre par un ou plusieurs rivets *a*, ronds ou plats; les extrémités de la grande feuille sont recourbées, fig. 14, et garnies de cuivre, d'étain ou de tout autre métal, pour leur donner de l'épaisseur et empêcher qu'elles ne coupent la garniture et ne gênent la personne qui la porte. Ces extrémités seront encores percées d'un trou pour être, au besoin, fixées au corset.

Le corset pourra recevoir en longueur, en largeur, des dimensions quelconque, et se composer d'un plus ou moins grand nombre de feuilles varient d'épaisseur à l'enfini.

Fig. 12, busc prèt à être employé ou porté, recouvert de ses enveloppes en peaux ou étoffes, etc., comme il est dit ci devant.

Fig. 13, busc convexe redressé, opposé au côté qui doit toucher le corps, il ne diffère de la fig. 11, que parce que les feuilles ne varient qu'en longueur et épaisseur.

Tous ces buscs pourront avoir des feuilles mobiles pour recevoir jusq'à 0.05 centimètres de plus ou de moins de longueur.

Supposons la plus grande feuilles des plans qui précèdent, en deux parties, non fixées au centre, glissant à volonté entre deux feuilles de la grandueur de celle indiquée par la lettre *k*, fig. 13, celles ci fixées comme les autres par des rivets; pour les racourcir, il ne s'agira que de frapper sur les bouts de la feuille mobile, ou de les tirer pour lui donner une dimension plus grande; de cette façon, un busc de personne de grande taille pourra saus gêne être porté par une personne de petite taille.

Description des machines et procédés pour lesquels des brevets d'invention ont été pris sous le régime de la loi du 5 Juillet, 1844. * * * Tome premiere * * * Paris, * * * MDCCCL, p. 130.

370 *Defendant's Exhibit* 18.

[Translation.]

93.

Patent of invention for fifteen years, dated the 22d of January, 1845, to Mr. Laporte (Pierre) and Miss Laporte (Marguerite), for a busk.

The busks can be made of tempered steel and brought to a blue, as of the springs of clocks, of galvanized steel, of wrought-iron, sheet-iron, copper rolled cold, and [of] other metals reduced to leaves, of whalebone, of wood and of glass in very thin leaves.

They are prevented from [guarded against] oxidation by the following means: 1st, by being greased; 2d, covered by an envelope of gut of any kind and hog's bladder; 3d, by being galvanized.

And, furthermore, covered with white skins or colored, or stuffs [fabrics] of all kinds, sewed or glued with all kinds [every kind] of glue.

They can be used with advantage to replace the springs of herniary bandages [trusses], and for different other uses where there is need of continued elasticity. They can be curved or straightened.

Pl. XXVII, fig. 11, busk convex side turned up opposite to the side which should touch the body. The five leaves, the ends of which are indicated by the letters *c c*, *b b*, may be varied in length, width, thickness, and number; they are fixed at the centre by one or several rivets *a*, round or flat; the ends of the large leaf are turned over, Fig. 14, and furnished with copper, tin, or any other metal, to give them thickness and to prevent them from cutting the clothing [covering], and from hurting the person who wears them [it]. These ends are then again to be pierced with a hole to be, as may be needed, fastened to the corset.

371 The busk corset can have in length, in width, any dimensions and be composed of a more or less number of leaves, varying the thickness indefinitely.

Fig. 12, busk ready to be used or worn, covered with envelopes of skin or stuff, etc., as has been said above.

Fig. 13, convex busk turned up opposite to the side which should touch the body; it differs from the Fig. 11 only because the leaves vary only in length and thickness.

All of these busks can have movable leaves to obtain [get] up to 0.05 centimetres, more or less, in length.

Suppose the largest leaf of the plans which precede in two parts, not fixed at the centre, sliding at pleasure between two leaves of the size of that shown by the letter *k*, Fig. 13, these fixed as the others by rivets; to shorten them it is only needed to strike upon the ends of the movable leaf or to pull them [out] to give it a greater length; in this way a busk of large size can, without inconvenience, be worn by a person of small size.

372 *Defendant's Exhibit 8.—R. E. S., ex'r, &c.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file wrapper and contents in the matter of the reissued letters patent granted Frances Lee Barnes, admix., &c., dated May 12th, 1868, No. 2929, for "improvement in corset springs."

In testimony whereof I, J. M. Thatcher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THATCHER,
Acting Commissioner.

Petition for reissue.

To the Commissioner of Patents:

The petition of Frances L. Barnes, of 335 Broadway, in the city, county, and State of New York, administratrix of the estate of Samuel H. Barnes, deceased, respectfully represents:

That the said Samuel H. Barnes during his lifetime did obtain letters

patent of the United States of America for a new and useful improvement in extension corset springs, which letters patent are dated
373 on the seventeenth day of July, 1866; that she now believes that the same is inoperative and invalid by reason of a defective specification, which defect has arisen from inadvertence and mistake. She therefore prays that she may be allowed to surrender the same, and requests that new letters patent may issue to her for the same invention, for the residue of the period for which the original patent was granted, under the amended specification herewith presented, she having paid thirty dollars into the Treasury of the United States, agreeably to the requirements of the act of Congress in that case made and provided. And she hereby authorizes O. D. Munn, S. H. Wales and A. C. Beach, of the firm of Munn & Co., of the cities of New York and Washington, or their accredited agents, to act as her attorneys in presenting the application and in making all such alterations and amendments as may be required.

FRANCES L. BARNES,
Administratrix of the estate of Samuel H. Barnes, deceased.

[50 cent. stamp, March 12, 1868.]

Oath.

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On this twelfth day of March, 1868, before the subscriber, a notary public in and for said county, personally appeared the above-named Frances L. Barnes, and made solemn oath that she verily believes that by reason of an insufficient or defective specification, her aforesaid patent is not fully valid and available to her; and that the said error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, to the best of her knowledge or belief.

WM. F. McNAMARA,
Notary Public.

374 *Statement.*

The object of this reissue is to correct an error of inadvertence contained in the original specification, and the correction consists in erasing the word "thin" wherever it occurs in said specification.

FRANCES L. BARNES,
Administratrix,
By MUNN & CO.,
Attorneys.

NEW YORK, *March 12th*, 1868.

To all whom it may concern:

Be it known that Samuel H. Barnes, deceased, of the city, county, and State of New York, during his lifetime did invent a new and improved corset spring, and I, Frances L. Barnes, of the city, county, and State of New York, administratrix of the estate of said Samuel H. Barnes, deceased, do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same.

The present invention consists in forming the springs of corsets of two or more metallic plates placed one upon another and fastened to-

gether at their centre, but so connected at or near each end that they can play or move upon each other in the direction of their length, as the springs are bent, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained, and the springs rendered much more durable than the springs for corsets now in general use, as will be obvious from the following detail description thereof, reference being had to the accompanying drawing, in which

375 Figure 1 is a view of those two springs of the corset, having the ordinary clasps for fastening the corset about the waist of the person who is to wear it.

Figure 2, an edge view of the same.

Similar letters of reference indicate corresponding parts.

A, A, in the drawings represent two springs of a corset properly bent in the direction of their length to conform to the body or waist of a person, each of which spring in the present instance, is composed of two metallic plates B, B^2, placed one upon the other (the one B a little longer than the other B^2), and there secured at their centre, or midway between their two ends in the case A, by the rivets which secure the ordinary corset clasp C to the same, and in the other case A^2 by the headed rivet D, on which the clasp C is interlocked by its eye E.

At or near each end of the short plate B^2 of the two springs A, A^2, are short slots *a*, extending in the direction of their length, through which project the rounded ends or heads *b*, of fixed pins *c*, in the longer or under plate B, by means of which slots, as the corset springs are bent, the plates constituting the same can play or move, the one upon the other, the heads of the pins C preventing them from becoming disengaged, or, in other words, springing apart from each other.

From the above description it is plain to be seen by forming the corset springs of two plates (or more may be used if desired, laid one upon the other, but so connected together that the several plates constituting such plates can freely play upon each other, in the direction of their length), that the flexibility, pliability, or elasticity of the springs is much increased, without in the least degree impairing their strength, rendering them much more durable and serviceable than the ordinary

376 corset springs now in general use, an advantage and result of the utmost importance and utility.

Although the spring have been hereinabove explained, as formed of two metallic plates, laid one upon the other and secured together as described, three or more may be used, but I deem two sufficient for ordinary corsets, it being distinctly understood that I do not intend to limit myself to any particular number of plates which may be employed to form the springs, whether one or more, the present invention simply consisting in so securing the several plates constituting the springs to each other, that they can freely move or play upon each other.

Having thus described the invention,

What I claim as new and desire to secure by letters patent, is:

A corset spring consisting of the parts B, provided with pins *b* and slotted springs B^2, riveted as shown, and having suitable clasps C and headed rivets D, and of form corresponding to the body of the wearer, constructed and operating in the manner and for the purpose herein represented and described.

The above reissue specification of the invention of Samuel H Barnes, deceased, signed by me this 12th day of March, 1868.

FRANCES L. BARNES,
Administratrix of the estate of Samuel H. Barnes, deceased.

Witness:
WM. F. MCNAMARA.
P. D. MUNN.

377 The people of the State of New York to all whom these presents shall come or may concern, send greeting:

Know ye, that at the county of New York, on the 20th day of September, in the year of our Lord one thousand eight hundred and sixty-six, before Gideon J. Tucker, esq., surrogate of our said county, the last will and testament of Samuel H. Barnes, deceased, was proved, and is now approved and allowed by us; and the said Samuel H. Barnes being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the proving and registering said will, and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof, doth belong unto us, the goods, chattels, and credits of the said deceased and any way concerning his will, is granted unto Frances L. Barnes, of the city of New York, sole executrix in the said will named, she being first duly sworn faithfully and honestly to discharge the duties of such executrix.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto annexed.

Witness, Gideon J. Tucker, esq., surrogate of our said county, at the city of New York, the 20th day of September, in the year of our Lord one thousand eight hundred and sixty-six, and of our Independence the ninety-first.

[SEAL.] GIDEON J. TUCKER,
Surrogate.

378 STATE AND COUNTY OF NEW YORK,
Surrogate Office, ss:

I, William B. Aitken, clerk to the surrogate's court of said county, do hereby certify that I have compared the annexed copy of the letters testamentary, granted in the estate of Samuel H. Barnes, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of office of said surrogate this 13th day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] WM. B. AITKEN,
Clerk to the Surrogate's Court.

[5 cts. U. S. rev. stamp, cancelled.]

379 BARNET.

Reissue, 7, 31. No. 2929.

Frances L. Barnes, adm'st'x of the estate of Samuel H. Barnes, deceased:
Of New York,
County of " "
State of " "

EXTENSION CORSET SPRINGS.

Received March 21, 1868.
Petition " "
Affidavit " "
Specification " "
1 Drawing " "
Old patent No. 56345, July 17, 1866.
Cert. dep.
1 Cash, $30, March 21, 1868.
Examined April 29, 1868, J. Barnett.
2 Issue, N. W. Heilborn, April 30, 1868.
4 Patented July 17, 1868.
Reissued May 12, 1868.

(Written across the face:)

Received in draughtsman room, April 7th, 1868.
Received in examiner's room, April 8, 1868.
Pub'd Artisan, April 7, 1868.

a. m.
MUNN & CO., *Pres't.*

Ex'd.—A R.

380 *Defendants' Exhibit* 9.—*R. E. S., examiner, &c.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file wrapper and contents (except the complainant's record, brief for complainant, and decision by Judge Blatchford) in the matter of the reissued letters patent granted Frances Lee Barnes, executrix, &c., dated Nov. 5th, 1872, No. 5130, for "improvement in corset springs."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

WASH., D. C., *Sept.* 11, 1872.

Hon. COMMISSIONER OF PATENTS:

SIR: Please recognize James L. Norris, of Washington City, D. C., as my associate in the matter of the reissue application of F. E. Barnes for letters patent for corset steels.

Filed Sept. 11, 1872.

Very respectfully,

BOYD ELIOT,
Attorney for Board.

381 CITY AND COUNTY OF WASHINGTON,
District of Columbia, ss:

Before me personally appears Boyd Eliot, of 34 Beach street, New York City, who deposes and says that the reissue letters patent, dated August 31st, 1869, granted to Frances Lee Barnes, executrix of Samuel

H. Barnes, for an improvement in corset springs, were e ntrusted to him for the purpose of securing an opinion upon the validity of said reissue patent; that he delivered said reissue patent to lawyers who were about to commence suits at law under said reissue patent; that he, the said Boyd Eliot, has made search for the reissue patent, and is unable to find the same; he therefore requests that a certified copy be accepted in lieu of the said lost reissue patent.

BOYD ELIOT.

Sworn to and subscribed before me this 12th (12th) day of September, 1872.

[SEAL.] EDW. F. BROWN,
Notary Public.

U. S. PATENT OFFICE,
Washington, D. C., Sept. 11, 1872.

In case of S. H. Barnes, by his executrix, F. L. Barnes, for reissue of patent July 17, '66, reissues May 12, 1868, and June 29, '69, and Aug. 31, '69, I find no assignment of an undivided interest.

P. E. WILSON,
Assignment Clerk.

382 *Petition.*

To the Commissioners of Patents:

Your petitioner, of the city, county, and State of New York, prays that she may be allowed to surrender the letters patent for an improvement in corset springs, granted July 17th, 1866, to Samuel H. Barnes, now deceased, and reissued to her May 12th, 1868, June 29th, 1869, and August 31st, 1869, and that letters patent may be reissued to her for the same invention upon the amended specification; and she hereby appoints Boyd Eliot, of 34 Beach street, N. Y., her attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith. Accompanying this petition is an abstract of title, duly certified, as required in such cases.

FRANCES LEE BARNES,
Executrix.

[50 cent stamp, Sept., 1872, cancelled.]

To all whom it may concern:

Be it known that Samuel H. Barnes, now deceased, of the city, county, and State of New York, during his lifetime did invent certain improvements in corsets steels.

Frances Lee Barnes, of the same city, county, and State aforesaid, executrix, do hereby declare that the following is a full, clear, and exact description thereof:

The invention consists in forming the springs of corsets of two
383 or more metallic plates placed one upon another, and so connected as to prevent them from sliding off each other, latterly or edgewise, and at the same time admit of their playing or sliding upon each other, in the direction of their length or longitudinally, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained and the springs rendered much more durable than the springs for corsets now in general use, as will be

obvious from the following detailed description thereof, reference being had to the accompanying drawings:

DRAWINGS.

Figure 1 is a plan or side view of the two springs of a corset provided with clasps for combining them together in pairs and holding the corset in proper position upon the body of the person wearing it.

Figure 2 is an edge view of the same.

A, A^2, represent a pair of corset springs, each number of which pair is, in the present case, represented as composed of two metallic plates, B, B^2, placed one upon the other, and there secured together by rivets, as at C and D.

The plates in the member A are here shown as held one upon the other by the rivets that fasten the central clasp upon the springs as at C, while the plates in the member A^2 are held one upon the other by the headed rivet as at D, on which the clasp at C is interlocked by its eye E.

At or near each end of the short plate B^2, of the two springs A, A^2, are short slots, *a*, extending in the direction of their length, through which project the rounded ends or heads *b* of fixed pins C in the longer or under plate B; by means of which slots, as the corset springs are bent, the plates constituting the same can play or move, the one upon the other, the heads of the pin C preventing them from becoming disengaged, or, in other words, springing apart from each other, or sliding off laterally.

384 As the great object is to so combine the plates as to prevent their slipping off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other longitudinally, any other means of combining the plates which will secure these results will be within the principle of this invention.

I therefore claim as the invention of the said Samuel H. Barnes, deceased:

1st. A pair of corset*s* springs, each spring consisting of two or more metallic plates placed one on another and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length.

2d. A pair of corset springs, each member of the pair being composed of two or more metallic plates placed one on another and fastened together at their centres, and so connected at or near each end that they can move or play on each other in the direction of their length.

3d. A pair of corset springs, each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding off each other laterally, and so admit of their playing or sliding on each other in the direction of their length, the pair being provided with a clasp or claps by which the two members of the pair can be connected and disconnected.

FRANCES LEE BARNES,
Executrix.

Witnesses:
PHILLIP O'REILLY.
BOYD ELIOT.

385 *Oath.*

STATE OF NEW YORK,
City and County of New York, ss:

Frances Lee Barnes, the above-named petitioner, being duly sworn,

deposes and says that she verily believes that by reason of an insufficient specification, letters patent granted to Samuel H. Barnes, now deceased, and last reissued to her August 31st, 1869, are inoperative; that the said error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, to the best of her knowledge and belief; that the entire title of said letters patent is vested in her, and that she verily believes the said Samuel H. Barnes to be the original and first inventor of the invention set forth and claimed in the foregoing amended specification, and that the said Samuel H. Barnes is now deceased.

FRANCES LEE BARNES,
Executrix.

Sworn and subscribed to before me this day of August, 1872.
[SEAL.] WM. CLITUS WITTER,
Notary Public, N. Y. Co.

386 U. S. PATENT OFFICE,
Washington, D. C., September 25th, 1872.

F. L. BARNES,
Care of J. S. Norris, Washington, D. C.:

Please find below a communication from the examiner, relating to your application for the reissue of your patent, No. 56345, for corset springs, granted July 17, 1866; reissued May 12, '68, June 29, '69, and August 31, '69.

Very respectfully,

M. D. LEGGETT,
Commissioner.

EXAMINER'S ROOM, No. 5.

A careful examination shows the invention was not patentable when patented. It was not a new device.

Overlaying springs to strengthen the whole or parts was an old invention, and of frequent use for coach springs, and in archery, &c. See carriage springs, McMinn's patent, Feb. 19, 1861; Pressey & Sheet's patent, Oct. 16, 1860; Phillip's patent, Nov. 20, 1864; Isham's patent, August 1, 1865; and Ballard's patent, March 6, 1855.

In archery all materials have been used in the same manner. Moseley's Essays on Archery, p. 58, modern bows.

The Book of Archery, plate XI, figs. 3 and 6.

The reissue is refused.

T. R. PEALE,
Examiner.

387 WASHINGTON, D. C., *Oct. 3d*, 1872.

Hon. COMMISSIONER OF PATENTS:

SIR: In the case of the application for a reissue of the patent to F. L. Barnes for "corset springs," rejected September 25th, 1872, permit me to say, that it is evident that the examiner has not taken into consideration the language of the claim as to the "pair," which you will discover is involved in each of said claims, and which construction is fully sustained by the recent decision of his honor Judge Blatchford, herewith filed, with the brief of George Gifford, esq., of New York, and also the testimony of the complainant in said case.

It seems to me that upon reading said opinion, specially the portion marked therein, the reissue asked for will be allowed.

Respectfully submitted,

BOYD ELIOT.

No. 1.] U. S. PATENT OFFICE,
Washington, D. C., October 5th, 1872.

F. L. BARNES,
Care of James S. Norris, Washington, D. C.:

Please find below a copy of communication from the examiner in charge of your application for the reissue of a patent, granted July 17th, 1866, for improvement in corset "springs," reissued May 12th, 1868, June 29, 1869, August 31st, 1869, and rejected on the 25th ult.

Very respectfully,

M. D. LEGGETT,
Commissioner.

388 EXAMINER'S ROOM, No. 5.

The application has been carefully reconsidered in view of the filing of three pamphlets, one containing a decision by Judge Blatchford on the 4th inst.

The judge in equity sustained the patent, Barnes vs. Ferdinand Strauss, U. S. circuit court southern district New York, May, 1872, because he believed Barnes was the inventor of a new and improved corset spring, as proved by the patent there before him.

Now, the examiner is called by duty to determine whether the specification and claim were patentable when the original application was made, the examination resulting in a negative decision. The invention was not new.

Corset springs were used in pairs long before Barnes' invention. See Fowler & Wallace, corset clasps, patented October 17th, 1865; Nelson's corset clasp, patented July 21st, 1863; J. Bower's corset, patented June 8th, 1865; J. W. Carter's improvement in corsets, patented Aug. 14, 1866.

Overlaying flat springs is an old device, as shown by the official letter of the 25th ult. The word pair leads to a misconception; two parts, to form a patentable pair, must be different in form, or otherwise for a conjoint function, as in scissors, &c. Springs have been used in a plurality of parts, as shown above, and it will be seen have been fastened together as in Barnes' patent.

The reissue is again rejected.

T. R. PEALLE,
Examiner.

389 U. S. PATENT OFFICE.

REISSUE.

Application of Frances L. Barnes, executrix of Sam'l H. Barnes, deceased.

Filed Sept. 11, 1872.

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1. Application.
2. Rej. 25 Sept., 1872. IIII.
3. Letter, &c., Oct. 4, 1872.

4. Rej. Oct. 5, 1872.
5. In bf., 21, 1872.
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18.

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390 REISSUE.

No. 5130.

Frances Lee Barnes, executrix of Samuel H. Barnes, dec'd,
Of New York,
County of "
State of "

CORSET SPRINGS.

Rec'd, Sept. 11, 1872.
Petition, " " "
Affidavit, " " "
Specification, " " "
1, Drawing, " 18, "
Cert. copy, } Reissue No. 3624, Aug. 31, 1869.
Old patent, }
1. Cert. dep.
1. Cash $30, Sept. 11, 1872.
Examined Oct. 21, '72, b'd of appeal.
2. Issue , Knight, Oct. 30, '72.
4. Patented July 17, 1866; reissued May 12, 1868; again reissued June 29, 1869; again reissued Aug. 31, 1869; and again reissued Nov. 5, 1872.
Recorded, vol. , page .
(Written on margin:) Cert. copy, old patent, filed Sept. 14, 1872.

BOYD ELIOT,
34 *Beach St., N. Y. City.*

JAMES S. NORRIS,
Present.

1872.

Rej'd Sept. 25, '72.
Rej'd Oct. 5, '72.
Answer to reasons for app. Oct. 15, '72.
Ex'd J. A. R.

391 *Defendants' Exhibit* 10.—*R. E. S., examiner.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file wrapper and contents in the matter of the reissued letters patent granted Frances Lee Egbert, executrix of Samuel H. Barnes, dec'd, dated January 7th, 1873, No. 5216, for "improvement in corset springs."

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this thirtieth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that careful search has been made of the digests of this office, and no assignment, agreement, license, power of attorney, or other instrument of writing is found of record under or relating to letters patent granted to Frances Lee Barnes, executrix of Samuel
392 H. Barnes, deceased, No. 5130, dated November 5, 1872, reissue of patent No. 56345, dated July 17, 1866, for "corset springs;" reissued May 12, 1868, No. 2929; again reissued June 29, 1869, No. 3520; and again reissued Aug. 31, 1869, No. 3624.

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

To the Commissioner of Patents:

Your petitioner, Frances Lee Egbert, a resident of the city of New York and State of New York, executrix of the estate of Samuel H. Barnes, deceased, prays that a reissue of the letters patent issued to Frances Lee Barnes, executrix of the estate of Samuel H. Barnes, deceased, dated November 5, 1872, and numbered 5130, may be granted to her for the invention set forth in the annexed specification, and she hereby appoints W. C. Witter, of the city of New York, her attorney, with full powers of substitution and revocation, to prosecute the application for said reissue, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

Signed at New York, in the State of New York, this 28th day of December, 1872.

FRANCES LEE EGBERT,
Executrix.

393 To all whom it may concern:

Be it known that Samuel H. Barnes, deceased, of the city, county, and State of New York, during his lifetime did invent certain

improvements in corset steels or springs; and I, Frances Lee Egbert, of the same city, county, and State aforesaid, executrix, do hereby declare that the following is a full, clear, and exact description thereof:

This invention consists in forming the springs of the corsets of two or more metallic plates, placed one upon another, and so connected as to prevent them from sliding off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other, in the direction of their length, or longitudinally, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained, and the springs rendered much more durable than the springs for corsets now in general use, as will be obvious from the following detailed description thereof, reference being had to the accompanying drawing.

DRAWING.

Figure 1 is a plan or side view of the two springs of a corset provided with clasps for combining them together in pairs and holding the corset in proper position upon the body of the person wearing it. Figure 2 is an edge view of the same. A, A^2 represent a pair of corset springs, each member of which pair is in the present case represented as composed of two metallic plates, B, B^2, placed one upon the other, and there secured together by rivets, as at C and D. The plates in the member A are here shown as held one upon the other by the rivets that fasten the central clasp upon the springs, as at C, while the plates in the member A^2 are held one upon the other by the headed rivet, as at D, on which the clasp at C is interlocked by its eye E. At or near each
394 end of the short plate B^2 of the two springs A, A^2 are short slots, *a*, extending in the direction of their length, through which project the rounded ends or heads, *b*, of fixed pins, *c*, in the longer or under plate, B, by means of which slots, as the corset springs are bent, the plates constituting the same can play or move, the one upon the other, the heads of the pins *c* preventing them from becoming disengaged, or, in other words, springing apart from each other or sliding off laterally.

As the great object is to so combine the plates as to prevent their slipping off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other longitudinally, any other means of combining the plates which will secure these results will be within the principle of this invention.

I therefore claim as the invention of the said Samuel H. Barnes, deceased:

1. A pair of corset springs; each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length.

2. A pair of corset springs, each member of the pair being composed of two or more metallic plates, placed one on another, and fastened together at their centres, and so connected at or near each end that they can move or play on each other in the direction of their length.

3. A pair of corset springs, each spring consisting of two or more metallic plates placed one upon another, and so connected as to prevent them from sliding off each other laterally and to admit of their playing or sliding on each other in the direction of their length, the pair

395 being provided with a clasp or clasps, by which the two members of the pair can be connected and disconnected.

FRANCES LEE EGBERT,
Executrix.

Witnesses:
WESLEY EGBERT,
N. E. COLES.

In the matter of the application for a reissue of the letters patent granted to Frances Lee Barnes, executrix, dated Nov. 5, 1872, and numbered 5130.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Frances Lee Egbert, being duly sworn, deposes and says that she was and is the executrix of the estate of Samuel H. Barnes, deceased, to whom the original patent, dated July 17, 1866, was granted; that on the 2d day of November, 1870, she was married to Wesley Egbert; that prior to her said marriage said original patent had been reissued to her in the name of Frances Lee Barnes, executrix, &c.; that the patent mentioned in the foregoing petition, dated Nov. 5, 1872, and numbered 5130, was reissued to her in the name Francis Lee Barnes, executrix; that she is advised and believes that this was an error and that the said patent should have been reissued to her in the name of Frances Lee Egbert, executrix.

This deponent further says that said error accrued from inadvertence and mistake, and without any fraudulent or wrongful intention; that she was not aware until recently that any such error existed, nor
396 was she aware until recently that said patent should have been issued to her in the name of Frances Lee Egbert, executrix, instead of in the name of Frances Lee Barnes, executrix; and she further says that the entire title is vested in her as such executrix, and has been ever since the decease of her said husband, Samuel H. Barnes.

FRANCES LEE EGBERT.

Subscribed and sworn to before me this 28th Dec., 1872.
[L. S.] WM. CLITUS WITTER,
Notary Public, N. Y. Co.

In the matter of the application for a reissue of the letters patent granted to Frances Lee Barnes, executrix, dated Nov. 5, 1872, and numbered 5130.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Boyd Eliot, being duly sworn, deposes and says that he was the solicitor in obtaining the reissued letters patent dated Nov. 5, 1872, and numbered 5130, and referred to in the foregoing petition; that the patent which was surrendered, dated Aug. 31, 1869, No. 3624, and in place of which said reissue, dated Nov. 5, 1872, and numbered 5130, was granted, had been issued to Frances Lee Barnes, executrix; that he used the same name in applying for and obtaining the reissued patent, No. 5130, mentioned in said petition; that deponent at that time
397 did not know that the applicant had been married since the date of said surrendered patent; that the use of the name Barnes instead of Egbert in said reissue was a mere inadvertence or mistake, and without any fraudulent or wrongful intention.

BOYD ELIOT.

Subscribed and sworn to before me this 28th December.

[L. S.] WM. CLITUS WITTER,
Notary Public, N. Y. Co.

In the matter of the application for a reissue of the letters patent granted to Frances Lee Barnes, executrix, dated Nov. 5, 1872, and numbered 5130.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Geo. Gifford, being duly sworn, deposes and says that he has been counsel for Frances Lee Egbert, executrix of the estate of Samuel H. Barnes, deceased, for several years; that he was consulted by Boyd Eliot at the time he was preparing the application for the reissued patent, dated Nov. 5, 1872, mentioned in the foregoing petition; that nothing was said nor did anything occur to him respecting the applicant's name having been changed by marriage since the reissue dated Aug. 31, 1869; that under the circumstances it was very natural for Mr. Eliot to use the name which was in the patent being surrendered,
398 and that the use of the name Barnes instead of Egbert in said application and reissue was a mere inadvertence or mistake, and certainly without any fraudulent or wrongful intention or deception on the part of any one concerned; that Frances Lee Egbert is the same person whose name prior to her marriage with Wesley Egbert was Frances Lee Barnes.

GEO. GIFFORD.

Subscribed and sworn to before me this 28th December, 1872.

[L. S] WM. CLITUS WITTER,
Notary Public, N. Y. Co.

399 REISSUE.

U. S. PATENT OFFICE.

Application of Frances Lee Egbert, executrix of Samuel H. Barnes.
Filed December 30, 1872. 1144/75

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1872 1144/75

400 REISSUE.

No. 5216.

Frances Lee Egbert, of executrix of Samuel H. Barnes, deceased.

Of New York,
County of " "
State of " "

CORSET SPRINGS.

Rec'd Dec'r 30, 1872.
Petition " " "
Affidavit " " "
Specification " " "
1 Drawing " " "
Reissue } No. 5130, Nov. 5, 1872.
Old patent }
Cert. dep.
1 Cash $30, Dec'r 30, 1872.
Examined Dec'r 30, 1872, T. R. Peale.
2 Issue Dec. 30, 1872, Knight.
4 Patented July 17, 1866. Reissued May 12, 1868; again reissued June 29, 1869; again reissued Aug. 31, 1869; again reissued Nov. 5, 1872; and again reissued January 7, 1873.
Recorded, vol. , page .

W. C. WITTER,
New York, N. Y., No. 34 Beach st.

Ex'd, B. N. B.

1872.

401 *Defendants' Exhibit* 11.—*R. E. S., examiner, &c.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the reissued letters patent granted Frances Lee Barnes as executrix, dated November 5th, 1872, No. 5130, for "improvement in corset springs."

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

No. 5130.—REISSUE.

The United States of America to all to whom these presents shall come:

Whereas Frances Lee Barnes, of New York, New York, executrix of Samuel H. Barnes, deceased, has presented to the Commissioner of Patents a petition praying for the reissue of letters patent for an alleged new and useful improvement in corset springs (for which letters patent

were issued to said Samuel H. Barnes, dated July 17, 1866, the same surrendered and new letters issued to said executrix dated May
402 12, 1868, which second letters were surrendered and new letters issued to her, dated June 29, 1869, which third letters were surrendered and new letters issued to her dated August 31, 1869, which last letters having been surrendered the same have been canceled, and new letters ordered to issue to her on amended specification), a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law: Now, therefore, these letters patent are to grant unto the said Frances Lee Barnes, as executrix, her successors or assigns, for the term of seventeen years from the seventeenth day of July, one thousand eight hundred and sixty-six, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh.

[L. S.]

B. R. COWEN,
Acting Secretary of the Interior.

Countersigned:

J. M. THACHER,
Acting Commissioner of Patents.

403 UNITED STATES PATENT OFFICE.

Frances Lee Barnes, of New York, N. Y., executrix of Samuel H. Barnes, deceased. "Improvement in corset springs."

Specification forming part of letters patent No. 56345, dated July 17, 1866; reissue No. 2929, dated May 12, 1869; reissue No. 3520, dated June 29, 1869; reissue No. 3624, dated August 31, 1869; reissue No. 5130, dated November 5, 1872.

To all whom it may concern:

Be it known that Samuel H. Barnes, deceased, of the city, county, and State of New York, during his lifetime did invent certain improvements in corset steels or springs; and I, Frances Lee Barnes, of the same city, county, and State aforesaid, executrix, do hereby declare that the following is a full, clear, and exact description thereof:

This invention consists in forming the springs of corsets of two or more metallic plates placed one upon another, and so connected as to prevent them from sliding off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other in the direction of their length or longitudinally, whereby their flexibility and elasticity are greatly increased, while at the same time much strength is obtained, and the springs rendered much more durable than the springs for corsets now in general use, as will be obvious from the following detailed description thereof, reference being had to the accompanying drawing.

DRAWING.

Figure 1 is a plan or side view of the two springs of a corset provided with clasps for combining them together in pairs and holding the corset in proper position upon the body of the person wearing it. Fig. 2 is an edge view of the same.

404 A A^2 represent a pair of corset springs, each member of which pair is in the present case represented as composed of two metallic plates, BB^2, placed one upon the other, and there secured together by rivets, as at C and D. The plates in the member A are here shown as held one upon the other by the rivets that fasten the central clasp upon the springs, as at C, while the plates in the member A^2 are held one upon the other by the headed rivet, as at D, on which the clasp at C is interlocked by its eye E. At or near each end of the short plate B^2 of the two springs A A^2 are short slots *a* extending in the direction of their length through which project the rounded ends or heads *b* of fixed pins *c* in the longer or under plate B, by means of which slots, as the corset springs are bent, the plates constituting the same can play or move the one upon the other, the heads of the pins *c* preventing them from becoming disengaged; or, in other words, springing apart from each other or sliding off laterally.

As the great object is to so combine the plates as to prevent their slipping off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other longitudinally, any other means of combining the plates which will secure these results will be within the principle of this invention.

I therefore claim as the invention of the said Samuel H. Barnes, deceased—

1. A pair of corset springs, each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length.

2. A pair of corset springs, each member of the pair being composed of two or more metallic plates placed one on another and fastened together at their centers, and so connected at or near each end that they can move or play on each other in the direction of their length.

405 3. A pair of corset springs, each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding off each other laterally and to admit of their playing or sliding on each other in the direction of their length, the pair being provided with a clasp or clasps, by which the two members of the pair can be connected and disconnected.

FRANCES LEE BARNES,
Executrix.

Witnesses:
PHILIP O'REILLY.
BOYD ELIOT.

Defendants' Exhibit 12.—*R. E. S., Ex'r.*

The U. S. Patent Office, to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the bound volumes of the library of this office of the specification and drawing in the matter of the English letters patent granted George Twigg, dated Feb-

ruary 7th, 1865, No. 349, for "improvements in fastenings for stay-busks, leggings, gaiters, and other similar articles."

In testimony whereof I, J. M. Thatcher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] JOHN THATCHER,
Acting Commissioner.

406 Specification. In pursuance of the conditions of the letters patent filed by the said George Twigg in the Great Seal Patent Office on the 5th August, 1865.

To all to whom these presents shall come:

I, George Twigg, of Birmingham, in the county of Warwick, manufacturer, send greeting:

Whereas Her Most Excellent Majesty Queen Victoria, by her letters patent, bearing date the seventh day of February, in the year of our Lord one thousand eight hundred and sixty-five, in the twenty-eighth year of her reign, did, for herself, her heirs, and successors, give and grant unto me, the said George Twigg, her special license that I, the said George Twigg, my executors, administrators, and assigns, or such others as I, the said George Twigg, my executors, administrators, and assigns should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should, and lawfully might, make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for "improvements in fastenings for stay-busks, leggings, gaiters, and other simi ar articles," upon the condition (amongst others) that I, the said George Twigg, by an instrument in writing under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said letters patent:

Now, know ye, that I, the said George Twigg, do hereby declare the nature of my said invention and in what manner the same is to
407 be performed to be particularly described and ascertained in and by the following statement, reference being had to the drawings hereunto annexed, and to letters and figures marked thereon, that is to say:

Referring to the annexed drawings, figure 1 represents a front view of a stay-busk fitted with my improved fastenings; figure 2, a back view; and figure 3, a detail of the clips or catches.

(a, a^1) are two slips of steel forming the busk; (B) a slip of brass or other metal, upon which are riveted studs (c and d), (c) being the pivot or pin upon which the catch (e) works, and (d) a stud working through a slot in the slip (a); (f) is a spring governing the catch (e); upon the slip (a^1) is riveted the counterpart (g) of the catch (e); these parts are formed to engage in each other when secured, so that by bringing into contact the slips (a, a^1), the catch (e) and counterpart (g) snap together; the parts are released by pulling the tape or ribbon (h) attached to the slip (B), which operation has the effect of pulling back the catch (e) and

thus releasing the counterpart (*g*) and admitting of the separation of the two slips (*a*, a^1).

Figures 4, 5, and 6 show a fastening of similar description to that already specified, but with a slight modification in the arrangement of the parts. Figure 4 being a front view, figure 5 a back view, and figure 6 a detail of the clips or catches. The modification consists in forming the studs (*h*) upon the catches (*e*) and slots (*i*) in the metal slip (*k*), a fixed stud (*l*) being attached to one part of the back at the bottom; by drawing down the slip (*k*), the clip (*e*) is released from its corresponding catch (*g*), and the two parts of the busk may be separated. The same parts or appliances may be used for legging and gaiter fastenings, and other similar purposes.

Having thus described the nature of my said invention, and in
408 what manner the same is to be performed, I claim the improvements in fastenings for stay-busks, leggings, gaiters, and other similar articles as herein more fully set forth and specified.

In witness whereof I, the said George Twigg, have hereunto set my hand and seal, this fourth day of August, in the year of our Lord one thousand eight hundred and sixty-five.

GEORGE TWIGG. [L. S.]

Ex'd, J. A. W.

Defendants' Exhibit 13.—*R. E. S., Ex'r.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the bound volume of the library of this office, of the specification in the matter of the English letters patent granted John Harras Elvans, dated August 13th, 1861, No. 2006, for "an improved steel busk or stay fastening."

In testimony whereof I, J. M. Thatcher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

409 A. D., 1861, 13th August.—No. 2006.

STEEL BUSK OR STAY FASTENING.

(This invention received provisional protection only.)

Provisional specification left by John Harras Elvans at the office of the Commissioners of Patents with his petition on the 13th August, 1861.

I, John Harras Elvans, of No. 7 Guilford Place, Lower Kennington Lane, in the county of Surrey, do hereby declare the nature of the said invention for "An Improved Steel Busk or Stay Fastening" to be as follows:

This invention consists in constructing a steel busk or stay fastening, opening down the centre, and so arranged to readily fasten and unfasten by means of three catches, locking on to a spring slide. The busk is

ruary 7th, 1865, No. 349, for "improvements in fastenings for stay-busks, leggings, gaiters, and other similar articles."

In testimony whereof I, J. M. Thatcher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] JOHN THATCHER,
Acting Commissioner.

406 Specification. In pursuance of the conditions of the letters patent filed by the said George Twigg in the Great Seal Patent Office on the 5th August, 1865.

To all to whom these presents shall come:

I, George Twigg, of Birmingham, in the county of Warwick, manufacturer, send greeting:

Whereas Her Most Excellent Majesty Queen Victoria, by her letters patent, bearing date the seventh day of February, in the year of our Lord one thousand eight hundred and sixty-five, in the twenty-eighth year of her reign, did, for herself, her heirs, and successors, give and grant unto me, the said George Twigg, her special license that I, the said George Twigg, my executors, administrators, and assigns, or such others as I, the said George Twigg, my executors, administrators, and assigns should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should, and lawfully might, make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for "improvements in fastenings for stay-busks, leggings, gaiters, and other simi ar articles," upon the condition (amongst others) that I, the said George Twigg, by an instrument in writing under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said letters patent:

Now, know ye, that I, the said George Twigg, do hereby declare the nature of my said invention and in what manner the same is to
407 be performed to be particularly described and ascertained in and by the following statement, reference being had to the drawings hereunto annexed, and to letters and figures marked thereon, that is to say:

Referring to the annexed drawings, figure 1 represents a front view of a stay-busk fitted with my improved fastenings; figure 2, a back view; and figure 3, a detail of the clips or catches.

(a, a^1) are two slips of steel forming the busk; (B) a slip of brass or other metal, upon which are riveted studs (c and d), (c) being the pivot or pin upon which the catch (e) works, and (d) a stud working through a slot in the slip (a); (f) is a spring governing the catch (e); upon the slip (a^1) is riveted the counterpart (g) of the catch (e); these parts are formed to engage in each other when secured, so that by bringing into contact the slips (a, a^1), the catch (e) and counterpart (g) snap together; the parts are released by pulling the tape or ribbon (h) attached to the slip (B), which operation has the effect of pulling back the catch (e) and

thus releasing the counterpart (*g*) and admitting of the separation of the two slips (*a*, a^1).

Figures 4, 5, and 6 show a fastening of similar description to that already specified, but with a slight modification in the arrangement of the parts. Figure 4 being a front view, figure 5 a back view, and figure 6 a detail of the clips or catches. The modification consists in forming the studs (*h*) upon the catches (*e*) and slots (*i*) in the metal slip (*k*), a fixed stud (*l*) being attached to one part of the back at the bottom; by drawing down the slip (*k*), the clip (*e*) is released from its corresponding catch (*g*), and the two parts of the busk may be separated. The same parts or appliances may be used for legging and gaiter fastenings, and other similar purposes.

Having thus described the nature of my said invention, and in
408 what manner the same is to be performed, I claim the improvements in fastenings for stay-busks, leggings, gaiters, and other similar articles as herein more fully set forth and specified.

In witness whereof I, the said George Twigg, have hereunto set my hand and seal, this fourth day of August, in the year of our Lord one thousand eight hundred and sixty-five.

GEORGE TWIGG. [L. S.]

Ex'd, J. A. W.

Defendants' Exhibit 13.—*R. E. S., Ex'r.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the bound volume of the library of this office, of the specification in the matter of the English letters patent granted John Harras Elvans, dated August 13th, 1861, No. 2006, for "an improved steel busk or stay fastening."

In testimony whereof I, J. M. Thatcher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

409 A. D., 1861, 13th August.—No. 2006.

STEEL BUSK OR STAY FASTENING.

(This invention received provisional protection only.)

Provisional specification left by John Harras Elvans at the office of the Commissioners of Patents with his petition on the 13th August, 1861.

I, John Harras Elvans, of No. 7 Guilford Place, Lower Kennington Lane, in the county of Surrey, do hereby declare the nature of the said invention for "An Improved Steel Busk or Stay Fastening" to be as follows:

This invention consists in constructing a steel busk or stay fastening, opening down the centre, and so arranged to readily fasten and unfasten by means of three catches, locking on to a spring slide. The busk is

formed of two steels, each about five-eighths of an inch in width, of the usual length and substance. One of these steels or slides has a metal stud riveted on in the centre, about two and a half inches from the top; below this stud is a narrow steel slide, extending down to about half an inch below the end of the steel; on this slide are two similar metal studs, riveted at equal distances. This slide is also provided with three small slots, and is fastened on to the steel by three studs or rivets, which pass through the slots and enable the slide to shift up and down on the steel with ease, at the same time keeping it in its place when in wear. Attached to the upper end of this slide is a slip of vulcanized India rubber, forming a spring; this India rubber is riveted (at the end) to the steel, just below the metal stud, by which means the two studs on the slide shift with the slide by the action of the spring. The other steel or slide has a metal clutch, riveted on so as to project out from the
410 inner slide about two and a half inches from the top, and also two metal catches riveted on (in a similar way as the clutch), one in the centre and one near the lower end. This steel or slide is provided with a rule joint between the two catches, to admit of a more ready fastening of the lower catch on the stud of the spring slide.

Ex'd, H. S.

Defendants' Exhibit 18.—*R. E. S., Ex'r.*

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the bound volumes of the library of this office of the French letters patent, granted Au Sieur Laporte (Pierre) et demoiselle Laporte (Marguerite) endate du 22 Janvier, 1845. "Pour un buse."

In testimony whereof I, Samuel A. Duncan, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety fifth.

[SEAL.] SAMUEL A. DUNCAN,
Acting Commissioner.

Defendants' Exhibit 22.

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the
411 records of this office, of the letters patent granted Samuel H. Barnes, dated July 17th, 1866, No. 56345, for "extension corset springs."

In testimony whereof I, M. D. Leggett, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety seventh.

[SEAL.] J. M. THACHER,
Acting Commissioner.

The United States of America to all to whom these letters patents shall come:

Whereas Samuel H. Barnes, of New York, New York, has alleged that

he has invented a new and useful improvement in extension corset springs, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty five dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said Samuel H. Barnes, his heirs, administrators, or assigns, for the term of seventeen years from the seventeenth day of July, one thousand eight hundred and sixty-six, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said
412 Samuel H. Barnes, in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
[L. S.] T. C. THACHER,
Commissioner of Patents.

Samuel H. Barnes, of New York, N. Y. Letters patent No. 56345, dated July 17, 1866. Improvement in extension corset springs.

To all whom it may concern:

Be it known that I, Samuel H. Barnes, of the city, county and State of New York, have invented a new and improved "corset spring," and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same:

The present invention consists in forming the springs of corsets by two or more thin metallic plates, placed one upon another and fastened together at their centre, but so connected, at or near each end, that they can play or move upon each other in the direction of their length, as the springs are bent, whereby their flexibility and elasticity
413 are greatly increased, while at the same time much strength is obtained and the springs rendered much more durable than the springs for corsets now in general use, as will be obvious from the following detail description thereof, reference being had to the accompanying drawings, in which—

Figure 1 is a view of those two springs of the corset having the ordinary clasps for fastening the corset about the waist of the person who is to wear it.

Figure 2, an edge view of the same.

A A^2, in the drawings, represents two springs of a corset, properly bent in the direction of their length, to conform to the body or a waist

of a person, each of which springs, in the present instance, is composed of two thin, narrow metallic plates, B B^2, placed one upon the other (the one B a little longer than the other B^2), and there secured at their centre, or midway between their two ends, in the one case A, by the rivets which secure the ordinary corset clasps G to the same, and in the other case A^2, by the headed rivet D, on which the clasp G is interlocked by its eye E.

At or near each end of the short plates B^2 of the two springs A A^2, are slots *a*, extending in the direction of their length, through which project the rounded ends or heads *b* of fixed pins *c*, in the longer, or under plates B, by means of which slots, as the corset springs are bent, the plates constituting the same can play or move the one upon the other, the heads of the pins C preventing them from becoming disengaged, or, in other words, springing apart from each other.

From the above description it is plain to be seen, by forming the corset springs of two thin plates (or more may be used, if so desired, laid one upon the other, but so connected together that the several plates constituting such plates can freely play upon each other in the
414 direction of their length), that the pliability, flexibility, or elasticity of the springs is much increased, without in the least degree impairing or diminishing their strength, rendering them much more durable and serviceable than the ordinary corset springs now in general use, an advantage and result of the utmost importance and utility.

Although the springs have been herein above explained as formed of two thin metallic plates, laid one upon the other and secured together as described, three or more may be used; but I deem two sufficient for ordinary corsets—it being distinctly understood that I do not intend to limit myself to any particular number of plates which may be employed to form the springs, whether one or more, the present invention simply consisting in so securing the several plates constituting the springs to each other, that they can freely move or play upon each other.

I claim as new, and desire to secure by letters patent—

A corset spring, consisting of the parts B, provided with pins *b* and slotted springs B^2, riveted as shown, and having suitable clasps, G, and headed rivets, D, and of form corresponding to the body of the wearer, all constructed and operating in the manner and for the purpose herein represented and described.

The above specification of my invention signed by me this 10th day of March, 1866.

SAMUEL H. BARNES.

Witnesses:

M. M. LIVINGSTON.
ALBERT W. BROWN.

(Exd., E. F. J.)

415 U. S. circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX, &c.
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK, and Henry S. Magraue.

NEW YORK, *March* 13, 1873.

Examination of witnesses under second supplementary answer on the part of the defendants, for final hearing under the 67th rule of the Supreme Court of the United States.

Present: Thomas P. How, esq., counsel for defendants; W. C. Witter, counsel for complainant.

On the examination of PHILLIPP LIPPMANN, on the part of the defendants, he, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

416 A. Phillipp Lippmann; I am in my 36th year; I reside at 333 West 48th street, between 8th and 9th avenues; am a manufacturer of ladies' bustles, corset-clasps, skirts, hoop-skirt material, and commission business in general.

Q. 2. Did you ever make any double corset springs: and if yea, when first, and where?

A. During the fall of 1859 or 1860; I first took two flat pieces of steel, placing them flatwise, one on top of the other, and riveting them together, at 35 Jane street, in New York City; I remember of taking six single steels to make one pair of double steels, but sometimes I could make out of four single pair one pair of double steels; that was when I had some rivets and hooks left from the two single plates, out of which I took the rivets and the hooks.

Q. 3. Will you please produce a pair of corset springs made as exactly like those you then made as possible?

A. Here is a pair which I made in the other office about five minutes ago, made by using six single corset clasps:

(Which pair is marked Defendants' Exhibit 23, R. E. S., Examiner, and offered in evidence.)

which pair is like those I used to rivet together, when in Jane street, for repairing corsets, and also putting the same into new corsets whenever customers used to complain that the single steels which were in their corsets were of no account, and broke so easy; more especially, where the lady buying or getting her corset repaired was stout around the waist.

Q. 4. About when did you commence to make such corset steels like Exhibit 23, and how long did you continue to make them?

A. It must have been, or it was, about six weeks or two months after I moved into 35 Jane street, in which place I was about a year and a half or two years, during which time I continued repairing and

417 having put in corset steels into corsets like Exhibit 23. That was either during the fall of 1859, or spring and fall of 1860; as I am not positive if I moved into Jane street during the spring of 1859, or during the spring or fall of 1860, but I can find out the exact time when I did move in. I also know positively that I was in 35 Jane street a long while before President Lincoln's first election.

Q. 5. During the time that you were in Jane street, as you have stated, about how many pairs of corset springs like the Exhibit 23 did you make?

A. I cannot state exactly the number of pairs that I did make, but it must have been more than seventy-five, and may be three hundred pair, or may be more than that, as I had plenty of old corsets brought into the store during my stay there, where the clasps were broken, and as the complaint was generally that the steels that were in the corsets were not good for much, where I then invariably had put in or sewed in steels, like Exhibit 23, so as to produce a strong and pliable clasp.

Q. 6 What was done with those old corsets after the springs like Exhibit 23 were put in, as you have stated?

A. The customers that brought the old corsets called for them again, paid for the repairing, and took them away and wore them; and such customers, after having had such pair as Exhibit 23 put into their old corsets, often used to call even with a new pair of corsets and had a pair of double springs put into the new corsets, so as to have a strong

pair of corset steels, stating that the steels in their old corsets which I had put in for them, like Exhibit 23, suited so well.

Q. 7. Do you recollect now who any of these customers were for whom you put in these springs like Exhibit 23, as you have stated?

A. I do not know at present, any of them, but may be able to find some, as my trade was a retail trade, and ladies used to come and
418 bring their old corsets and call for them again, or when they brought a corset paid for it.

Q. 8. What persons were in your employ during the time you were in Jane street, as you have stated—I mean in your place of business there?

A. Three or four; sometimes three, sometimes four, that worked in the store. Their names are as follows: Miss Hannah Rosenberg, Mary McLaughlin (now Mrs. Bradley), Fannie Picket (now married, but I don't know her name, but can find out), and a niece of Miss Hannah Rosenberg that used to come to the store and help sometimes in the store, or watch the store, her name being Hannah Rosenberg also.

Q. 9. When you left 35 Jane street, did any one succeed you there in the business; and, if so, who?

A. When I left 35 Jane street I sold out to Miss Hannah Rosenberg, who carried on the business afterwards.

Q. 10. State whether or not she is now living, if you know?

A. She is dead; but her niece is living.

Q. 11. When you left 35 Jane street, did you continue the same business, or did you go into other business?

A. I went into the manufacturing of hoop skirts and hoop-skirt materials, and also in selling cotton yarns and so forth, at 89 Liberty street.

Q. 12. During the time you were in Jane street, as you have stated, did you ever hear any complaint in regard to the corset springs like Defendant's Exhibit 23, which you furnished to your customers, as you have stated?

A. I did—which was, that we charged too much for the same; otherwise, as far as what the wearing was concerned, I never heard a complaint.

Q. 13. State what kind of corset clasps you are now engaged in the manufacture of, and if you see among the exhibits on the table before you any which appear to be of your manufacture, such as you are now making, please point them out.

419 A. I do; Exhibit 19.

Q. 14. How long have you now been manufacturing steels like Exhibit 19, since you last engaged in their manufacture?

A. To the best of my knowledge two and a half or three years, and have been selling them right along in the market.

Q. 15. Have you heard any complaint in regard to their operation?

A. No.

In answer to cross-examination, the witness says, as follows:

X Q. 16. You have said you could ascertain the date when you moved into 35 Jane street; will you please to do so and report at the next meeting?

A. I will.

X Q. 17. Did you own or rent the house?

A. I rented the store.

X Q. 18. Of whom did you rent the store?

A. Of a Mr. Tenbroecke. I am not positive if his name was Henry Tenbroecke, but can find out, as he was the owner of the house.

X Q. 19. Will you ascertain and report at next meeting, the name of this landlord?

A. I will.

X Q. 20. Did you hold under a written lease, the store number 35 Jane street?

A. I had no lease, but paid the rent from month to month, as I did rent the store out of the regular time when other stores or dwellings are generally rented.

X Q. 21. When was that.

A. It must have been, to the best of my knowledge, either during the fall of 1859 or spring and fall of 1860. I best remember that I was in the store, as stated before, before President Lincoln was first elected, as I used to converse with some of the neighbors regarding the election going on at that time.

X Q. 22. When was Abraham Lincoln first elected?

420 A. I believe in November, 1860.

X Q. 23. How do you associate the fact that you had no written lease with the fact that you went in out of the regular time. What connection is there between these two incidents?

A. I paid a very low rent, and Mr. Tenbroecke told me that he would let me have the store cheaper on account of having a clean business, and that his store would be kept in good order; and that he would let me have the store by the month, cheap. I believe that I paid as low as nineteen or twenty-nine dollars per month.

X Q. 24. Is this the only connection there is between the fact of your having no written lease and the fact of your going in not in the regular time?

A. It is, more especially that I was—after I was awhile in the store—became very intimate and on very friendly terms with Mr. Tenbroecke, and also his family, which, as far as I believe, liked me very much as a tenant and as an associate; and Mr. Tenbroecke told me often that he could get more rent for the store than what I paid him, but that he rather have me in the store on account of keeping the place in and around the store so quiet and clean.

X Q. 25. What do you mean by your language, "not in the regular time"?

A. I consider the regular time for renting stores, to move in or to move out, on the first of May; any other time during the year, it was considered at that time, to the best of my knowledge, out of the regular time for renting or letting stores.

X Q. 26. Do you depend upon anything but your memory for your recollection that it was out of the regular time when you went into 35 Jane street?

A. I do not.

X Q. 27. Is your memory pretty good in such matters?

Q. Sometimes it is, as I have stated the fact before, regarding renting the store so cheap, because it was out of the regular time,
421 that Mr. Tenbroecke and I used to converse upon it, why he let me have the store so cheap at the time he let it to me.

X Q. 28. How much out of the regular time was it?

A. If it was in the fall of 1859 that I rented the store, then it must have been about the difference between the first of May, 1859, and the fall of 1859; if it was in the spring of 1860, it must have been the difference, or in the time of May first, 1859, and spring of 1860; if it was in the fall of 1860, it must have been between the time of May first, 1860, and fall of 1860.

X Q. 29. Does your money serve you any further on that subject?

A. It does, as I know positively that I was in the store during the canvass of President Lincoln's first election.

X Q. 30. Did you keep any books while you were in 35 Jane street?

A. I think I did, by putting down the sales we made every day.

X Q. 31. Where are they?

A. I don't know, but may be able to find them; I cannot positively state, nor do I know, if I have any left of them, as to the best of my knowledge, I have not kept, for my retail business which I did there, any other book but putting down every evening the amount of sales.

X Q. 32. Did you make any memorandum of the amounts paid for rent; if so, where?

A. I don't think I made any memorandum, or any entry of rent, or anything of the kind.

X Q. 33. What bank did you deal with then, if any?

A. I don't remember that I had a bank account during my stay in Jane street, but cannot positively state, but can find out.

X Q. 34. Will you please to do so, and report at the next meeting?

A. I will.

422 X Q. 35. Do you know Mr. Tenbrœcke, to whom you have referred now, or where he is and what his business is?

A. Mr. Tenbroecke is dead; but his wife and child, and his nephew are living, and I think I can find them.

X Q. 36. Do you think you can ascertain from them, or obtain from them, a memorandum as to the date when you went in 35 Jane street?

A. I think I can, and I will do so if I find them, and bring the memorandum to the next meeting if desired.

Adjourned to Friday, March 14, 1873, at 11 o'clock, a. m.

NEW YORK, *March* 14, 1873—11 a. m.

Present: Counsel as before.

Adjourned to Tuesday, March 18, 1873, at 11 o'clock, a. m.

TUESDAY, *March* 18, 1873—11 a. m.

Present: Counsel as before.

X Q. 37. Have you ascertained when it was that you went into the house or shop, 35 Jane street? If yea, please state.

A. I have ascertained, as far as I could, that I did move into 35 Jane street, to the best of my ability, about thirteen years ago.

X Q. 38. Have you ascertained any more definitely than your testimony given before to day shows? State all you have learned about it, if anything.

A. I went to Mr. Henry Tenbroecke, the nephew of Mr. Henry Tenbroecke, the landlord of whom I rented the store, 35 Jane street, and he, Mr. Henry Tenbroecke, informed me that he remembered well
423 the time when I went into the store at 35 Jane street, as he was about fourteen years married, and after being a year married, about that time, he moved to the corner of Perry and Greenwich streets, over Carson's paint store, and that that was about the time when I moved into the store, which is about some thirteen years ago. I also visited Mr. John B. Allen, who informed me that he remembered well that I was in the store—to the best of his knowledge, a good while before President Lincoln's first election, by stating to me that he remembered well that he went to Chicago in—I don't remember exactly whether he said May or July 13th, when Mr. Lincoln was nominated on the 16th; that when he came home I came into the store and told them: "Mr.

Allen, why didn't you tell me that you was going to the convention to Chicago—I would liked to have gone along?" and that at that time he remembered well I was quite a while in the store, 35 Jane street. I also went on Saturday night last into the baker's store, next door to 35 Jane street, and on the corner of Eighth avenue, and ascertained there if they remembered the time when I first moved into the store 35 Jane street. One lady, who lives in the store now with Mr. Hoyler, the baker, informed me that she remembered that it must have been, to the best of her memory, some thirteen years.

X Q. 39. Have you ascertained whether or not it was the fall of 1859 that you moved into 35 Jane street?

A. I have not been able to fix the time exactly, if it was in 1859 or commencement of 1860, except what I have stated in regard to the conversation I had with Mr. Henry Tenbroecke, Mr. J. B. Allen, and the lady in the baker store. I have written also a letter to Mrs. Tenbroecke, wife of the landlord of whom I rented the store, that she should inform me, to the best of her recollection, and state the time, as near as she could, when I moved into their store 35 Jane street. Mrs. Tenbroecke lives at Huntington, Long Island, so her nephew, Mr. Henry
424 Tenbroecke, informed me. I know positive that I was in the store a long while before President Lincoln's nomination, which was in 1860, either the 16th of May or the 16th of July, 1860.

X Q. 40. How long do you think you was in there previous to Mr. Lincoln's nomination?

A. It may have been from three to nine months, to the best of my recollection; it might have been a year.

X Q. 41. Are you positive that it was either in 1859 or 1860?

A. I am.

X Q. 42. Have you found any memorandum of your own upon this point?

A. I have not.

X Q. 43. Have you discovered the names of any parties—customers—which were called for at the last session?

A. I have not.

X Q. 44. Have you found any books of accounts, memoranda of sales, or anything of a written description, showing the time of sale, or the character of the articles which you have introduced here in evidence?

A. No.

X Q. 45. Were all the double steels made by you, during this period, like the pair introduced in evidence, Exhibit 23?

A. Yes.

X Q. 46. Was that the only kind of double steels you ever made previous to the year 1861?

A. Yes.

X Q. 47. What implements or tools did you use to make these steels, which you say you made in 1859 or 1860?

A. To the best of my knowledge, all the implements that I did use for making them was files, plyers, pincers and hammers.

X Q. 48. Where did you buy these, or any of these tools?

425 A. I don't remember exactly if I had them when I was in business in 118 Maiden Lane, in the manufacture of hoop skirts, or if I bought them during the time that I went into 35 Jane street. I know I used to buy such things as hardware at the corner of Eighth avenue—at the corner of Horatio square and Eighth avenue—in a hardware store, which is ab ut one block from Jane street.

X Q 49. How long had you been in the hoop-skirt business before you went to 35 Jane street?

A. About a year or two.

X Q. 50. In business for yourself?

A. Yes.

X Q. 51. What did you do before that?

A. I was about a year in business in Kansas City, Missouri.

X Q. 52. What before that?

A. I was in Bangor, Maine, in the dry goods business.

X Q. 53. For how long?

A. About two or three years, to the best of my knowledge.

X Q. 54. Were you in business for yourself in Bangor, Maine?

A. Yes.

X Q. 55. What was your occupation, and where, before you were in the dry goods business in Bangor.

(Objected to as entirely irrelevant.)

A. I was in Liverpool, England, in the linen business.

X Q. 56. For how long?

A. About a year.

X Q. 57. What before that?

(Same objection.)

A. I was in the dry goods business; and also in linen business in Hamburg, Germany.

X Q 58. For how long?

(Same objection.)

426 A. About two or three years, to the best of my knowledge.

X Q. 59. What before that?

A. Nothing.

X Q. 60. Where were you born?

A. In Altona, Germany.

X Q 61. How long after your birth was it that you was engaged in the linen business in Hamburg, Germany?

(Same objection.)

A. After I was 13 years old.

X Q. 62. How long after?

(Same objection.)

A. I believe about a week after I was 13 years old.

X Q. 63. Can you recollect where any of the women resided for whom you repaired or made corset steels like Exhibit 23?

A. I cannot, as customers used to bring their corsets to the store, 35 Jane street, for whom I used to repair corsets in the manner stated previous, and then called for them again and paid for the same, like it is generally done in a retail business.

X Q. 64. And you did not send or take any of them home yourself?

A. Not to my knowledge.

X Q. 65. Are you the Lippmann who was defendant in suit by Young, complainant, not long ago?

(Objected to as irrelevant and immaterial, and also as new matter not relating to the direct examination.)

A. I am; and also will further state that the suit to which reference is made was in a suit where the honorable Judge Blatchford dissolved the injunction which he himself issued against me, as I proved the suit and the claim the said Young claimed was not a valid one, as re-
427 ported in the official Patent Gazette, September the 17th, 1872, volume 2, number 14, page 342.

X Q. 66. Were there any men in your employ at 35 Jane street during the time you made these articles like Exhibit 23?

A. To the best of my recollection there was none; if there was it must have been after I hired the under floor of the rear building of 35 Jane street.

X Q. 67. Can you give the name of any man to whom you showed any of these articles, or who saw any one of them?

A. If there has been any man in my employ during the time that I was in 35 Jane street, it must have been a Mr. Louis Rosenberg. I don't know if I showed them to him, but I know that he used to come into the store and see me work at them and putting them together, as Exhibit 23, by placing steels flatwise, one on top of the other, and by filing them.

X Q. 68. Have you any other answer to the question?

A. It might have been that Mr. Henry Tenbroecke, the nephew of the landlord of whom I rented the store, might have seen me work at them, as he used to work there in the rear of the store, 35 Jane street. I am not positive if he did.

X Q. 69. Will you testify that any man ever saw those steels like Exhibit 23, to your knowledge; if so, give his name?

A. As I stated before, if any man did see any of these steels, as Exhibit 23, it must have been either Mr. Louis Rosenberg or Mr. Henry Tenbroecke. I don't know of any other man that used to come into the store, as our customers were all ladies.

X Q. 70. Do you remember any occasion when either of these gentlemen whom you have mentioned saw the articles like Exhibit 23?

A. If they did see, it must have been during the time that I worked at them, when they came into the store, or when they were sewed into the corsets.

428 X Q. 71. Do you remember whether they did or did not see them?

A. I know that one of them did, which was Mr. Louis Rosenberg.

X Q. 72. Where is he now?

A. In the city.

X Q. 73. Whereabouts?

A. He lives in 47th street.

X Q. 74. What number?

A. I don't remember the number, but can ascertain. As I now have asked, it is 242.

X Q. 75. State the circumstances when, as you say, Mr. Louis Rosenberg saw these articles?

A. I asked him if he did, and he remembered that I did do such a thing in the store, and he told me that he did see me do so, by filing and hammering, and working at them, and placing them together.

(Answer objected to by counsel for complainant as hearsay evidence.)

X Q. 76. Where does Mr. Tenbroecke, the nephew, reside?

A. Somewhere in Greenwich street.

X Q. 77. Is that as near as you can come to it?

A. I know the number and have written it down, but I haven't got it with me.

PHILLIPP LIPPMANN.

Subscribed and sworn to before me this 18th March, 1873.

R. E. STILLWELL,
Examiner, &c.

Miss HANNAH ROSENBERG, being called and sworn on the part of the defendants, deposes and says as follows:

Q. 1. What is your name, residence, and occupation?

429 A. Miss Hannah Rosenberg; 242 West 47th street; sales lady at fancy goodr.

Q. 2. Please look at the corset-springs now shown you, marked Defendants' Exhibit 23, and state when first and where you saw corset-springs like them.

A. At first when I frequented the store, 35 Jane street, such as those Exhibit 23.

Q. 3. When was it you first saw such springs?

A. As near as I can date, when I first visited the store, which, I think, was about in the year 1859 or 1860.

Q. 4. Where was it that you then saw them?

A. At 35 Jane street.

Q. 5. State, if you recollect, who showed them to you.

A. No one in particular, I believe. I felt an interest in the curiosity, and while being there devoted some attention to it.

Q. 6. Who kept the store at that time?

A. Mr. Phillipp Lippmann.

Q. 7. You mean the last witness?

A. Yes, sir.

Q. 8. How came you to see the corset-springs there, as you have stated?

A. I could not but help seeing them on the sill of the window in quite a careless condition.

Q. 9. Do you know what use, if any, was made of those springs, or any of those springs, which you saw at number 35 Jane street, like Exhibit 23, as you have stated?

A. They were replaced in other corsets, or the same ones, brought or left there at the time.

Q. 10. Do you know who sewed any of such springs into corsets at about that time?

(Objected to as leading.)

A. Yes, sir.

Q. 11. Who?

A. Miss Rosenberg.

430 Q. 12. Did you see any one making such springs there in 1859 or 1860, and if so, who?

(Objected to as leading.)

A. I did—Mr. Phillipp Lippmann.

Q. 13. Did you see him making such springs more than once?

A. I did.

Q. 14. Can you see any material difference between the corset springs you saw in 1859 or 1860, at 35 Jane street, as you have stated, and Exhibit 23?

(Objected to as leading.)

A. None whatever.

Q. 15. Did you ever see any other person except Mr. Lippmann make corset-springs like Exhibit 23, at 35 Jane street?

A. I did.

Q. 16. Who?

A. Mr. Louis Rosenberg.

Q. 17. Was that during the time that Mr. Lippmann occupied the store at 35 Jane street, or at some other time?

A. It was not at the time.

Q. 18. Was it before or after?
A. After.
Q. 19. About how long after?
A. I cannot exactly date.
Q. 20. Who occupied the store at that time?
A. At what time?
Q. 21. At the time that Louis Rosenberg made corset-springs there like Exhibit 23, as you have stated?
A. Miss Hannah Rosenberg.
Q. 22. Is she now living?
A. No, sir.
Q. 23. Do you know what was done with the springs which you saw Mr. Louis Rosenberg make there?
A. They were sewed into other corsets.
431 Q. 24. Do you know who sewed them into corsets?
A. I do.
Q. 25. State who.
A. Miss Hannah Rosenberg.
Q. 26. Did you ever see Mr. Louis Rosenberg make more than one pair there of corset-springs like Exhibit 23?
A. I did.
Q. 27. About how many pair, as nearly as you can recollect?
A. Impossible for me to remember.
Q. 28. Is Mr. Louis Rosenberg a relative of yours?
A. A father.
Q. 29. How do you know that it was in 1859 or 1860 that you first saw corset-springs like Exhibit 23 at No. 35 Jane street, as you have stated?
A. As I was about nine or ten years of age.
Q. 3. By what fact are you able to remember your age at that time? (Objected to as leading.)
A. As well as I can remember I was nine or ten years old, and frequented the 13th street school, which is now about twelve years ago.
Q. 31. Did you ever see any corset springs like Exhibit 23 sold at 35 Jane street?
A. Once in a while.
Q. 32. And about when?
A. I can't remember.
Q. 33. Were they sold separately from the corsets, or were they sewed into the corsets?
A. They were sold separately if required.
Q. While Mr. Lippmann had the store, 35 Jane street, and when you visited the store, was he or not often out of the store for portions of the time?
A. He was.
Q. 35. Who then attended the store?
A. Miss Hannah Rosenberg.

432 And upon cross-examination the witness answered as follows:
X Q. 36. What is your exact age?
A. I will be twenty-two in August.
X Q. 37. Narrate, in your own language, how Mr. Lippmann made the corset steels in 1859 or 1860, as you say he did. Tell all you know about it.
A. By taking two pair of steels, breaking the one pair in two, so as to gain the rivets to save to repair some of the others with, and by filing

and hammering them so as to get them even, so as to place on the top of the others.

X Q. 38. Is that all you observed of the process?

A. As well as I remember, it is.

X Q. 39. Supposing the pair of corset-steels, such as you say Mr. Lippmann made, to be on the wearer, which do you call the top spring of one member of the pair, the outside plate or the inside plate?

A. The outside plate.

X Q. 40. You have spoke of Mr. Lippmann's using a file; what did he use a file for, and upon what?

A. Upon the corset clasps which were intended for to double them.

X Q. 41. What particular part of them did he file?

A. As well as I can remember, the center.

X Q. 42. You noticed, then, that he did file the ends, did you?

A. I think not—file the ends.

X Q. 43. Upon which member of the pair were the hooks placed, and upon which member the rivets, as to right or left hand?

A. The hooks on the right and the knobs on the left.

X Q. 44. Did Mr. Lippmann take the hooks off the single corset-steel and put them on the double ones in your presence?

A. None of them were double before they were made so.

X Q. 45. Did Mr. Lippmann take the hooks off the single cor-
433 set-steel and put them on what became the double ones, in your presence?

A. He did.

X Q. 46. Please answer the same question, having reference to the rivets or pins over which the hooks were to catch.

A. He did.

X Q. 47. How did he make the holes through the under plate?

A. By using two pair of steels to make one pair out of.

X Q. 48. I mean what tool did he make the holes with?

A. No tool for the purpose of making the holes. By using the sides which already had had the knobs on, as near as I can state.

X Q. 49. How came Hannah Rosenberg, your aunt, to be in Mr. Lippmann's employ?

A. I don't know.

X Q. 50. In whose employ are you now?

A. P. Lippmann & Company.

X Q. 51. That is the Mr. Lippmann who has just testified, is it?

A. It is.

X Q. 52. Did you ever testify or make affidavit in a suit before?

A. I did not.

X Q. 53. Are you in any manner related to Mr. Lippmann?

A. I am the niece.

X Q. 54. In what business, if you know, and with whom, if anybody, is Louis Rosenberg?

A. In the chandelier business, with Mitchell, Vance & Company.

MISS HANNAH ROSENBERG.

Subscribed and sworn to before me this 18th March, 1873.

R. E. STILLWELL,
Examiner, &c.

434 JOHN J. JOHNSON, a witness called on behalf of the defendants, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. John J. Johnson; age, 31; residence, Huntingdon, Connecticut; agent for N. H. Downs, in the grain business.

Q. 2. Did you know, in his lifetime, Samuel H. Barnes, who obtained letters patent July 17, 1866, for an improvement in corset springs?

A. He was my uncle. I did.

Q. 3. State when first, if ever, you had any conversation with him about corset springs.

A. I think in 1865.

Q. 4. State that conversation as nearly as you can.

A. He was speaking about his patent in his leather business, and added that he was trying to get up a double corset steel; had arranged two single steels together by tying them or fastening them together in some manner. That is all that I recollect that was said at that time.

Q. 5. In that conversation did you understand him that he had completed his invention, or that he was then engaged on it?

(Objected to as leading.)

A. He was engaged on it, as I understood him.

Q. 6. State when, if ever, you next had a conversation with him on that subject.

A. In the winter of 1865 and 1866.

Q. 7. What circumstance, if any, enables you to fix the date of the conversation last referred to?

A. From the fact that I went to him to get advice about buying out a partner in my business at about that time.

Q. Do you recollect whether you did buy out such partner, and the date?

A. I did; the first of January, 1866.

435 Q. 9. About how long was such buying out after the conversation, last referred to, with Mr. Barnes?

A. Within a few weeks.

Q. 10. State what took place and what was said by Mr. Barnes at this conversation last referred to.

A. I understood that he thought that he had completed his invention, and was about to get some one to make him a model.

Q. 11. Was anything said at this conversation about his showing you a model, and if so, what?

A. I think he had no model at that time, but was about to get one made.

Q. 12. State when next, if ever, you had further conversation with him on that subject of the corset spring?

A. Shortly after—within a few weeks, or within a few days. I saw him every few days—usually referred to it whenever I saw him.

Q. 13. State what took place and what was said by Mr. Barnes at this conversation last referred to.

A. He wanted to make some arrangement and have me go into business with him, if he was able to attend to it, being sick at the time.

Q. 14. When first, if ever, did he show you a model of the invention?

A. I never saw a model, but he showed me a drawing of the steel which he made.

Q. 15. State whether previous to this first conversation, of which you have spoken, you were in the habit of seeing Mr. Barnes, and about how often?

A. I saw him quite often, every few weeks.

Q 16. About how intimate were you with Mr. Barnes before and along about the time of the first conversation, of which you have spoken?

A. Were always very intimate with him, and he requested me very

particularly always to come and see him when I was in New York, as he was sick; being in New York every few days, I always went to see him.

Q. 17. Did you ever take care of him while he was sick, and when?

436 A. Nothing farther than to go after medicine and stimulants.

Q. 18. Did Mr. Barnes ever say anything to you about his wife wearing a pair of double springs in her corsets?

A. He did.

Q. 19. Did he state to you how they were made; and if so, how?

A. He explained to me the manner of the steel being made by showing me a drawing.

Q. 20. When was it he showed you the drawing?

A. I think it was in the month of June, 1866.

Q. 21. Did Mr. Barnes, at the time he showed you the drawing, state whether or not, or represent whether or not, he had ever had a pair of corset springs made like the drawing he then showed you?

A. Had had something of a double steel made, which I had reference to that Mrs. Barnes had worn.

Q. 22. Did you learn in what respect the corset springs Mrs. Barnes had worn differed from the drawing, if any, and how those springs worn by her were constructed?

A. They were substantially the same as the drawing, as I understood.

And on cross-examination the witness testified as follows:

X Q. 23. Are you the man who claimed some little amount of money which the widow Barnes had to sue a savings bank to get possession of?

(Objected to as new matter, and as immaterial.)

A. I don't know that she has got possession of any money which was claimed by me.

X Q. 24. State what you do know.

A. I had notice that Mrs. Barnes was about to sue the bank for the money, as near as I remember.

X Q. 25. Is that all you remember?

437 A. I remember of having a conversation with her concerning it.

X Q. 26. State the substance of the conversation.

A. The last time I saw her she asked me if I would sign a paper for her to get the money. If she would come to Birmingham I would try and arrange it satisfactory to her, as the amount was only one hundred dollars. I think she said that it was of no particular consequence, but that it would be of a little use to her if she could get it from the bank, as she had no available money just at that time. She did not come to Birmingham, and I have never heard anything further about it, whether she got it or not. I have never received any notice from the bank that she had. We never exchanged a word in the world regarding the money, and were always on good terms. I have reference to the time after she came to Birmingham, when speaking of the money. She was at Birmingham at different times.

X Q. 27. Then the money of which you speak was in the bank, was it?

A. I was told so by Mrs. Barnes.

X Q. 28. Why couldn't she draw it out when she wanted it?

(Objected to as new matter, foreign to the issue.)

A. The bank refused to pay it to her, as I understood from her.

X Q. 29. Did you do all you could to aid her in obtaining it?

A. I didn't do anything about it, because she didn't come to Birmingham, as she told me she would.

X Q. 30. What business had you with it, or about it, any way? Explain the matter.

(Same objection.)

438 A. It was deposited to my credit, as Mrs. Barnes said.

X Q. 31. By whom?

A. Samuel H. Barnes, as I understood.

X Q. 32. For what purpose did you understand it was so deposited?

A. Never was any particular explanation made to me concerning it by Mrs. Barnes.

X Q. 33. Don't you know, or haven't you heard, that Mrs. Barnes was in very needy circumstances, living upon money which she could borrow from some friends, because you and some of your relatives did not do what they could to help her obtain possession of this money?

(Objected to as calling for hearsay, and also as new matter foreign to the case.)

A. I have never heard of anything of that kind from her, or any of the relatives whatever.

X Q. 34. Could she not have obtained the money deposited in your name if you had given a written request to that effect, and is not that what she begged you to do?

(Objected to as immaterial and irrelevant, and new matter not referred to in direct examination.)

A. I do not know that she could. She told me that the bank refused to pay it to her.

X Q. 35. You will please answer the last part of the preceding question?

A. She did not beg me to do any such thing; merely mentioned it to me, and asked me if I wouldn't as leave do so as not.

X Q. 36. Is it with a kindly spirit towards her that you have come from Huntington, Connecticut, to try to swear down her patent?

A. I have no ill-will towards Mrs. Barnes whatever, and don't know what the points at issue are regarding the patent, at this moment.

439 X Q. 37. You know which side you are swearing for, don't you?

A. I do.

X Q. 38. You know that Mrs. Barnes was compelled to bring suit to get that money, don't you?

A. If she has got it, this is the first time I have heard anything about it since Mrs. Barnes and myself had conversation about it.

X Q. 39. You know you didn't give her a release of it, don't you?

A. I do.

X Q. 40. What did you want to make her go way up to Birmingham after your "arrangements" for, when you could have caused her to get the money at once without making her any trouble?

(Counsel for defendants object to this line of examination as foreign to the case.)

A. She proposed herself, in the first place, that she should come up to Birmingham, and wished that I would use my influence to get my sisters to sign some writing to get the money out of the bank. I ascertained that they being under age could not sign any such papers, as the bank might be liable to pay the money over again after they became of age; and as she did not come up, there was nothing more done about it; as I was but little interested I did not trouble myself about it.

X Q. 41. You didn't get the money, did you?

A. I don't know that anybody has got it but the bank.

X Q. 42. Do you think it belongs to you?

A. I supposed it did, or it wouldn't have been put there for me.

X Q. 43. What did you ever do for it, or to deserve it, in your opinion?

A. Nothing in particular, as I know of.

X Q. 44. Have you had any friendly intercourse with Mrs. Egbert very lately?

A. I haven't seen her in some time?

440 X Q. 45. Why not.

A. Haven't happened to go near where she was.

X Q. 46. Has she solicited your intimacy lately?

A. I have neither seen nor heard anything from her since that time.

And in answer to redirect examination, answered as follows:

Re D. Q. 47. Your sisters, of whom you have have spoken, had some interest in or claim on this hundred dollars of which you have testified, had they?

A. Not this particular hundred dollars which was in my name—other moneys which were to their credit was what they had reference to.

Re D. Q. 48. Were your sisters' parents living at the time of the conversation of which you have testified, with Mrs. Barnes, in regard to the money?

A. They were.

Re D. Q. 49. Did you ever learn from Mr. Barnes that he had filed a caveat for this improvement in corset springs; and, if so, at what time did he represent that such caveat was filed?

A. I don't remember particularly about that. I think that at one time, when speaking of his invention, he was about to file a caveat or make an application for a patent. Don't remember which it was. I think this was in the winter of 1865 and 1866.

Re D. Q. 50. What led him at that time to say anything about a caveat or an application for a patent, if you know?

A. He was speaking of the steel, and thought that if he got a patent on it it would be a good invention. He said he thought he would make considerable money out of it.

Re D. Q. 51. State whether at that time Mrs. Barnes made any remarks about his showing or describing the invention to you; and, if so, what?

A. Something was said about his getting the patent, or rather that he was about to get it—I should have said, perhaps, filed an application, as he hadn't got any patent at that time—not to say
441 anything about it. Usually referred to the corset steel whenever I saw him.

Re D. Q. 52. Did you ever hear Mrs. Barnes caution Mr. Barnes against describing or showing his invention to any one; and, if so, when, and what did she say?

A. One time when I was there some one was about to come in the room. We were speaking about the steel at the time, and Mrs. Barnes cautioned him afterwards about saying anything about it, and he replied that it would not make any difference, as he had either filed a caveat or made an application for a patent, I do not remember which. I should think, as near as I can remember, that this was in January or February, in the year 1866.

JOHN J. JOHNSON.

Subscribed and sworn to before me this 18th March, 1873.

R. F. STILWELL,
Examiner, &c.

Adjourned to 11 o'clock, Wednesday, March 19, 1873.

WEDNESDAY *March* 19, 1873—11 a. m.

Present: Counsel as before.

Counsel for defendants here gives notice that the defendants propose to amend their answer to show prior manufacture, use, and sale of the invention in question in this case by James Earwicker, and others having connection with him, at No. 8 Stuyvesant street, and No. 5 Hall Place, in the city of New York, and elsewhere in the United States; and that such manufacture, use, and sale to others to be used,
442 was for more than two years prior to any application by Samuel H. Barnes for letters patent of the United States for the said alleged invention; and defendants propose to proceed now de bene esse to take the testimony of the said James Earwicker and others to prove the facts referred to in this statement and notice of counsel.

JAMES EARWICKER, a witness called for the defendants, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

(The testimony of this witness as prior manufacturer, user, seller, or inventor of the invention in question in this case objected to, for the reason that his name is not set up in the answer.)

A. Name, James Earwicker; age, 59; residence, 5 Hall Place, in the city of New York; occupation, manufacturer of corsets.

Q. 2. How long have you been engaged in the manufacturer of corsets?

A. Since 1827.

Q. 3. Please look at the corset now shown you and state if you know who made it, and when?

A. I made it, about 15 months ago.

Q. 4. Please examine said corset and state whether it is in the same condition as when you made it; and, if not, how otherwise?

A. The same, except where it has been ripped.

(Counsel for defendants offer said corset in evidence, and the same is marked Defendants' Exhibit 24, R. E. S., Examiner.)

Q. 5. State whether or not you have ever manufactured and sold, for use, corsets having double springs constructed and arranged as shown in Exhibit 24; and, if so, when, where, and for how long?

443 A. I have; in 1861, at 8 Stuyvesant street and 5 Hall Place, for near twelve years.

Q. 6. About how often during these twelve years have you sold corsets having such double springs, constructed as shown in Exhibit 24, at the places or either of the places mentioned in your last answer?

A. Occasionally the whole time.

Q. 7. State whether any of the double springs so sold by you were secured together differently in any way from the mode shown in the spring which has been taken out, in Exhibit 24; and if so, how?

A. In no other way.

Q. 8. For what purpose did you make corset springs of two plates of metal each, in the manner shown in Exhibit 24?

A. To make them stronger.

Q. 9. State whether or not the winding of the strip of cloth, shown in Exhibit 24, secured them from sliding off each other laterally?

A. Yes, when in the corset.

Q. 10. How do you know that you manufactured and sold such corsets having such springs, in 1866?

A. Because the springs in use were not heavy enough at that time.

Q. 11. I mean by what circumstance do you fix the date?

A. By moving into the place on Stuyvesant street.

Q. 12. How long since you moved from No. 8 Stuyvesant street to your present place of business?

A. Eight years this May.

Q. 13. State whether the double corset springs made by you and put into corsets, and sold by you while you were in Stuyvesant street, were in any material respect different from those shown in Exhibit 24, or whether they were the same in all particulars of construction.

A. I don't make the corset steels; I don't make the steels, only use them in the corsets like the sample.

Q. 14. Were those used by you in the corsets and sold while
444 you were in Stuyvesant street, as you have stated, the same in all particulars of construction or different in any respect from those shown in Exhibit 24?

A. The same.

Q. 25. Please look at the double corset spring forming part of Exhibit 24, and state whether the two plates of the spring can slide off each other sidewise when secured together by the cloth wound around it?

A. Not when in the corset.

Q. 16. What other material, if any, beside cloth have you used while in Stuyvesant street, as you state, to secure the two plates of each spring together, as shown in Exhibit 24?

A. None.

Q. 17. For what purpose did you wind cloth around the two plates forming the double spring, as shown in Exhibit 24?

A. To keep from wear of the corset.

Q. 18. When did you begin the manufacture of corsets, and what steels or busks did you use in them?

A. In 1827—that was in Portsmouth, England—I used plain wood and steel busks.

Q. 19. And when did you first use double steels, like those in Exhibit 24?

A. About 1861.

Q. 20. Did you ever make any corset steels while you were in England; and if so, when?

A. No; but I have seen them used.

Q. 21. What was the nature of your business in 1861, as to whether it was a retail business for customers, or whether you sold to the trade?

A. Both retail and wholesale.

Q. 22. Do you remember what led you to make these double steels, and for what class of customers you used them?

A. I do; for a child that was deformed that wanted more support; so made them, when ordered.

Q. 23. And what were the physical characteristics of the people who usually ordered them?

A. Deformed.

445 Q. 24. State, if you please, how frequently you received orders for corsets having steels of this description?

A. Often.

Q. 25. Of whom have you purchased the steels you used in your corsets since 1861?

A. Monsieur Quibeth, of Harlem, and the Bridgeport Brass Company, and several others.

Q. 26. You know what side steels used in corsets are, don't you?

A. I do.

Q. 27. Did you ever use these to re-enforce the front steels, and how frequently?

A. Often.

Q. 28. How many people have you had in your employ in making corsets, on the average, since 1861?

A. About twenty-five.

Q. 29. In making large sized corsets for heavy women, what kind of steels have you been accustomed to use?

A. The regular button steel, with sometimes wood and sometimes steel under them.

Q. 30. Are the double steels in Exhibit 24 substantially like the double steels you have used since 1861 in their construction?

A. Similar.

Q. 31. From 1861 to the present time how many of these double steels have you used yearly, on the average?

A. I can't say positive; it might be fifty or a hundred a year.

Counsel for defendants tenders the witness to counsel for complainants for cross-examination.

J. EARWICKER.

Subscribed and sworn to before me, this 20th March, 1873.

R. E. STILWELL,
Examiner, &c.

446 CHARLES EARWICKER, a witness called on behalf of the defendants, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and business?

(The testimony of this witness as prior manufacturer, seller, or inventor of the invention in question in this case objected to, for the reason that his name is not set up in the answer.)

A. Charles Earwicher, twenty-four this 13th May; 5 Hall place; corset maker.

Q. 2. Are you the son of James Earwicker, the previous witness?

A. I am.

Q. 3. Please look at Defendants' Exhibit 24, and state if you know of whose manufacture it is?

A. It is my father's manufacture.

Q. 4. How long have you known your father to manufacture corsets having double steels like those shown in Exhibit 24?

A. Since I first went to work at corsets, June, 1861.

Q. 5. Please state what you know in regard to the manufacture by your father of such double springs?

A. When we have received orders for heavy steels we place two steels of full length and the half length covered with muslin, as shown in Exhibit 24.

Q. 6. How long has this been your practice?

A. Since I first went to work at it—June, 1861.

Q. 7. On the average, how many such corset steels has your father used in corsets each year since 1861, as near as you can estimate?

A. It might be fifty or a hundred, more or less.

Q. 8. What is your father's business in respect to customers, as being a retail or wholesale business?

A. Both.

447 Q. 9. Since 1861 has he been accustomed to receive orders from individual customers, and to fill the same?

A. Yes.

Q. 10. What is your position with your father in business?
A. Whaleboning and examining work after finishing.
Q. 11. What is whaleboning?
A. Putting whalebone in corsets.
Q. 12. Does it include putting in steels?
A. It does not.
Q. 13. Have you been accustomed, since 1861, to inspect the work turned out from your father's factory?
A. I have.
Counsel for defendants tenders the witness to Mr. Witter for cross-examination.

CHARLES EARWICKER.

Subscribed and sworn to before me this 19th March, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to 1 o'clock p. m., Thursday, March 20, 1873.

MARCH 20TH, 1873, *Thursday*—1 p. m.

Present: Counsel as before.
Counsel for complainant here requests the examiner to note upon the record that he repeats to defendants' counsel the offer, made verbally at the last meeting, to allow the third amendment to the answer to be filed upon condition that no further amendment to said answer should be asked for.
448 Counsel for defendants replies now, as then, that he does not feel that he would be justified in cutting off his clients from the benefit of any further defence which thereafter, with due diligence, be discovered, and suggests further that further development have, in his opinion, justified his prudence in this regard, inasmuch as he is informed that since that conversation additional defences have been discovered, which counsel gives notice that he intends to incorporate in amendment of answer and to prove in testimony, and that in pursuance of the notice given yesterday, and the notice now given, counsel for defendants proposes, owing to the shortness of time which defendants have for taking testimony, and the impossibility of bringing the motion before the court before the expiration of that time, to proced de bene esse with the proof of the facts which have been discovered on behalf of the defendants since the filing of the second amendments to the answer.

Miss CATHARINE REDMOND, a witness called on behalf of the defendants, being duly sworn, deposes and says:
Q. 1. What is your name, residence, and occupation?
(The testimony of this witness as prior manufacturer, user, seller, or inventor of the invention in question in this case objected to for the reason that her name is not set up in the answer.)
A. Catharine Redmond; 110 West Thirtieth street, New York City; corset maker.
Q. How long have you been a corset maker?
A. Well, about twenty years I have worked on it.
Q. How long have you been in that business for yourself?
A. Fourteen years, sir.
449 Q. 4. Where did you commence in that business for yourself?
A. 705 Broadway, city of New York.
Q. 5. How long did you carry on that business at that place?

A. Twelve years, sir.

Q. 6. Where are you now carrying on that business?

A. Corner of Thirty-first street and Broadway.

Q. 7. Do you know James Earwicker, who carries on the same or similar business at number 5 Hall Place?

A. Yes.

Q. 8. Please look at the corset now shown you, Defendants' Exhibit 24, and state whether you have ever known of said Earwicker's making corsets like Exhibit 24?

A. Yes, I have known it, and received them from him; know the corset, and know it is his.

Q. 9. State, if you know, whether the front springs or clasps in such corsets are constructed in any respect different from Exhibit 24, or whether they were in all respects the same.

(This question objected to, de bene esse, as leading. Question withdrawn.)

Q. 10. State, if you know, how the front springs in the corsets like Exhibit 24 were constructed.

A. If they were slight, we would put them in to make up the deficiency; if the single steel was slight, we would put in the double one—a piece of steel or a whalebone.

Q. 11. When did you first commence to put in additional pieces of steel or whalebone, in addition to the usual front springs on each side forming the clasp of the corset?

(Objected to, de bene esse, as leading.)

A. It might be fifteen years or twenty years; I know we used them frequently.

450 Q. 12. How long are you certain that you put in such additional pieces?

(Same objection, de bene esse.)

A. It may be seventeen years ago; it may have been sixteen years; I can't say the day. It is a common practice of every corset-maker to use those things.

Q. 13. Was it before or after you commenced business for yourself at 705 Broadway, as you have stated, that you first put in such additional plates in addition to the springs forming the regular corset clasps?

(Objected to, de bene esse, as leading, and because the witness has said she can't say.)

A. No. I did when I was working out. I did it when I was working at Bowlese's; it was the corner of Grand street and Broadway.

Q. 14. State whether that was before or since you went into business for yourself.

(Same objection, de bene esse.)

A. It was before.

Q. 15. State how often, since that time, you have made corsets with the springs doubled in that way.

A. I can't say how often, because we do it frequently every day, more or less.

Q. 16. State what device, if any, you used to secure the front and back plates of the spring together, when you made those springs double. State how you secured the plates together, if at all.

A. We would sometimes wind a piece of muslin around it, and sometimes we sewed a piece over tightly to keep the bone in.

Q. 17. What was done with the corsets which were made by you having double springs, as you have stated?

A. What was done with them? Sewed, of course.

451 Q. 18. For the first two years that you were doing business at 705 Broadway, as you have stated, about how many corsets with such springs in did you make and sell?

A. I might have sold fifty; I might have sold more; I can't say. It is something I don't keep an account of.

Q. 19. What is your best judgment in regard to the number?

A. I can't state.

Q. 20. Can you state whether there was a considerable number, or not more than one or two?

A. It might be a dozen, and it might be a half a dozen. I say half a dozen; I am sure of that, anyhow.

Q. 21. Can you state the names of any person or persons to whom you sold them?

A. I have sold them to a Mrs. Jacobs, and to a Mrs. Farsdel, and to a Mrs. Laubheimer.

Q. 22. Please state their full names, and also their places of residence, if you can.

A. I can't tell the full name, nor the residences either. I don't know the numbers.

Q. 23. Can you tell what street Mrs. Jacobs lives on?

A. Forty-eight street, west.

Q. 24. Between what avenues?

A. Between Fifth and Sixth.

Q. 25. How long have you known of Mr. Earwicker making or selling corsets having double springs constructed like Exhibit 24?

(Objected to, de bene esse, as leading.)

A. I knew him a good while; I don't know how long he has used the steels.

her
MISS C. × REDMOND.
mark.

452 THOMAS LOVE, a witness called on behalf of the defendants, being duly sworn, deposes and says:

Q. 1. What is your name, age, residence, and business?

(The testimony of this witness, as prior manufacturer, user, seller, or inventor of the invention in question in this case, objected to for the reason that his name is not set up in the answer.)

A. My name is Thomas Love; age, 66; in Rutherford Park; my business is corset-maker.

Q. 2. How long have you been engage d in the corset business?

A. About fifty years.

Q. 3. For the past twenty years has your business been in making corsets for your customers, or supplying the trade?

A. Both, sir.

Q. 4. During the past twenty years have you been accustomed to manufacture corsets for customers who desired to wear them?

A. Yes, sir.

Q. 5. Please look at Exhibit 24, and state whether you ever use steels like those which it contains, and when you first used them?

(Objected to, de bene esse, as leading.)

A. This is one steel put at the back of the other one, isn't it? Yes, sir; I have used plenty of them.

Q. 6. When did you first use them?

A. Well, I couldn't fix upon any particular date when I first used

them. I have used them ten or twelve or thirteen years, probably, back, as I needed them.

Q. 7. For what classes of customers did you use them?

A. Only for those ladies who required stout steels.

453 Q. 8. State, if you please, how many of such steels you used, on the average, yearly, during the last twelve or thirteen years.

A. On the safe side, perhaps, five or six a year.

Q. 9. During this period of time how have you been accustomed to unite these double springs?

A. By placing them at the back of the steel; sometimes pushing them up and sometimes covering them with muslin.

Q. 10. What kind of clasps did you use with these double steels for fastening them in front?

A. Similar to those on Exhibit 23.

Q. 11. Of whom have you purchased the steels which you used in your corsets for the last thirteen years?

A. Mostly from Louis Bernisce and Goubualt.

(Counsel for defendants tenders the witness to Mr. Witter for cross-examination.)

THOMAS LOVE.

Adjourned to 11 a. m., Friday, March 21, 1873.

FRIDAY, *March* 21, 1873.

Present: Counsel as before.

GEORGE H. BARNES, a witness called on the part of defendants, being duly sworn, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

(The testimony of this witness, as prior manufacturer, user, seller, or inventor of the invention in question in this case, objected to for the reason that his name is not set up in the answer.)

A. George H. Barnes; age forty-five, as near as I can remember; residence, 302 Henry street, New York City; occupation, corset-maker.

454 Q. 2. How long have you been engaged in the manufacture of corsets?

A. Thirty years?

Q. 3. Since you have been in business for yourself have you made corsets for individual customers and for the trade?

A. Yes, sir.

Q. 4. Have you ever used double corset steels in your corsets; if so, when did you first use them and how many in each year?

A. In 1859, and about a hundred in each year.

Q. 5. How were these double steels constructed?

A. By being bound together by a tape; a tape or strip of muslin, I guess, it is best to put it; that is what is generally used.

Q. 6. Please look at Defendants' Exhibit 24 and state how the steels used in it differed from the double steels used by you as you have testified?

A. The only difference between this and the one I used, the inner steel was the same length as the outer one.

Q. 7. What measures have you used with these double steels to fasten the corset in front?

A. Like this; to hook them like this (in Exhibit 24).

Q. 8. Please state what led you to use these double steels?

A. By the customers complaining that they broke them too often.

Q. 9. That what broke too often?
A. The single steels.
Q. 10. For what kind of persons did you use these steels?
A. For persons of extra large busts and hips and extra small waist.

And being cross-examined, de bene esse, the witness answers as follows:

X Q. 11. To whom did you sell any double springs in 1859?
455 A. I can't remember any person that I can particularize this time.
X Q. 12. When you said that the double steels you made were like Exhibit 24, did you mean like the double steel which has been taken out of the corset and which you held in your and?
A. Yes, with the exceptions that I specified.

GEORGE H. BARNES.

Subscribed and sworn to before me this 21st March, 1873.

R. E. STILWELL,
Examiner, &c.

Mrs. ELIZA JACOBS, a witness called on behalf of the defendants, being duly sworn, deposes and says:

Q. 1. What is you name and residence?
(The testimony of this witness, as prior manufacturer, user, seller, or inventor of the invention in question in this case, objected to, for the reason that her name is not set up in the answer.)
A. Mrs. Eliza Jacobs; residence 70 West Forty-eighth street.
Q. 2. Who has made your corsets for the last ten or twelve years?
A. Miss Redmond.
Q. 3. What sort of steels has she put in the corsets used by you during this period?
A. She has used a steel, and generally put a whalebone or another bone inside of the steel, or underneath the steel.
Q. 4. Has she used anything instead of the whalebone?
A. An inner steel inside of the steel.
456 Q. 5. Look at Defendants' Exhibit 24, and say whether the steels used by Miss Redmond in your corsets were like the steels in the exhibit, if you know?
(Objected to, de bene esse, as leading.)
A. I don't know much about the steels.
Q. 6. You only knew they were double?
(Same objection, de bene esse.)
A. That is all.

And being cross-examined, de bene esse, the witness answers as follows:

X Q. 7. Was it from Miss Redmond that you learned that the extra whalebone or steel was put in?
A. She told me she was in the habit of alway putting them in.
X Q. 8. So you took her word for it that they were double?
A. I seen it myself when I opened the corset; I seen there was an inner steel or whalebone.

ELIZA JACOBS.

Subscribed and sworn to before me this 21st March, 1873.

R. E. STILWELL,
Examiner, &c.

MRS. ELIZA EARWICKER, a witness called on the part of the defendants, being duly sworn, deposes and says:

Q. 1. What is your name and business?

(The testimony of the witness, as prior manufacturer, seller, or
457 inventor of the invention in question in this case, objected to, for the reason that her name is not set up in the answer.)

A. Mrs. Eliza Earwicker, corset maker.

Q. 2. Are you the wife of James Earwicker?

A. Yes, sir.

Q. 3. How long have you been engaged in making corsets in this country?

A. About eighteen years.

Q. 4. During that period, has your business been manufacturing for the trade or for retail customers?

A. Retail customers.

Q. 5. Have you ever used double steels in corsets; and, if so, how long have yon used them?

A. I do; eight years; well, altogether, I guess about twelve years.

Q. 6. How were these double steels constructed?

A. We put a side steel under the front steel, and put muslin over it.

Q. 7. Were these side steels as long as the main steel?

A. Yes, sir.

Q. 8. For what class of persons were you accustomed to use these double steels?

A. Stout people.

Q. 9. Have you ever sold any of these double steels to persons apart from corsets?

A. Yes, sir; I have done that.

Q. 10. How frequently?

A. Only once; now and then.

Q. 11. Please look at Defendants' Exhibit 24, and say whether the steels it contains differ from the steels you have spoken of?

A. That's how we used to put them; sometimes we used to put them longer.

Q. 12. How did your corsets which had these double steels fasten in front?

A. The same as corsets Exhibit 24.

Q. 13. How many corsets having these double steels have you made a year for the past ten years on the average?

458 A. I am sure I couldn't tell exactly; well, about two hundred in all.

Q. 14. What is the purpose of doubling the steel in these corsets?

A. For strength.

Q. 15. Are you accustomed to repair corsets?

A. Sometimes we do; that is out of our line.

(Counsel for defendants tenders the witness to counsel for complainants for cross-examination.)

MRS. ELIZA EARWICKER.

Subscribed and sworn to before me this 21st March, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Saturday, March 22d, 1873, at 11 o'clock a. m.

SATURDAY, *March 22d*, 1873.

Present, counsel as before.

HENRY TEN BROECK, a witness called on behalf of the defendants, being duly sworn, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

(The testimony of this witness, as prior manufacturer, user, seller, or inventor of the invention in question in this case, objected to for the reason that his name is not set up in the answer.)

A. Henry Tembroeck; forty-four; 291 Greenwich street; carpenter.

459 Q. 2. Do you know Mr. Lippmann, and how long have you known him?

A. Yes; I know Mr. Lippmann; have known him since '59 or '60.

Q. 3. Did you ever occupy any part of the same premises with him; and, if so, when, and where were they?

A. As far as regards the premises, I occupied a shop in the rear building, 35 Jane street.

Q. 4. Please look at Defendants' Exhibit 23, and state when and where you saw steels of similar construction.

(Objected to, de bene esse, as leading.)

A. I saw them, I suppose, twenty times a day in spring, summer, and fall, as he was working at them by the window, in the year '59 or '60, at 35 Jane street.

Q. 5. How many do you think you saw?

A. I cannot tell; there was a pile laying there in the window; there may have been twenty pair or forty pair,

Q. 6. How long were you in the habit of visiting Mr. Lippmann's premises?

A. Off and on, seven or eight months.

Q. 7. During this period of time, did Mr. Lippmann use any of your tools; and, if so, what tools?

A. Yes, sir; I lent him some out of my shop; I lent him some saw files and a small hammer.

Q. What did he use them for, if you know?

A. For them frames—steels. For filing those rivets.

Q. 9. Did you know Miss Rosemberg; and, if so, what was her business?

A. She was in the store there as saleswoman, to tend to business, I suppose, just as I would.

Q. 10. What was the business done at the store where she was saleswoman?

A. Repairing hoopskirts and corsets; things of that kind.

460 Q. 11. When was this?

A. In 1859 or 1860; the same time as I told you before, 1860 or 1861.

Q. 12. Did you ever know her to use or sell any corset steels like Exhibit 23 during this time?

A. They used to be brought there to be fixed.

Q. 13. Bring what there to be fixed?

A. Corsets and hoopskirts.

Q. 14. Do you mean that ladies brought corsets there to be fixed?

A. Yes, sir.

Q. 15. Did you ever know Miss Rosenberg to use these double steels to repair corsets during this time; if so, how often?

A. Yes, sir; I couldn't say how often; I seen her working at them, putting them into corsets.

Q. 16. Do you know where Miss Rosenberg got these double steels she used in the corsets?

A. No, sir; I don't know where she got them; I don't know who she got them of.

(Counsel for defendants tenders the witness to counsel for complainants for cross examination.)

HENRY TEN BROECK.

Subscribed and sworn to before me this 22d March, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to half past 2 p. m., Saturday, March 22, 1873.

461 U. S. circuit court, southern district of New York. In equity.

FRANCES LEE EGBERT, AS EXECUTRIX,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHCOCK and Henry S. Magrane.

Testimony on the part of the defendants, taken before Richard E. Stilwell, examiner, under the 67th rule, by order of court, dated April 29th, 1873.

NEW YORK, *Tuesday, May 6th*, 1873—11 a. m.

Mrs. MARY A. SHERMAN, being duly sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, place of residence, and occupation?

A. Mary A. Sherman; 305 Cumberland street, Brooklyn, N. Y.; manufacturer of corsets, &c.

Q. When, if ever, did you first have any knowledge of corset springs in which each spring of the pair was made of two or more plates of metal; and state also the circumstances under which the same came to your knowledge.

A. In the fall of 1857. I purchased a pair, either the latter part of October or beginning of November, 1857, of a lady who came round and sold them by sample. She showed me these, being double, and
462 of course I thought it an advantage over those, being double. She had not my size at the time she took my measure, and brought them to me a few days after. They were two plates, wound like that. (Witness produces exhibit marked Sherman.) Those being my first corsets, I was not in the habit of wearing them every day; only on dress occasions, so I wore that set till 1860; then I commenced manufacturing myself. At that time I was in the hoop-skirt business. I never engaged in the corset business till 1860, then I commenced manufacturing them. From that date up to the present date I have made the double steels, wound them for my own goods and for my customers, sold them in my store to customers in Philadelphia, Boston, New York, and Brooklyn, and about ten other branch stores, eastern cities, western and southern cities, and all, so that when "Can'tbreak'em" came out it was nothing new to me. I did not think it was anything extra. I did not think it was as good as my own, because I sometimes made them of three and four plates. I never paid any attention to "Can'tbreak'ems" till people

came to my store and inquired for them. Then I got them and sold them, but never put them in my corsets for a long time. I have done so in the last two or three years—I mean the corsets we sold. I don't know whether we are using them—I know we are not; we are using those like Complainant's Exhibit C now. We like those better because they are double all the way down.

Q. 3. How did the construction of the corset springs purchased and worn by you, as you say, in 1857, and afterwards, compare with the construction of the corset springs Exhibit Sherman.

(Objected to as leading by an exhibition of a model.)

A. What do you mean by that; do you mean about its being double?

Q. 4. I mean in all respects, and whether they were like or not like Exhibit Sherman.

(Same objection.)

A. Whether they were like? They were like these (Exhibit
463 Sherman). I like the ones like Exhibit Sherman, because I get it just as stiff as I please, as I can put three or four thicknesses in them; now, for instance, I made a corset to orde for a lady in Jane street, New York; her weight she told me at the time was nearly 350 pounds. I took a steel, added to hers four thicknesses and a piece in centre besides, so as to give her strength.

Q. 5. Was there any difference between the corset springs you wore in 1857, as you have stated, and the corset springs Exhibit Sherman, in the manner of their construction?

(Objected to as leading.)

A. There was no difference between the ones I purchased in the corsets and these, Exhibit Sherman.

Q. 6. State, if you know, who made Exhibit Sherman, and where?

A. It was made in my factory, by Mr. Seder.

Q. 7. State the names of some persons to whom you have sold corset springs like Exhibit Sherman since you commenced making them, in 1860?

A. Mrs. Van Dyke, Mrs. Gilchrist, Mrs. Madden, Mrs. Gerret Smith, Mrs. Caswell, and Mrs. Nodyne, Mrs. Thompson, Mrs. Henry Ward Beecher, Mrs. S. B. Chittenden, Mrs. Bussing, Mrs. Jenks, Mrs. Tracy, Mrs. Reynolds, Mrs. A. A. Low, Mrs. Robertson's family, the whole of the Spies family in Brooklyn, Mrs. Huntley, in Williamsburg, and many others.

Q. 8. How do you know that it was in 1857 that you purchased a corset with corset springs like Exhibit Sherman? By what circumstances do you fix the date?

(Objected to as leading.)

A. Because it was the year that I commenced manufacturing hoopskirts. I commenced that business in the month of March, 1857; then I moved my manufacturing rooms in the month of October, 1857, and commenced retailing; that this lady called upon me. She wanted me to add the corset business to my line. I don't suppose I had been in that place more than three or four weeks when I purchased that corset.

464 Q. 9. How long have you continued to wear corset springs constructed like Exhibit Sherman?

(Same objection.)

A. From 1857 to the present date, never wore any other kind, only as I have grown stouter I have added thicknesses.

Q. 10. Have you ever furnished corset springs like Exhibit Sherman to any of your relatives; and, if so, who and when?

(Same objection.)

A. My sister, Mrs. Vandyke, in 1862; my sister Gilchrist, ten years ago.

Q. In your trade in corsets, which have given the best satisfaction corset springs like Exhibit Sherman or the "Can't-b reak-'em" corset springs?

A. Exhibit Sherman.

Cross-examined by Mr. WITTER:

X Q. 12. You have said that the corset spring which you bought in 1857 and wore was like in construction to Exhibit Sherman. What do you mean by that?

A. I mean it was constructed of two plates and wound together with muslin.

X Q. 12. Do you mean anything further than that, except that the two members of the pair were capable of being connected or put together, as in Exhibit Sherman?

A. All I mean is, that I could add, in manufacturing as many thicknesses as I chose, by having it in the way of Exhibit Sherman.

X Q. 14. Anything further?

A. Yes, there is; by having it that way I could lengthen my steels to any length; what I mean is that I could make steels of greater length and strength than are usually made.

X Q. 15. The simple question has been this: In what particulars did the construction of the pair of corset steels you wore in 1857 re-
465 semble the pair of corset steels Exhibit Sherman? Please confine your answer to that question.

A. When I opened the corset to examine the steels, I found that there were two plates inside, the same as Exhibit Sherman, and they were well rusted and corroded together, the two plates, so that I had to pull them apart; I found them just as the lady had explained them to me, made of two plates; I bought those corsets in the fall, in October or November; I did not open the corsets until after the next summer had passed, but I understood what they were before I opened them, as she had shown me how she placed them; and in wearing them through the summer they had rusted together; I suppose it was perspiration had caused them to rust; I don't know whether it was the steel or perspiration.

X Q. 16. Have you completed your answer to cross-question 15?

A. It was two plates wound together with muslin, hooked together with three hooks; that's all there was about it, that I see.

X Q. 17. You say this lady stated to you how she placed the plates; what did she say on the subject? I do not ask you for her exact language, but for the substance of her statements.

A. Well, the substance was, that the single steel with my weight caused them to cut the body under the stomach, and she explained that she could do away with that by adding the two plates, likewise that they would last me longer and would not break so easily.

X Q. 18. Do you mean by putting one plate right on top of the other, without anything between them?

A. Yes, sir.

X Q. 19. Where did you procure the single plate from which you made the double steels which you made and sold, and were they plain strips of steel?

A. My husband made them and tempered them himself; they were not plain steels; take the rivets out of another pair like this (Exhibit Sherman), that was the way we did; sometimes we purchased some off

a German temperer, on Mercer street; I think the substance of that is, we made some and bought some.

466 X Q. 20. Do you mean that your husband re-tempered the single steels?

A. I don't mean he re-tempered them; he tempered them himself; he bought the steel of the steel company, and tempered them; we were steel temperers at that time; Mr. Sherman carried on that business; we tempered hoop-skirts.

X Q. 21. Then, do you mean that he bought the steel, tempered it and made it into single corset steels, and then when he wanted to make a double corset steel, he took the rivets out of the single?

A. Yes, sir.

X Q. 22. Then, all the double corset steels you made were made in the same way, were they?

A. Yes, sir.

MARY A. SHERMAN.

Sworn to before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

SARAH E. GILCHRIST, being duly sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, place of residence, and occupation?

A. Sarah E. Gilchrist; 100 Bergen street, Brooklyn, New York; no occupation, but to attend to my house.

Q. 2. Are you a sister of Mrs. Sherman, the last witness?

A. Yes, sir.

Q. 3. Have you ever worn any corset steels which you obtained from Mrs. Sherman, and, if so, when first and for how long?

A. Yes; for about ten years, say ten years and a month.

Q. 4. Of how many plates of metal was each spring in the pair composed, in the corset steels you obtained from Mrs. Sherman, and wore the past ten years?

A. Double, like those (Exhibit Sherman).

467 Q. 5. State how they compared, in construction, with the corset springs (Exhibit Sherman)?

(Objected to as leading.)

A. They were precisely the same.

Cross-examined by Mr. WITTER:

X Q. 6. Have you seen that pair of corset steels (Exhibit Sherman) unwound?

A. No, sir.

SARAH E. GILCHRIST.

Sworn before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

KATE O'DONNELL, being sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, residence, and occupation?

A. Kate O'Donnell; 103 William street, South Brooklyn; corset maker.

Q. 2. Have you been in the employ of Mrs. Mary A. Sherman, who has testified in this cause, and, if so, for how long?

A. Yes; for the last twelve years.

Q. 3. State at what places?

A. Corner of Grand street and Crosby street, New York, and No. 202 Broadway, New York; corner of Warren street and Broadway, New York, and No. 320 Fulton street, Brooklyn.

Q. 4. While in her employ, have you ever, as such employé, made corset springs, in which each member of the pair of springs was composed of two or more plates of metal; and, if so, when first and where?

(Objected to as leading.)

A. Yes; corner of Grand street and Crosby street, New York—about twelve years ago.

468 Q. 5. Please look at the corset springs (Defendant's Exhibit Sherman), and state how the corset springs you then made compared, in construction, with Exhibit Sherman?

A. Those are the same; we used to put two pair together, and wrap a piece of muslin round them.

Q. 6. How long have you continued to make up corset steels, like Exhibit Sherman, for Mrs. Sherman?

(Objected to as leading.)

A. During all the time I have been with her—about twelve years—whenever they are ordered.

Cross-examined by Mr. WITTER:

X Q. 7. Just describe how you made a pair of those double steels?

A. We generally get two single pairs; file off the buttons from one pair; put the two pairs together, and wrap a piece of muslin round them.

X Q. 8. What held the two plates together while you were winding?

A. Held them in one hand, and wrapped the muslin round them with the other.

X Q. 9. And the wrapping was to keep the two steels together, was it?

A. Yes, sir

KATE O'DONNELL.

Sworn before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

JOSEPHINE WHITE, being sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, place of residence, and occupation?

469 A. Josephine White; 731 Fulton avenue, Brooklyn, New York; corset maker.

Q. 2. Are you in the employ of Mrs. Mary A. Sherman, who has testified in this cause; and, if so, how long have you have been in her employ?

A. Yes, sir; ten years.

Q. 3. Please look at the corset springs Defendant's Exhibit Sherman and state if you know who put them together or made them up?

A. I put them together, by wrapping the muslin round them, holding the springs in one hand and wrapping them with the other.

Q. 4. When first did you have knowledge of corset springs constructed like Exhibit Sherman?

(Objected to as leading.)

A. About 1863.

Q. 5. Where?

A. At 202 Broadway, New York City.

Q. State whether or not you had anything to do with their construction at that time; and, if so, what?

A. I had, the same as I am still doing; wrapping the steels together.

Q. 7. State whether there was any difference between the construction of the corset springs which you say you helped to make in 1863 and the construction of Exhibit Sherman?

(Objected to as leading.)

A. As they are now? No, sir; they were the same.

Q. 8. State what was done with the corset springs made, as you say, in Mrs. Sherman's establishment from 1863 to the present time?

(Objected to as leading.)

A. After they were made they were put in the corsets; some were sold, and some were put in our order corsets.

470 Cross-examination by Mr. WITTER:

X Q. 9. What was the wrapping for?

A. To keep the plates together.

JOSEPHINE WHITE.

Sworn before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

JULIUS F. SEDER, being duly sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, place of residence, and occupation?

A. Julius F. Seder; forty-two years of age; reside at 161 Myrtle avenue, Brooklyn, N. Y.; cutter of corsets and other ladies' wear.

Q. 2. Do you know Mrs. Mary A. Sherman, who has testified in this cause?

A. I do.

Q. 3. Have you ever been in her employ; and, if so, for how long and in what capacity?

A. I have been in her employ as cutter, foreman, for eleven years last January.

Q. 4. Please look at the corset springs now shown you, Defendants' Exhibit Sherman, and state when you first had knowledge of such corset springs and where?

(Objected to as leading.)

A. I saw those first at Crosby street, corner Grand street, New York, the first year I was with Mr. and Mrs. Sherman.

Q. 5. State whether or not the corset springs Defendants' Exhibit Sherman differ in any respect from corset springs you then saw?

(Same objection.)

A. These are the same kind, the way we fixed them or had them fixed.

471 Q. 6. Do you see any difference in the construction of these springs Exhibit Sherman and the same springs you saw eleven years ago, as you have stated?

A. I do not.

Q. 7. As foreman for Mrs. Sherman, have you ever directed the construction or making up such corset springs, and if so, for how long?

(Same objection.)

A. Ever since the commencement till now, in 1861, month of January.

Q. 8. Have you ever taken orders for such springs, as foreman for Mrs. Sherman?

A. I do, as my books will show.

Q. 9. Will you please produce such books and show therein some such orders?

A. Yes, sir. I produce an order book. Entry on page 5: "No. 29,336, Canal street, May 14, 1866; make long Vic. white, 36 in. waist, 43 in. bust, 45 in. hips, length front 11½ in.; all around at the bottom, stiff steels, whalebones"; that means double steels. The books earlier than this were destroyed by fire. I refer to entry on page 24: No. 52, 586, Sixth ave.; make a white satin jean, double, 22½ in., 40.43, very long waisted, extra boned, 2 bones down the bust, low under the arms, double "steels in front, 4 hook steels. Wednesday. $5.75." The date is 29th August, 1866. The 52 means number in the month of corset of all kinds. The 586 means number of the corset.

Q. 10. Have you any knowledge of the corset springs known in the market as the "Can't-break-'em" corset springs, manufactured by Barnes & Cruttenden, of this city?

A. I have seen those springs and handled them, but do not know who is the maker of them.

Q. 11. State what knowledge, if any, you have in regard to which are the most satisfactory corset springs; the "Can't-break-'em" corset spring, or the corset spring like Exhibit Sherman?

Well, the ones that we made were more satisfactory.

472 Cross-examined by Mr. WITTER:

X Q. 12. Do you know what the wrapping around these steels was for?

A. It was to keep the steels together.

JULIUS SEDER.

Sworn before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

CHARLES SCHNELLER, being produced and sworn as a witness on the part of the defendants, deposes as follows, Emil Aaron being sworn as an interpreter:

Q. 1. What is your name, age, place of residence, and occupation?

A. Charles Schneller; forty-two years of age; Williamsbridge, N. Y., and a corset spring maker.

Q. 2. Please look at the corset spring now shown you, and state if you know who made it?

(Springs handed to witness and marked Defendants' Exhibit Schneller.)

A. I made them.

Q. 3. How long have you made such corset springs?

A. Before the war, in 1860 or 1861.

Q. 4. State whether those made by you as early as 1860 or 1861 were exactly like Exhibit Schneller, or different in any respect?

(Objected to as leading.)

A. Just exactly like it.

Q. 5. Where did you make those corset springs like Exhibit Schneller which you made in 1860 or 1861?

A. In New York.

Q. 6. About how many such corset springs did you make before the war?

473 A. I can't state how many pairs; sometimes customers would come and demand two pair, sometimes a dozen, sometimes a gross.

Q. 7. How long did you continue to make such corset springs as Exhibit Schneller?

A. I make them since 1857 to the present day.

Q. Were you, since 1857, in business for yourself, and where did you carry on that business?

A. I was; 145 Elm street, New York.

Q. 9. What was your business while at 145 Elm street?

A. Made corset springs.

Q. 10. Did you make for dealers or did you make for private customers?

A. I made for manufacturers, importers, and stores.

Q. 11. Name some of the houses for whom you made corset springs.

A. Messrs. Schelle, Julius Hart, Ottenheimer, Muldner & Scheffner; I make for Mrs. Sherman, Madame Peddie, Madame Sybil, Madame Nathan, and others.

Q. 12. Do you mean by your last answer that you made double corset springs like Exhibit Schneller for all the persons you have named in your last answer?

A. Those just like Exhibit Schneller I made only for Mr. T. H. Gaynor; I make a contract with him to make them with clasp of Exhibit Schneller, only for him; for corset makers, I made clasps like Exhibit Sherman; for corset makers I made double steel; for importers I only made single steel. The double steel I made for corset makers were in all respects like Exhibit Schneller, except the clasp.

Q. 13. When did you make the pair of corset steels Exhibit Schneller No. 2?

A. The steel and clasps were made before the war; I put them together yesterday.

Q. 14. Have you any double steels and clasps now present made and put together before the war?

(Objected to as leading.)

A. No; the single steels in Exhibit Schneller No. 2 were made before the war, but I put another back on it yesterday, just as I did before the war.

474 Q. 15. Did you furnish one of these double steels to Mr. Mayers some six weeks or four weeks ago?

A. Yes; I have given him a pair.

Cross-examined by Mr. WITTER:

Q. 15. Is Exhibit Schneller No. 2 the pair you furnished Mr. Mayer?

A. Yes.

Q. 16. Where is Mrs. Sherman or Madame Sybil or Madame Nathan?

A. Madame Sybil is on Broadway, between Thirteenth and Fourteenth streets; Madame Nathan was in Sixth avenue, but I think she is now out of business; Mrs. Sherman was in Canal street when I knew her; I don't know where she is now.

Redirect by Mr. HOW:

R. D. 17. Did you sell double corset steels to Mrs. Sherman, Madame Sybil, and Madame Nathan, or only single ones?

A. Yes; I sold them double, by two or three pair at a time.

R. D. 18. You have stated that you gave to Mr. Mayer, some six weeks ago, a pair of these double steels; do you now remember when you made that pair?

A. I can't recollect the date, but it was before the war.

R. D. 19. Do you know whether Mr. Gaynor is now alive?

A. I don't know; at the beginning of the war I had gone to large expense for him, and I don't see him any more.

CHARLES SCHNELLER.

Sworn before me this 6th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to May 7th, 1873, at 11 a. m.

475 NEW YORK, *7th May*, 1873—11 a. m.

Parties met pursuant to adjournment.

Present, counsel as before.

JOSEPH SEYMOUR, being duly sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is you' name, age, place of residence, and occupation?

A. Joseph Seymour; twenty-three years of age; reside at No. 73 West Houston street, New York City; by occupation, a brass moulder.

Q. 2. Do you know Charles Schneller who has testified in this cause?

A. Yes, sir.

Q. 3. Did you ever work for him?

A. Yes, sir.

Q. 4. How old were you when you commenced working for him?

A. Ten years.

Q. 5. How long did you remain with him at that time?

A. About a year and a half.

Q. 6. Have you ever worked for him since; and, if so, when, and for how long?

A. I have worked for him three or four different times; they average about six years all put together.

Q. 7. Please look at Defendants' Exhibit "Schneller," and "Schneller No. 2," and state when you first saw corset springs of that construction, and where.

(Objected to as leading.)

A. These I have never seen before; they were made before my time; I have seen the steels and clasps, but I have never seen them put together double; I have seen others put together double, but with different clasps; these clasps I have never seen used so long as I have worked for Mr. Schneller.

476 Q. 8. What kind of clasps did you see used with those you saw put together double?

A. Clasps he generally uses: small clasps. To my knowledge, I have never seen him use two different clasps on the same corset springs.

Q. 9. State whether, in other respects, the corset springs you speak of having seen made were the same or different, with the exception of the difference in clasps.

(Objected to as leading.)

A. They were the same thing in all respects, except the difference in the clasps.

Q. 10. Please look at Defendants' Exhibit "20," now shown you, and state how the clasps on those springs compare with the clasps on the double springs of which you have testified.

A. Very near alike; they are the same kind.

Q. 11. When did you first see corset springs like Exhibit "Schneller,"

and Exhibit "Schneller No. 2," made double with clasps on them like Defendants' Exhibit "20," and where?

(Objected to as leading.)

A. I was working at 123 Elm street then, or he was; that was the first time I went to work for him, and I have seen them ever since, and they were never made except by order, or by himself; when the steel was too limber he would reinforce it by putting a piece at the back of it; I saw them first at 123 Elm street.

Q. 12. While you were at work for him the first time, about how many corset springs did you see made?

A. That I couldn't answer.

Q. 13. About how many?

A. That I couldn't judge; I kept no account.

Q. 14. About how often while you were at work with him during this first time you have mentioned, did you or Mr. Schneller work on such corset springs?

(Objected to as leading.)

477 A. I could not say.

JOSEPH SEYMOUR.

Sworn before me this 7th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to 8th May, 1873, at 11 a. m.

THURSDAY, *8th May*, 1873—11 a. m.

Parties meet pursuant to adjournment.

Present: Counsel as before.

JACOB GEERING, being produced and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, place of residence, and occupation?

A. Jacob Geering, sixty-one years of age, reside at 184 Spring street, New York City, corset-maker.

Q. 2. How long have you been engaged in the business of making corsets, and where have you carried it on?

A. About forty years; I have carried it on in my country, in Switzland, and about twenty-one years in New York.

Q. 3. Have you ever made double corset steels; that is to say, in which each steel was supported by another steel behind it?

A. Yes.

Q. 4. When did you first make such steels, and where?

A. About thirty years ago, in Switzerland.

Q. 5. Did you ever make any such steels in this country; and, if so, when first, and where?

A. Yes, sir; about 1860, in New York.

Q. 6. Please describe these steels you made in New York about 1860, and if you see on the table before you any steel like it, please point it out.

478 A. This is the steel (exhibit pointed out by witness is marked "Defendants' Exhibit Geering, 8th May, 1873, R. E. S., Ex'r.")

Q. 7. Do you know Charles Schneller, and how long have you known him?

A. Yes, sir; I guess I have known him since 1860.

Q. 8. Did you ever purchase any double corset steels of him; and, if so, when, and how many?

A. Yes, sir; it was between 1860 and 1861. He made me two pair, and I ordered some more of single steel.

Q. 9. Why did you not order more of these double steels from him?

A. Because I made them myself right along when I had time.

Q. 10. How did the double steels made by you differ from the double steels made for you by Schneller?

A. The difference was nothing.

Q. 11. Since 1860 have you continued to make these double steels?

A. Yes, I have.

Q. 12. What did you do with these steels?

A. I put them in corsets and sold them.

JACOB GEERING.

Sworn before me this 8th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Mrs. MINA SEBILLE, being duly sworn as a witness the part of the defendants, deposes and says:

Q. 1. What is your name, place of residence, and occupation?

A. Mina Sebille; reside at 854 Broadway; corset-maker.

Q. 2. How long have you carried on this business?

A. Since 1862.

Q. 3. Do you know Charles Schneller, and how long have you known him?

A. Yes; since I am in business.

479 Q. 4. Have you here a pair of double corset springs made by him for you; and, if so, produce them?

A. That's the pair. [Witness produces a pair of corset springs marked Defendants' Exhibit Sebille.]

Q. 5. Did he ever make other double corset springs for you like those produced by you; and, if yea, when did he first make such steels for you?

A. He don't make no other kind for me but that; he made them very often when I wanted them, from the beginning of my business. I only take them double when I can't get them strong enough single, and I sometimes make them double myself.

Cross-examined by Mr. WITTER:

X Q. 6. When did Mr. Schneller make the pair of corset springs for you marked Exhibit Sebille?

A. I could not tell you. It has not been used, because the kid covering is two thick. It has been knocked aside this long time.

MINA SEBILLE.

Sworn before me the 8th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Monday, May 12th, 1873, at 11 a. m.

NEW YORK, *Monday, May 12th*, 1873.

Present: Counsel as before.

Adjourned to new notice.

480 U. S. circuit court, southern district of New York.

FRANCES LEE EGBERT, AS EXECUTRIX,
vs.
SAMUEL A. CASTLE, RUFUS E. HITCHOCK, and Henry S. Magrane.

Testimony on the part of the defendants, taken before, Richard E. Stilwell, examiner, under the 67th rule, by order of court, dated April 29, 1873, and in pursuance to new notice.

NEW YORK, *Monday, May 19th*, 1873.

Present: W. C. Witter, counsel for complainant; Thomas P. How, counsel for defendants.

EDWARD S. RENWICK, a witness recalled on the part of the defendants, deposes and says:

Q. 1. Compare Defendants' Exhibit Sherman, now shown you, with the combinations described in the specification and recited in the first and third claims of the reissued letters patent No. 5216, dated January 7, 1873, granted to Frances Lee Egbert, executrix, &c., for improvement in corset springs, and state whether or not Exhibit Sherman contains substantially the same combinations, and give your reasons for your opinion.

A. Upon making the comparison required by the question, I find that the said Exhibit Sherman contains in substance the combination (assuming there be one) of mechanical devices recited in the first claim of the said patent, taken in connection with the description in the specification, and also in connection with the mechanical devices recited in the third claim of said patent, taken in connection with the said description. My reasons for this opinion are as follows:

481 The first claim of the said patent, as I understand it, recites one of two things—namely, first, a pair of corset-springs (as distinguished from a single corset-spring), whether the said pair are combined together, or there be no means whatever of connecting them with each other. Or, second, a combination of two corset springs, constituting a pair, fitted with means of connection of some kind, by which the two members of the pair may be connected with each other, but not of necessity requiring clasps as the said means of connection.

In either case the thing recited is characterized by the following peculiarities, viz:

First. There must be two corset springs constituting a pair.

Second. Each of said springs must consist of two or more metallic plates, placed one on another.

Third. The two or more plates of each spring placed as above stated, must be so connected as to prevent them from sliding off each other laterally, but to admit of their playing or sliding on each other in the direction of their length. The descriptive part of the patent, commencing with the words "figure 1," and ending with the words "principle of this invention," does not use the word connecting or connection, but describes in substance means for effecting the connection of the two or more metallic plates of a spring, and then makes the statement contained in the last paragraph, preceeding the claiming cause; from which description I understand that the thing recited in the first claim is not restricted to any peculiar form or construction of the means of connecting the two or more plates of each spring; and that any other known

means which would be a mechanical equivalent, or a well known mechanical substitute, for connecting two similar articles together in such a manner that they would be prevented from becoming disengaged or sliding off each other laterally, while at the same time they were permitted to move in the direction of their lengths, is included within the recital of said claim.

482 Now, the said Exhibit Sherman contains:

First. Two corset-springs constituting a pair substantially identical with the pair recited in the first claim of said patent.

Second. Each of said springs of said Sherman Exhibit consists of two metallic plates, placed one on another, substantially as described in the said patent; because, although the precise form of spring represented in the drawings of the patent has one of the metallic plates shorter than the other, while Exhibit Sherman contains two metallic plates of the same length, I consider this difference immaterial, in view of the fact that, as I understand the language of the patent, the combination recited in the first claim is not recited to the precise form of spring represented in the said drawings.

Third. The two or more plates of each spring of said Sherman Exhibit are connected together by means which are a well-known mechanical substitute for the means of connection described in the patent, for the purpose of connecting the plates of each spring, so as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length. The means in said Exhibit Sherman, to which I refer, is the same band of muslin, by means of which the two plates of each spring are connected with the mode of operation above mentioned.

The said Exhibit Sherman contains, in my opinion, the combination recited in the third claim of the said patent, for the following reasons:

The said combination, as I understand the patent, is characterised by the three peculiarities above referred to by me as characterizing the combination recited in the first claim, with the addition of a fourth peculiarity; which is, that the pair of springs shall be provided with a clasp or clasps, by means of which the two members of the pair can be connected or disconnected. Now, I find that the said Exhibit Sherman has, in addition to the three peculiarities above mentioned by me

483 (which makes it contain in substance the combination recited in the first claim) clasps identical in construction and operation with the clasps recited in the third claim as they are described in the descriptive portion of the specification, so that the said Exhibit Sherman contains, in substance, every peculiarity which characterizes the combination recited in the said third claim.

Q. 2. Compare Defendants' Exhibit 24 with the combination described in the said Egbert patent, and recited in the first and third claim thereof, and state whether or not the said Exhibit 24 contains substantially the said combinations, and give your reasons.

A. Upon making the comparison required, I find that the said Defendants' Exhibit 24 contains in substance the two combinations recited respectively in the first and third claims of the said patent. My reasons for this opinion are as follows: I find that the said Defendants' Exhibit 24 contains a pair of corset-springs combined and connected in the same manner as the pair of corset-springs of Exhibit Sherman, but closer in form to the form of corset-springs represented in the drawings of the said patent than the springs of Exhibit Sherman are; because, in the former, one of the metallic plates of each spring is shorter than the other, as is represented in the said drawings; whereas in the said

Exhibit Sherman both the metallic plates of each spring are of the same length. The same reasons, therefore, which I have given in reference to the Exhibit Sherman are equally true in reference to Defendants' Exhibit 24, in reference to the points inquired of; and I refer to my answer to interrogatory 1 of the present examination for my reasons in detail.

Q. 3. Compare Defendants' Exhibit Sebille with the combinations recited in the first and third claims of the Egbert patent aforesaid, and state whether or not said Exhibit Sebille contains substantially the same combinations, and give your reasons.

A. Upon making the comparison referred to in the question, I find that the said Exhibit Sebille contains substantially the two com-
484 binations recited respectively in the first and third claims of the said patent. My reasons for this opinion are as follows:

The said exhibit contains, in substance, a combination which is characterized by the following three peculiarities, corresponding with the three which characterize the combination recited in the said first claim, as stated by me in my answer to interrogatory 1 of the present examination. The three peculiarities in said Exhibit Sebille, to which I refer, are:

First. The two corset springs constituting a pair.

Second. Each of said springs is composed of two metallic plates, placed one on another, as described in said patent.

Third. The two plates of each spring of said Exhibit Sebille are connected so as to prevent them from sliding off each other laterally, as described in said patent, and to admit of their playing or sliding on each other in the direction of their length.

The means of connection for this purpose are two in number, namely, the rivets that fasten the clasps nearer the centers upon the springs, which rivets correspond in all respects with the rivets described in said patent for the same purpose, with the slight difference that they are not placed quite as near to the centers of the lengths of the springs as the corresponding connecting rivets represented in the drawings of the patent at D.

The second means of connection is the sheath which incloses the two springs of each pair from end to end, and which is a well-known mechanical substitute for rivets working in slots for the purpose of preventing two articles from sliding off each other laterally, and at the same time admitting them to play upon each other longitudinally.

The said Exhibit Sebille contains, in my opinion, the combination recited in the third claim of the said patent, because, in addition to containing in substance the three peculiarities recited in the first claim of said patent, it has the pair of springs provided with clasps which
485 are identically the same as the clasps recited in the said third claim, and represented in the drawings of the said patent.

Q. 4. Compare defendants' Exhibit Schneller, and defendants' Exhibit Schneller No. 2 with the combinations recited in the first and third claims of the Egbert patent aforesaid, and state whether or not said Exhibit Schneller, and Exhibit Schneller No. 2, contain substantially the same combinations, and give your reasons.

A. Upon comparing the said defendants' Exhibit Schneller and defendants' Exhibit Schneller No. 2 with the combinations recited in the first and third claims of the said patent, I find that the said two exhibits are identical in construction, with the exception that Exhibit Schneller has two small holes in the plates of one of the springs, while Exhibit Schneller No. 2 has no holes; as, however, this difference is immaterial

as respects the peculiarities of the combinations recited in the first and third claims of the said patent, I do not deem it necessary to pay any attention to it. Each of said exhibits contain the two combinations recited respectively in the first and third claims of the said patent. My reasons for this opinion are, that I find that each of said exhibits has the following three peculiarities corresponding with the three peculiarities of the combination of the said first claim mentioned by me in my answer to question 1 of the present examination, namely:

First. Two corset springs, constituting a pair.

Second. Each of said springs is composed of two metallic plates, placed one on another, as described in the said patent.

Third. The two or more plates of each spring of each of said exhibits are connected together by means which prevent them from sliding off each other laterally, and admit of their playing or sliding on each other in the direction of their length. The means to which I refer in each of said exhibits are identical with one of the means described in said patent for the same purpose, being rivets corresponding with
486 those represented at D, and connecting the members of the central clasp with the two plates of each spring simultaneously.

My reason for stating that each of said exhibits contain in substance the combination recited in the third claim of the patent, is that each of said exhibits, in addition to having the said three peculiarities of the first combination, has also clasps by which the two members of the pair of springs can be connected or disconnected, which clasps are substantially the same for the said purpose as those represented in the drawings of the said patent; the central clasp being identically the same as the central clasp represented in the drawings of the patent, except in the mere form of its periphery, and the end clasps having one member of each identically the same as one of the members of the corresponding clasps of the said drawings, while the other member of each of said end clasps is a well known substitute for the corresponding member represented in the drawings of the patent.

Q. 5. Compare defendants' Exhibit Geering with the combinations recited in the first and third claims of the aforesaid Egbert patent, and state whether or not said Exhibit Geering contains substantially the same combinations, and give your reasons?

A. Upon making the comparison required by the question, I find that the said Exhibit Geering contained in substance the combination recited respectively in the first and third claims of the said patent. My reasons for stating that the said Geering Exhibit contains in substance the combination recited in the first of said claims are, that the said exhibit has the three peculiarities which characterise the said combination, as stated by me in my answer to interrogatory 1 of the present examination, namely:

First. The said exhibit has two corset springs, constituting a pair, substantially identical with the pair recited in the first claim of said patent.

Second. Each of said springs of said Exhibit Geering consists of two metallic plates placed one on another, substantially as described in said patent.

487 Third. The two plates of each spring of the said Exhibit Geering are connected by means which prevent them from sliding off each other laterally, and admit of their playing or sliding on each other in the direction of their length. Moreover, the said means are the same as one of the means for the same purpose, represented in the drawings of the patent, being rivets which connect the plates of the two springs,

at about the centers of their lengths. The said Exhibit Geering contains, in my opinion, substantially the same combination as is recited in the third claim of the said patent; because it has, in addition to the said three peculiarities above stated, the pair of springs provided with clasps by which the two members of the pair can be connected and disconnected; and the said clasps of the said exhibit are identically the same in mechanical construction and operation as the clasps represented in the drawing of the said patent.

Q. 6. State whether or not, in either of the exhibits to which you have been referred in the present examination, and in which, if either, the two plates forming each spring are so connected at or near the ends thereof as to prevent them from springing apart facewise, as well as from sliding off each other laterally?

A. Exhibit Sherman, defendants' Exhibit 24, and Exhibit Sebille, each have the two plates of each spring of the pair so connected at their ends that the said plates are prevented from springing apart facewise, as well as from sliding off each other laterally.

Q. 7. If the two plates of the springs bearing the headed pins, constituting a portion of the clasps in Exhibit Schneller, Schneller No. 2, and Geering are properly riveted, can they be easily swung around upon each other at their ends?

A. If they are riveted, as rivets are usually put in, the two plates cannot be readily turned around over each other upon the said rivet on the first occasion; but if force enough has been used to turn them around once upon the rivet, as a center, they can readily be so turned afterwards, as the effect of the first turning is to partially loosen the riveting.

488 Q. 8. How long have you known corset springs to be covered tightly with some flexible fabric, such as muslin or leather, and inserted in a tubular casing formed of the cloth of the corset?

A. I have known corset springs to be covered with muslin or leather for many years—not less than fifteen years, and probably for a much longer period; and I have also, for at least the same period, known corset springs, so covered, to be inserted and secured in tubular casings formed of the cloth of the corsets.

E. S. RENWICK.

Subscribed and sworn to before me this 19th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Tuesday, May 20, 1873, at 11 a. m.

NEW YORK, *Tuesday, May* 20, 1873.

Present: Counsel as before.

WILLIAM C. HICKS, a witness, recalled on the part of the defendants, on direct examination by Mr. How, says as follows:

Q. 1. Please compare the corset spring, defendants' Exhibit Sherman, with the combinations described in the reissued letters patent No. 5216, granted to Frances Lee Egbert, as executrix, &c., and dated January 7, 1873, for improvement in corset springs, and recited in the first and and third claims thereof, and state whether or not you find the same combinations in the said Exhibit Sherman, and give your reasons for any opinion you may express in this regard.

A. I do find, upon making said comparison, the same combination of mechanical devices recited in the first and third claims of said reissued

patent, taken in connection with the description, and my reasons are as follows:

As I understand the subject-matter of the first claim of said
489 patent, the article therein described is composed, first, of two metallic corset springs, each spring being formed of two metallic plates, lying one upon the *an*other; and secondly, that these metallic springs are each composed of two plates of metal, so connected that they are prevented from sliding off each other laterally or edgewise, and at the same time they are permitted to slide upon each other lengthwise; and, third, that these springs, constructed as above described, shall be so formed or positioned or connected that they may co-operate together as one pair. The description preceeding this first claim states as follows:

"As the great object is to so combine the plates as to prevent their slipping off each other laterally or edgewise, and at the same time admit of their playing or sliding upon each other longitudinally, any other means of combining the plates which will secure these results will be within the principle of this invention."

I find in the Exhibit Sherman two springs, each spring composed of two metallic plates placed one on another, and prevented from moving off each other laterally or edgewise, and so connected, also, that they are permitted to move on each other lengthwise, by wrapping said plates together, one on the other, with muslin wound over their whole length, and I consider that the muslin holds the plates together in such a manner as to prevent them from sliding off each other sidewise, and at the same time permits them to slide on each other lengthwise; this means of connecting the two plates is equivalent to the means set forth in the description and first claim. I find also, in Exhibit Sherman, identically the same clasp or means of connecting the two members of the pair together as that described and shown in the patent, enabling them to co-operate together as one pair; and, therefore, I find in said Exhibit Sherman the three characteristics mentioned by me as constituting the combination or mechanical construction recited in the first claim of said Egbert patent.

As I understand the third claim of said patent, taken in connection with the description, the mechanical construction or combination
490 therein recited is composed first of two corset springs, each one of which springs is formed by placing one metallic plate upon another; secondly, that these metallic plates, placed one upon another, are so connected that they are prevented from sliding off each other laterally or edgewise, and permitted to slide on each other lengthwise; thirdly, that they shall be so formed or connected that they may co-operate together as one pair; and fourthly, that their means of connection shall be clasps, so constructed that the members of the pair can be both connected and disconnected. At least three of these characteristics are common to the first and third claims. I have already stated that I found the first three of these characteristics in this Exhibit Sherman; and I also find the fourth characteristic, viz, clasps by which the members of the pair may be connected or disconnected, identically the same in construction as those described in the patent and recited in the third claim thereof. In this Sherman Exhibit the reinforcing springs are of the same length as the foundation spring upon which they lie. There are four clasps in place of three shown in the patent; and the reinforcing plate is upon the back of the foundation plate instead of on the front of it, as shown in the patent; but I do not consider these

points at all material, nor do they change in any manner the mode of operation of the pair of corset steels referred to.

Q. 2. Compare Defendants' Exhibit described in the said Egbert patent, and recited in the first and third claims thereof, and state whether you find in said Exhibit 24 the same combinations; and give your reasons for any findings you may express in this regard?

A. I have made the comparison required by the question, and find that said Exhibit 24 does contain the combination of mechanical devices or mechanical construction recited in the first and third claims of said patent, and my reasons are as follows:

I find said Exhibit 24 almost identical in construction with Exhibit Sherman, compared by me with said claims in answer to the first question in this examination; the only difference that I notice, and that I do not consider at all material, is that the reinforcing spring of each member of the pair is shorter than the foundation spring upon which
491 it is placed, more nearly corresponding in proportionate length with the reinforcing spring shown in the patent, and this Exhibit 24 contains the three characteristics mentioned by me in answer to the first question of this examination, as belonging to the first claim of said patent; and also the four characteristics mentioned by me in said answer belonging to the third claim of said patent.

Q. 3. Compare Defendants' Exhibit Sebille with the combinations described in the said Egbert patent, and recited in the first and third claims thereof, and state whether you find in said Exhibit Sebille the said combinations, and give your reasons.

A. I have made the comparison called for by the question, and I do not find in said Exhibit Sebille the combinations recited in both the first and third claims of the patent; my reasons are as follows: Exhibit Sebille has all the characteristics mentioned by me in answer to the first question of this examination as peculiar to the first claim of the patent, for it consists of two compound springs, each spring composed of two metallic plates placed one on the other and prevented from moving off of each other laterally, and allowed to slide upon each other longitudinally by two different means; the first of which is a rivet, by which the two plates are fastened together near the centers of their length in one member of the pair; the said rivet being also a stud forming a part of the clasp, as shown in the Egbert patent, and the other member of the pair riveted also near the center of the plates lengthwise by two rivets, which fasten the other portion of the clasp which I may call the loop, identically as shown in the Egbert patent; the other means of connecting the two plates together is a kid sheath, which is closely wrapped and sewed around said plates of each member of the pair, and in which the plates are entirely incased, effectually preventing any tendency to lateral displacement and yet allowing the plates to slide on each other in each direction towards the ends from the rivets, substantially as shown in the Egbert patent. I find also in said Exhibit Sebille all the characteristics peculiar to the third claims of said patent,
492 as I find in addition to the characteristics just named by me the identical clasps shown in the patent for connecting and disconnecting the members of the pair.

Q. 4. Compare Defendants' Exhibit Schneller and Schneller No. 2 with the combinations described in said Egbert patent, and recited in the first and third claim thereof, and state whether you find in said exhibits the same combinations, and give your reasons.

A. I have made the comparison called for by the question. I find no substantial difference between Exhibit Schneller and Exhibit Schneller

No. 2. I find they each contain the combinations of mechanical devices recited in the first and third claims of said Egbert patent, for the following reasons:

I find they have all the characteristics mentioned by me as peculiar to the first claim of the patent, for Exhibit Schneller is composed of two corset springs, each spring formed of two metallic plates placed upon another, so that they cannot slide off from each other laterally, and are permitted to slide upon each other longitudinally, and they are so constructed that they can be connected to co-operate together as one pair. The means for connecting the plates of each member of the pair, at or about the centre of their length, is identical with that shown in the Egbert patent, being the rivet stud in one member of the pair, and the two rivets of the loop portion of the clasp in the other. In the former case, when the rivet is fastened, as it usually is and should be, the members of the pair would be prevented from swinging upon that rivet, and thus prevent lateral movement of the plates at their ends; but whether loose or tight, the plates are prevented from moving off of each other laterally, and are allowed to slide on each other longitudinally at a distance varying from the centre to the ends precisely in the same manner as shown in the Egbert patent; in the other member of the pair the two rivets in the centre entirely prevent any tendency for the plates to move off of each other sidewise at any portion of their length, at the same time they allow the plates to move on each other in the manner shown in the patent. I find, in addition to the three
493 characteristics above mentioned, which are common to the first and third claims, the fourth characteristic as mentioned by me in answer to my first question referred to, peculiar to the third claim, as I find clasps by which both members of the pair may be connected and disconnected. These clasps in Exhibit Schneller and Schneller No. 2 are somewhat different from the clasps shown in the patent in shape, but they operate substantially in the same way, and I do not consider the difference material.

Q. 5. Compare Defendants' Exhibit Geering, with the first and third claims of the said Egbert patent, and state the result of such comparison, and the grounds upon which you base any conclusions you may express in regard thereto?

A. I have made the comparison mentioned in the question, and I find said Exhibit Geering to contain the combination of mechanical devices recited in the first and third claims of the said patent, for the following reasons:

I find the first characteristic mentioned by me in answer to the first question of this examination, as peculiar to the first and third claims, on each member of the pair of corset springs is composed of two plates of metal, placed one upon the other. I find, also, the second characteristic, as I find said metallic plates so connected by means of a rivet in each member of the pair, about midway of their length, which effectually prevents them from moving off of each other laterally, and permits them to slide on each other longitudinally, in the manner shown in the patent. I find, also, in Exhibit Geering, that each member of the pair is so constructed that it can co-operate with the other member of the pair so as to act as one.

I find all the characteristics mentioned by me above, as peculiar to the first and third claims; and, in addition, the fourth characteristic of the third claim, as the two members of the pair are connected together by such clasps as will permit the members of the pair to be disconnected.

Q. 6. State whether or not, in either of the exhibits of which
494 you have testified in your present examination, and in which, if either the two plates forming each spring are so connected, at or near their ends, as to prevent them from springing apart facewise, as well as from sliding off each other laterally?

A. The Exhibit Sebille, the Exhibit Sherman and Exhibit 24 are so constructed.

Q. 7. How long have you known each member of the pair of corset springs to be inclosed in a separate casing of some fibrous material or leather, and sewed in a pocket in the corset provided for them?

A. I have no means of fixing definitely the time when I first saw such a construction, but I can safely say it was early as the year 1860, and, I think, probably a long time before that.

WM. C. HICKS.

Sworn to before me this 20th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Saturday, May 24, 1873, at 11 a. m.

NEW YORK, *Saturday, May* 24, 1873.

Present, Thomas P. How, counsel for defendants.

Adjourned to Tuesday, May 27, 1873, at 11 a. m.

NEW YORK, *Tuesday, May* 27, 1873.

Present, counsel for both parties.

Adjourned to Wednesday, May 28, 1873, at 11 a. m., by consent of counsel.

495 WEDNESDAY, *May* 28, 1873.

Present, Thomas P. How, counsel for defendants.

Adjourned to Friday, May 30, 1873, at 10 a. m.

NEW YORK, *Friday,* 30, 1873.

Present, Thomas P. How, counsel for defendants; W. C. Witter, counsel for complainant.

MORRIS P. BRAY, being produced and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. Morris P. Bray; age, thirty-two; residence, New Haven, Conn.; occupation, corset manufacturer.

Q. 2. How long have you been engaged in the manufacture of corsets?

A. About two years.

Q. 3. At about what rate are you manufacturing corsets at the present time?

A. About thirty dozen a day.

Q. 4. Compare Defendants' Exhibit 20 and Defendants' Exhibit Sherman, now shown you, and state which are the best and most serviceable for corset springs?

A. At what point is this Sherman steel connected? Is it connected by rivets? I should say this Exhibit Sherman is the best steel.

Q. 5. Have you ascertained since you commenced your answer, whe-

ther the two plates forming each spring are connected by rivets, or not?

A. I have.

Q. 6. How do you find in regard to that?

A. By convincing myself that there are no rivets connecting them together at any point.

Q. 7. Compare Defendants' Exhibit 24 with Defendants' Exhibit 20, and state which shows the best, most serviceable corset spring?

496 A. I should say, that if this under plate in Exhibit 24 extended the whole length, it would be better than Exhibit 20; or, if wound properly, so as to keep this piece in proper position, it would be better then.

Q. 8. Compare Defendants' Exhibit Geering with Defendants' Exhibit 20, in point of utility as corset springs?

A. Geering I should pronounce the best steel—the best spring.

Q. 9. Make the same comparison between Exhibits 19 and 20?

A. Number 19 is the best spring.

Q. 1.0 Compare Defendants' Exhibit 20 and Sebille in point of utility.

A. The Sebille, made of the same *guage* or thickness of steel, would be the best. The two plates are the same as in the Exhibit No. 20.

Q. 11. Compare Defendants' Exhibits Schneller and Schneller No. 2, with Exhibit 20, and state which are the best corset springs?

A. Using the same hook as on No. 20, or common hook, Schneller and Schneller No. 2 are superior to No. 20.

Q. 12. Give your reasons why you regard Defendants' Exhibits 19, Geering, Sherman, Sebille, Schneller, and Schneller No. 2, as better corset springs than Defendants' Exhibit 20?

A. The superiority of Exhibit 19 over Exhibit 20 consists in being riveted at only one point, that is, riveted or connected together at the centre at one point, and not connected at the ends, by means of pins and slots. I make the same reply to this steel Geering, adding in this and the other case that the reinforcing spring runs the whole length of the main steel. This Sherman steel, I think, is better, because it is not connected at all, and both steels are of equal length. This Exhibit Sebille, the same reply as I made to No. 10, providing that Sebille and No. 20 are both constructed with the same *guage* steel. Schneller and Schneller No. 2 are both, in my opinion, superior to No. 20, being devoid of pins and slots, and both steels of full length, the same clasps being used in the Schneller and Schneller No. 2 as on No. 20—the same hooks and eyes.

497 And in answer to cross-examination by Mr. WITTER, the witness says as follows:

X Q. 13. Are you the inventor or proprietor, or interested in the steel known as the climax steel, against which an injunction has been obtained by the complainant, or have you ever been?

A. I am the inventor of the climax steel, and sold one-half of the patent to the Shelton & Osborn Manufacturing Company; the other half to Robert N. Bassett, of Burlingham, Conn. There are conditions in the sale to Robert N. Basset that I don't wish to state. I have heard that an injunction had been obtained—as I understood it, a temporary injunction—Shelton & Osborn and Robert N. Bassett not appearing. Have heard that the injunction was granted against Parker Brothers & Company.

X Q. 14. Did you ever, personally, manufacture any kind of corset steel?

A. I have not.

X Q. 15. Did you ever wear any? If yea, how many?

A. Not any.

X Q. 16. State how many and of what kinds you have ever sold.

A. To the best of my knowledge four different kinds. I can't sta how many.

X Q. 17. Answer that question just as nearly as you can.

A. I have sold the common single steel, the common corset clasp, t clasp known as the duplex, the everlasting, and the climax. In answ to the quantity, I should say about one gross or more.

X Q. 18. You are also aware, are you not, that the corset steel know as the everlasting was enjoined by this complainant?

A. I am.

X Q. 19. Are the styles which you have mentioned the only styles steels which you have dealt in?

A. To my best knowledge, yes.

X Q. 20. Was the sale of your patent, or any interest in it, in a manner conditional upon the validity or invalidity of the patent in th suit, or any suit thereon?

498 A. It was not.

X Q. 21. Or of your own patent?

(Objected to as irrelevant.)

A. It was not.

X Q. 22. What steels are used in the corsets which you now man facture?

A. An ordinary single steel.

X Q. 23. State as near as you can how many of the climax steels y have sold, or caused to be made and sold; state approximately.

A. I decline to answer the question.

X Q. 24. Do you decline to answer the question because you think will criminate you?

A. I decline to answer the question for personal reasons.

X Q. 25. You will please to answer cross-question 24.

A. I do not.

And in answer to redirect examination by Mr. How, the witness sa as follows:

Re D. Q. 26. State, if you know, the reason why Shelton & Osbo and Robert N. Bassett did not appear in the injunction case which w brought against the climax steel, of which you have testified.

A. Only from statements that Shelton made to me by the Shelton Osborn Manufacturing Company and Robert N. Bassett, that they h consulted the firm of Keller & Blake, and were informed that the junction was merely a temporary one, and would not effect the valid of the patent. Shelton & Osborn Manufacturing Company and Rob N. Bassett also stated to me that they were in hopes of forming a c solidation with Barnes & Cruttenden, so that Porter Brothers & Co pany should sell both the steels, known as the "Can't-break-'em" the steel No. 20, together with the climax. Such an arrangem had been talked of, and an agreement made verbally between Bar & Cruttenden and the Shelton & Osborn Manufacturing Comp and Robert N. Bassett; but when the agreement was writ

499 Barnes & Cruttenden refused to sign the agreement. This is stantially as represented to me by Shelton & Osborn Manu turing Company and Robert N. Bassett.

(This answer objected to by counsel for complainant as hearsay.)

Re D. Q. 27. Do you know whether, at the time of this application for injunction, Porter Brothers & Company were agents for the climax steel?

A. They were. Mr. Gifford, in a letter to me, requested me to come to New York and be introduced to his client, Barnes & Cruttenden, in order to talk toward a consolidation between the "Can't-break-'em" and the climax interest. This was prior to the sale made to Robert N. Bassett.

Re D. Q. 28. Do you know whether any correspondence had passed between Porter Brothers & Company and Shelton & Osborn Manufacturing Company, or Robert N. Bassett, in relation to continuing the sale of the climax steel after the injunction against the everlasting steel was granted?

A. I cannot say; I am not aware of any.

Re D. Q. 29. Do you know whether Porter Brothers & Company sold any climax steels after the everlasting steel was enjoined?

A. I cannot say whether they did or did not, as I am not connected with the Shelton & Osborn Manufacturing Company, or Robert N. Bassett, or Porter Brothers & Company.

And in answer to recross-examination by Mr. WITTER, the witness says as follows:

X Q. 30. What patent did you refer to in the first part of your answer to redirect question 26?

A. The climax patent.

MORRIS P. BRAY.

Sworn to before me this 30th day of May, A. D. 1873.

R. E. STILWELL,
Examiner, &c.

500 JAMES H. FOY, being produced and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. James H. Foy; age, forty-four; residence, New Haven, Conn.; occupation, manufacturer of corset skirt supporters and corsets.

Q. 2. How long have you been engaged in that manufacture?

A. About ten years.

Q. 3. About how largely are you engaged in such manufacture?

A. The firm of which I am a member manufactured and sold about eighteen thousand dozens last year.

Q. 4. Have you or any member of your family ever obtained any patents for improvements in corsets?

A. My wife has taken out six or seven patents for corsets and corset skirt supporters.

Q. 5. About how early did she obtain the first one?

A. In the year 1862.

Q. 6. Who is the practical member in your firm who attends to the manufacture of corsets?

A. That is my particular part of the business?

Q. 7. Compare Defendants' Exhibit 20, now shown you, with Defendants' Exhibit 19, also shown you, and state which is the best and most serviceable pair of corset springs.

A. In my opinion Exhibit 19.

Q. 8. State why.

A. Because it has less rivets in it, and two thicknesses of steel extend

A. I have not.

X Q. 15. Did you ever wear any? If yea, how many?

A. Not any.

X Q. 16. State how many and of what kinds you have ever sold.

A. To the best of my knowledge four different kinds. I can't state how many.

X Q. 17. Answer that question just as nearly as you can.

A. I have sold the common single steel, the common corset clasp, the clasp known as the duplex, the everlasting, and the climax. In answer to the quantity, I should say about one gross or more.

X Q. 18. You are also aware, are you not, that the corset steel known as the everlasting was enjoined by this complainant?

A. I am.

X Q. 19. Are the styles which you have mentioned the only styles of steels which you have dealt in?

A. To my best knowledge, yes.

X Q. 20. Was the sale of your patent, or any interest in it, in any manner conditional upon the validity or invalidity of the patent in this suit, or any suit thereon?

498 A. It was not.

X Q. 21. Or of your own patent?

(Objected to as irrelevant.)

A. It was not.

X Q. 22. What steels are used in the corsets which you now manufacture?

A. An ordinary single steel.

X Q. 23. State as near as you can how many of the climax steels you have sold, or caused to be made and sold; state approximately.

A. I decline to answer the question.

X Q. 24. Do you decline to answer the question because you think it will criminate you?

A. I decline to answer the question for personal reasons.

X Q. 25. You will please to answer cross-question 24.

A. I do not.

And in answer to redirect examination by Mr. How, the witness says as follows:

Re D. Q. 26. State, if you know, the reason why Shelton & Osborn and Robert N. Bassett did not appear in the injunction case which was brought against the climax steel, of which you have testified.

A. Only from statements that Shelton made to me by the Shelton & Osborn Manufacturing Company and Robert N. Bassett, that they had consulted the firm of Keller & Blake, and were informed that the injunction was merely a temporary one, and would not effect the validity of the patent. Shelton & Osborn Manufacturing Company and Robert N. Bassett also stated to me that they were in hopes of forming a consolidation with Barnes & Cruttenden, so that Porter Brothers & Company should sell both the steels, known as the "Can't-break-'em" or the steel No. 20, together with the climax. Such an arrangement had been talked of, and an agreement made verbally between Barnes & Cruttenden and the Shelton & Osborn Manufacturing Company and Robert N. Bassett; but when the agreement was written,

499 Barnes & Cruttenden refused to sign the agreement. This is substantially as represented to me by Shelton & Osborn Manufacturing Company and Robert N. Bassett.

(This answer objected to by counsel for complainant as hearsay.)

Re D. Q. 27. Do you know whether, at the time of this application for injunction, Porter Brothers & Company were agents for the climax steel?

A. They were. Mr. Gifford, in a letter to me, requested me to come to New York and be introduced to his client, Barnes & Cruttenden, in order to talk toward a consolidation between the "Can't-break-'em" and the climax interest. This was prior to the sale made to Robert N. Bassett.

Re D. Q. 28. Do you know whether any correspondence had passed between Porter Brothers & Company and Shelton & Osborn Manufacturing Company, or Robert N. Bassett, in relation to continuing the sale of the climax steel after the injunction against the everlasting steel was granted?

A. I cannot say; I am not aware of any.

Re D. Q. 29. Do you know whether Porter Brothers & Company sold any climax steels after the everlasting steel was enjoined?

A. I cannot say whether they did or did not, as I am not connected with the Shelton & Osborn Manufacturing Company, or Robert N. Bassett, or Porter Brothers & Company.

And in answer to recross-examination by Mr. WITTER, the witness says as follows:

X Q. 30. What patent did you refer to in the first part of your answer to redirect question 26?

A. The climax patent.

MORRIS P. BRAY.

Sworn to before me this 30th day of May, A. D. 1873.

R. E. STILWELL,
Examiner, &c.

500 JAMES H. FOY, being produced and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. James H. Foy; age, forty-four; residence, New Haven, Conn.; occupation, manufacturer of corset skirt supporters and corsets.

Q. 2. How long have you been engaged in that manufacture?

A. About ten years.

Q. 3. About how largely are you engaged in such manufacture?

A. The firm of which I am a member manufactured and sold about eighteen thousand dozens last year.

Q. 4. Have you or any member of your family ever obtained any patents for improvements in corsets?

A. My wife has taken out six or seven patents for corsets and corset skirt supporters.

Q. 5. About how early did she obtain the first one?

A. In the year 1862.

Q. 6. Who is the practical member in your firm who attends to the manufacture of corsets?

A. That is my particular part of the business?

Q. 7. Compare Defendants' Exhibit 20, now shown you, with Defendants' Exhibit 19, also shown you, and state which is the best and most serviceable pair of corset springs.

A. In my opinion Exhibit 19.

Q. 8. State why.

A. Because it has less rivets in it, and two thicknesses of steel extend

the whole length, which makes it less liable to break; it is more flexible.

Q. 9. State what effect, if any, upon the corset the ends of the short plates of the springs in Exhibit 20 would be liable to have when the springs were bent in wearing the corset.

A. Liable to wear through the cloth, the material of which the corset is made.

Q. 10. What effect, if any, would the pins near the ends of these short plates be liable to have under the same conditions?

501 A. I should say that they would be liable to wear through the cloth if they projected above the plate.

Q. 11. Compare Defendants' Exhibit Geering, now shown you, with Defendants' Exhibit 20, in point of utility?

A. I should say Exhibit Geering would be less liable to break for the same reason that I stated in regard to Exhibit 19.

Q. 12. Compare the corset springs, Defendants' Exhibit Sherman, with the corset springs Defendants' Exhibit 20, as regards their respective utility?

A. I should say that Exhibit Sherman would be likely to last the longest, wear the longest.

Q. 13. Which would be the most serviceable while in use?

A. Sherman Exhibit.

Q. 14. State why Exhibit Sherman is superior to Exhibit 20.

A. Because there are two plates running the whole length, with rivets through only one plate.

Q. 15. Compare Defendants' Exhibit Sebille with Defendants' Exhibit 20, in point of utility.

A. I think the Sebille Exhibit would be the most durable.

Q. 16. Compare Defendants' Exhibit Schneller and Schneller No. 2 with Defendants' Exhibit 20, in regard to utility.

A. I should say Exhibit Schneller and Schneller No. 2 would be more durable.

Q. 17. State how corset springs have been usually inserted in the corset during the time that you have been engaged in their manufacture?

A. They have been inserted as those represented in Exhibit 24.

Q. 18 Suppose the corset springs, Exhibit Sherman, were inserted in a corset in the usual mode, and without the plates being wound together, could the plates forming each spring slide off each other laterally?

A. I should not think they would be liable to if they were confined properly in the corset.

502 And in answer to cross-examination by Mr. WITTER, the witness says as follows:

Q. 19. What corset steels have you been in the habit of using in the corsets manufactured by you or your wife?

A. Common single plate steel.

JAMES H. FOY.

Subscribed and sworn to before me this 30th May, 1873.

R. E. STILWELL,
Examiner.

JAMES BOWERS, being produced as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. James Bowers; age, thirty-two; residence, Newark, N. J.; occupation, corset manufacturer.

Q. 2. How long have you been in the corset manufacturing business?

A. About twenty years.

Q. 3. How largely are you now engaged in the manufacture of corsets?

A. About forty dozen a day.

Q. 4. Have you ever obtained any patent or patents for improvements in corsets, and how many?

A. I have; two.

Q. 5. Examine the corset spring, Defendants' Exhibit No. 20, now shown you, and also the corset springs Defendants' Exhibit Sherman, now shown you, and state which is the best and most serviceable pair of corset springs and why?

A. I think the Sherman is the most serviceable, being without rivets, and all the springs or plates being the same length and more flexible.

Q. 6. Compare Defendants' Exhibit 19 with Defendants' Exhibit 20 in point of utility?

503 A. I think my answer to this will be about the same as my last, fewer rivets, plates or springs, being all the same length, and being more flexible, and of greater durability in Exhibit 19.

Q. 7. Make the same comparison between Defendants' Exhibit 20 and Defendants' Exhibit Geering.

A. Well, this riveting in Exhibit Geering more flexible, and the springs being all the same length the Geering is the best.

Q. 8. Compare Defendants' Exhibit Sebille with Defendants' Exhibit 20, in regard to their utility.

A. Well, I think the Sebille is better—fewer rivets—the springs being all the same length.

Q. 9. Compare Defendants' Exhibits Schneller and Schneller No. 2 with Exhibit 20, with regard to their utility.

A. I think the Schneller and the Schneller No. 2 are superior, being more durable on account of less riveting, and the plates or springs being the same length.

Q. 10. State what would be the practical effect, if any, as a corset, of the ends of the short plates in Exhibit 20, when the springs were bent.

A. The tendency of the short plates would be to wear the corsets, which would not occur if the plates were all of the same length; the rivets holding the short plates also tend to wear out the corset.

Q. 11. How have corset springs been usually inserted in corsets ever since you commenced making corsets or became engaged in the making of corsets?

A. They were enclosed in a tight-fitting pocket in the front edge of the corset.

Q. 12. State whether, when enclosed in that way in the corset the plates of springs, like Defendants' Exhibit Sherman, could slide off each other laterally, even supposing the wrappings to be removed.

A. Not at all likely to.

And in answer to cross-questions by Mr. WITTER, the witness says as follows:

X Q. 15. What kind of corset springs have you been in the habit of putting into corsets?

504 A. The plain or common class, single steel.

JAS. BOWERS.

Sworn to before me this 30th day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to 10 a. m., Saturday, May 31, 1873.

NEW YORK, *Saturday, May* 31, 1873.

Present, counsel for both sides.

THOMAS S. GILBERT, being produced and sworn as a witness on the part of the defendants, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Thomas S. Gilbert; I am fifty years of age; residence, Derby, Conn.; occupation, corset manufacturer.

Q. 2. How long have you been engaged in the business of manufacturing corsets?

A. About five years.

Q. 3. How largely are you now engaged in that business?

A. My business amounts to about one hundred thousand dollars a year.

Q. 4. Prior to your commencing the manufacture of corsets, did you have anything to do with the corset trade; and, if yea, what, and for how long?

A. I was selling corsets in New Haven three years prior or about that time; it might have been a little less.

Q. 5. Examine the corset springs, Defendants' Exhibit 20, now shown you, and state which is the best and most serviceable pair of corset springs, and why?

A. Well, there can't be any doubt but that the Sherman is the best, because it is the most simple in its construction. First. The top
505 leafs being of the full length of the steel. The slots in Defendants' Exhibit 20 are objectionable on account of the upper leaf not coming down full length at the bottom; the steel is liable to break at the end of this upper leaf, andi n enclosing this steel, which has to be done tightly and neatly to make a finished job, the end of this upper leaf at the bottom is liable to perforate the cover.

Q. 6. Have you ever known corset springs like Exhibit 20 to break in the manner mentioned in your last answer?

A. I have.

Q. 7. Have you ever had an opportunity of comparing the durability of corset springs like Exhibit 20 with the durability of corset springs in which the two plates forming each spring are of equal length, or substantially so?

A. I have.

Q. 8. State what opportunity, and the result.

A. My wife is a plethoric woman, of full habits, being constantly breaking her corset springs, and I purchased a pair of springs like Exhibit 20, and had them put into her corset and the old ones taken out, and they broke at the bottom end of this upper leaf. I then procured a pair of steels where the leafs were of equal length, and they did not break.

Q. 9. Compare Defendants' Exhibit 19, now shown you, with Defendants' Exhibit 20, with regard to their utility as corset springs.

A. I have no doubt that this Exhibit 19 will out-last Exhibit 20 if they are both of equally good metal.

Q. 10. Supposing each to be of equally good metal, which will operate best as a corset spring during the time of their lasting?

A. I should think this would—Exhibit 19.

Q. 11. Make the same comparison between Defendants' Exhibit Geering and Defendants' Exhibit 20.

A. Well, I should say what I said about No. 19 would apply to this Exhibit Geering. I don't see any material difference between Exhibit Geering and Exhibit 19.

Q. Compare Defendants' Exhibit Sebille with Defendants' Exhibit 20 with regard to utility.

506 A. I should prefer this Exhibit Sebille.

Q. Compare Defendants' Exhibits Schneller and Schneller No. 2 with Defendants' Exhibit 20 in regard to utility.

A. With the exception of the clasp I should prefer this Schneller and Schneller No. 2 to the can't-break-'em, or Exhibit 20 as it is called.

Q. 14. Compare the corset springs in Defendants' Exhibit 24 with Defendants' Exhibit 20, in regard to utility.

A. This Exhibit 24 has the same objections precisely as I have to Exhibit 20, with the exception of this slot and rivet; that is in the favor of Exhibit 24.

Q. 16. How are corset springs generally secured in the corsets?

A. They are usually sewed in by a machine by a row of stitching near the back edge of the steel, which forms a pocket designated to enclose the steel.

Q. 16. How long have you known this mode of securing springs in corsets to be practiced?

A. About eight years.

Q. 17. Suppose the corset springs, Exhibit Sherman, were secured in that way in a corset, the wrapping now around them being first removed, could the two plates forming each spring slide off each other laterally?

A. They could not.

And in answer to cross examination by counsel for complainants, the witness says as follows:

X Q. 18. Have you manufactured corset springs, each member of the pair being composed of two plates?

A. I have.

X Q. 19. For how long have you manufactured corset springs?

A. Perhaps three months. I have never manufactured a corset spring where one plate overlapped the other.

X Q. 20. Please explain how those corset springs were made.

A. Each separate spring was composed of two plates enclosed in a single cover and parallel with each other.

507 X Q. 21. Have you made corset steels where one plate was placed on the top of the other?

A. I never have.

X Q. 22. Have you ever used in your corsets springs composed of two or more plates, one plate being placed over the other, and so connected as not to slip off each other laterally, and being allowed to move longitudinally, the members of the pair being united with suitable clasps?

A. Well, I must say, yes, I have, if the question is have I ever.

X Q. 23. For how long did you use such springs?

A. I have never used them except as matters of experiment, or when making a corset to order when the customer desired a double spring.

X Q. 24. Have you used double springs of any kind other than those stated?

A. I have.

X Q. 25. What kind, and how constructed?

A. By making a covering containing an extra pocket, so as to enclose two plates of steel.

X Q. 26. Have you not used double corset springs made by William B. Cargill?

A. I never did.

THOMAS S. GILBERT.

Subscribed and sworn to before me this 31st day of May, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Thursday, June 5, 1873, at 11 a. m.

NEW YORK, *Thursday, June* 5, 1873.

Present: Counsel for both parties.

JAMES CROTTY, a witness, called and sworn on behalf of defendants, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

508 A. James Crotty; age, fifty; residence, 42 Harrison Place, Brooklyn; occupation, corset manufacturer.

Q. 2. How long have you been engaged in the business of manufacturing corsets, and where?

A. Twenty-two years; eighteen years in Dublin; over eighteen years, nearly nineteen. I had a branch concern in London for about three years; and now, for the last three years and three months or four months, in New York.

Q. 3. About how largely are you now engaged in the manufacture of corsets?

A. We employ about eighty people.

Q. 4. About how largely were you engaged in the manufacture of corsets in Dublin, Ireland; and how did the largeness of your manufacture of corsets there compare with any other manufacturer in the United Kingdom?

A. I employed about sixteen hundred people, and was the largest manufacturer in Europe.

Q. 5. Please look at Defendants' Exhibit 20, now shown you, and also at Defendants' Exhibit Sherman, now shown you, and state which are the best corset springs, and why.

A. I consider the exhibit marked Sherman the best; as the rivets do not go through the two steels.

Q. 6. Any other reason?

A. That's the only reason. Well, I should say there is another reason. It would answer the purpose for which it is intended much better.

Q. 7. Please compare Defendants' Exhibits Schneller and Schneller No. 2, now shown you, with Exhibit No. 20, in regard to utility.

A. I consider the Schneller exhibit the best.

Q. 8. Compare Defendants' Exhibit 19 and Geering with Defendants' Exhibit 20, in point of utility.

A. I consider Defendants' Exhibit 19 and Geering the best.

Q. 9. Make the same comparison between Defendants' Exhibit Sebille and Defendants' Exhibit 20.

A. I consider Defendants' Exhibit Sebille the best.

509 Q. 10. Compare the corset springs found in Defendants' Exhibit 24 with Defendants' Exhibit 20, in point of utility.

A. I consider Defendants' Exhibit 24 the best.

Q. 11. State which, in your opinion, is the better construction, to have both plates of metal forming each spring of the same length, or to have

one of the plates of each spring shorter than the other, as shown in Exhibit 20?

A. I consider the spring with the two plates the same length the best.

Q. 12. How are corset springs generally secured in the corset?

A. They are put into a space just the width of themselves, and stitched down both sides.

Q. 13. When so secured in the corset, could or could not the two plates forming each spring in Exhibit Sherman slide off each other laterally, even if the wrappings were removed?

A. Not if they are put in properly.

JAMES CROTTY.

Sworn to before me this 5th day of June, 1873.

R. E. STILWELL,
Examiner, &c.

WILLIAM C. HICKS, a witness recalled for defendants, testified as follows:

Q. 1. Compare Defendants' Exhibit 20, and Defendants' Exhibit Sherman, in regard to their usefulness as corset springs.

A. I have compared the two exhibits mentioned in the question, and it is my opinion that the Exhibit Sherman, when properly incased in the corset, would be equally serviceable, if not superior to Exhibit 20, and for the following reason: While the two plates composing each member of the pair are so arranged as to support and strengthen each other, their action upon each other is not hampered by a rivet firmly fixing them together at any one point,
510 as in the case of Exhibit 20; and another reason is that the two plates referred to sustain and strengthen each other over their whole length, and especially that portion of their length, namely, their ends, or near their ends, where the greatest strain or liability to breaking generally comes, as I have learned from my own observation. I have frequently seen springs reinforced by shorter plates, after having been used in corsets, bent at the point on the longer spring where the shorter spring ends; and I have observed a greater tendency for the springs to give way at that point. I should therefore prefer that the double plates should be of equal length.

Q. 2. Compare Defendants' Exhibit 19 and Geering with Defendants' Exhibit 20, in regard to utility?

A. I have compared the exhibits referred to and I am of the opinion that the Exhibits No. 19 and Geering, as far as their general construction goes, and when properly sewed into the pockets of a corset, would be more serviceable than Exhibit 20; excepting in the case of Exhibit Geering, the ends are rough, and would be apt to cut and tear the pocket. If Exhibit Geering was trimmed at the ends like Exhibit 19, I should say that both Exhibits 19 and Geering would be superior to Exhitit 20, for the reasons stated in my last answer, excepting the one which refers to the center rivet.

Q. 3. Compare Defendants' Exhibit Schneller and Schneller No. 2 with Defendants' Exhibit 20, in regard to utility?

A. I have compared them, and, as far as the double plates are concerned, I think they would be equally serviceable as the Exhibit 20, having in addition the advantage of equal length of plates. I am not able to state whether the clasps are as good and convenient as those in

Exhibit 20, but I should think they might be as convenient to use, and perhaps, in some respects, better.

Q. 4. Compare Defendants' Exhibit Sebille with Defendants' Exhibit 20, in point of utility?

A. I have compared them; I am satisfied that Exhibit Sebille is fully equal in point of utility to Exhibit 20, and, as to the two plates of the springs are of equal length, superior as to durability.

511 Q. 5. Compare the corset springs in Defendants' Exhibit 24 with the corset springs Defendants' Exhibit 20, in point of durability?

A. I have compared the exhibits referred to, and I am of the opinion that when properly sewed into a corset Exhibit 24 would be as serviceable as Exhibit 20.

WM. C. HICKS.

Sworn to before me this 5th day of June, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Friday, June 6, 1873, at 11 a. m.

NEW YORK, *June 6th*, 1873.

Present, counsel for both parties.

THOMAS W. LOVE, a witness called and sworn on behalf of defendants, says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Thomas W. Love; thirty-three years; 77 Macdougal street; corset maker.

Q. 2. How long have you been engaged in the manufacture of corsets?

A. Ten years.

Q. 3. Where?

A. 243 Hudson street, New York.

Q. 4. Had you, at any time previous to that, worked at corset making; and, if so, when, and where?

A. I had, in 1855, 1856, and part of 1857, at 243 Hudson street.

Q. 5. About what is the extent of your business, at the present time, in the manufacture of corsets?

A. Between $70,000 and $75,000 a year.

Q. 6. Please look at the corset springs Defendants' Exhibit 20, now shown you, and also the corset springs Defendants' Exhibit Sherman, now shown you, and state which are the best, and why?

512 A. I think this is the best (Defendants' Exhibit Sherman), because it is more flexible.

Q. 7. Compare the Defendants' Exhibit 19 with Defendants' Exhibit 20, in point of utility?

A. This one, No. 19, it is more flexible. I think it is stronger, from the fact it has not so many rivet holes.

Q. 8. Which is the best pair of corset springs, Defendants' Exhibit 20, or Defendants' Exhibit Sebille, now shown you?

A. The Sebille is more flexible, but I think it is not any stronger, because so many holes punched in back plate.

Q. 9. Have you ever been in the habit, since you commenced business as a corset maker, of putting in corset springs in the fronts of corsets, in which two or more plates of metal were used to form such springs?

A. I have.

Q. 9. State how they were put in the corset?

A. Put in a side steel behind the other steel.

Q. 11. State how in that case, if at all, the two plates forming the spring were prevented from sliding off each other laterally or edgewise?

A. Having a pocket of right width.

Q. 12. Did you ever have any trouble with the plates forming corset springs getting out of place when this construction was used?

A. Not to my knowledge.

Q. 13. How were the pockets formed in the corsets to receive such springs?

A. It was formed the same as this is—Exhibit 24.

THOMAS W. LOVE.

Subscribed and sworn to before me this 6th day of June, 1873.

R. E. STILWELL,
Examiner, &c.

Adjourned to Tuesday, June 10, 1873, at 11 a. m.

513 NEW YORK, *June* 10, 1873—11 a. m.

Present, counsel for both parties.

Adjourned to 2.30 p. m.

NEW YORK, *June* 10, 1873—2.30 p. m.

Present, counsel for both parties.

JOHN L. PURINTON, a witness called and sworn for defendants, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. John L. Purinton; age, fifty-four; residence, New Hartford, Conn.; occupation, mechanic.

Q. 2. During the past three or four weeks has it been in your power to come here to give your testimony?

A. The time that I received the telegram I answered it that I would come, and within half an hour I found that I could not come. I found our superintendent and boss machinist were going away that day, and it is against our rules for the principal men to leave the establishment more than one at a time. We don't very often more than one at a time leave.

Q. 3. Do you know George Cruttenden, jr., and how long have you known him?

A. I know George Cruttenden; I did not know he was called junior; I have known him since October, 1867.

Q. 4. Did he, at that time, come to you to do work for him; and, if so, what work?

A. He did; he came in October. I was one of the firm of Thompson, Purinton & Company. We were making corset clasps at the time. He wanted us to make the "can't-break-em" corset clasps.

Q. 5. Did he ever make any statement to you as to when Mr. Barnes invented the "can't-break-em" clasps, and; if so, what was his statement?

(Objected to as calling for hearsay, and as incompetent and irrelevant.)

514 A. He did, during the last sickness of Mr. Barnes (that's what he said). He furthermore said that Mrs. Barnes had broken a number of steels; that first drawed his attention to that, and he invented the "can't-break 'em."

Q. 6. Since you began to testify, has the Mr. Cruttenden, of whom you have spoken, come into the room, and is he now present?

A. He is.

Q. 7. Did Mr. Cruttenden ever ask you anything about making a four-clasp steel; and, if so, what was it?

(Objected to as irrelevant, incompetent, and immaterial.)

A. He wanted a four-clasp steel. He brought some three-clasp steel. He wanted four-clasp. We talked it up.

Q. 8. When did you first make four-clasp steel for Mr. Cruttenden?

(Objected to as irrelevant, incompetent, and immaterial.)

A. It was in October, 1867.

JOHN L. PURINTON.

Subscribed and sworn to before me June 10, 1873.

R. E. STILWELL,
Examiner, &c.

Defendants rest.

515 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Samuel Blatchford, circuit judge.

FRANCES LEE EGBERT
vs.
PHILIP LIPPMANN & AUGUST SELIGMAN:

The above cause coming on for trial, hearing upon pleadings and proofs,

Mr. William C. Witter is heard in behalf of the complainant.

Mr. John B. Staples is heard in behalf of the defendants.

Curia advisari vult.

516 Circuit court of the United States for the southern district of New York.

FRANCES L. EGBERT, AS EXECUTRIX, &C.,
vs.
PHILLIPP LIPPMANN AND AUGUST SELIGMANN.

BLATCHFORD, *J.:*

The patent in this case was applied for in March, 1866. The answer sets up, as a defence, that more than two years before such application the invention was known and in use in the United States. The bill alleges that at the time of the application the invention had not been for more than two years in public use with the consent or allowance of the patentee. The answer denies that at the time of the application the invention had not been for more than two years in public use. After the defendant had introduced evidence for the purpose of showing that the invention had been made by others before the patentee made it,
517 the plaintiff introduced evidence showing that the patentee made the invention, a pair of corset steels, in the year 1855. At that time he made a pair of steels containing the invention patented, and gave them to a lady, who wore them. They lasted her a long time.

He made another pair for her early in 1858, which she wore a long time. She saw him at work on this pair. She knew, about 1863, of his making at that time another pair for another lady. The first two pairs of steels made were worn in several pairs of corsets, being ripped from one pair and put into other pairs. These first two pairs were made for a lady who in 1863 became the wife of the patentee. After her marriage to him, and in 1863, she was wearing a pair of corsets with these steels, and she ripped them out on one occason in that year, and the patentee showed them to one Sturges, and explained to him how they were made.

518 The 7th section of the act of July 4th, 1836 (5 U. S. Stat. at Large 119), provided that a patent should be issued if it should not appear to the Commissioner of Patents that the invention had been in public use or on sale with the applicant's consent or allowance prior to his application for the patent. The 15th section of that act provided that, in a suit for infringement, the defendant should have judgment if it should be proved that the thing patented had been in public use or on sale with the consent and allowance of the patentee before his application for a patent. By the 7th section of the act of March 3d, 1839 (5 U. S. Stat. at Large, 354), it was enacted that every person who shall have purchased or constructed any newly invented machine prior to the application by the inventor for a patent shall be held to possess the right to use and vend to others to be used the specific machine so made or purchased, without liability therefor to the inventor, and that "no patent shall be held to be invalid by reason of such purchase, sale,
519 or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale or prior use has been for more than two years prior to such application for a patent." The patent in question was applied for and issued when the act of 1839 was in force. The effect of that act is to require that an inventor shall not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having his patent rendered void by such use. Consent and allowance by the inventor are not necessary to such invalidity. But, a fortiori consent to a use in public, not followed by an application for a patent within two years afterwards, makes the patent when granted invalid. The policy introduced by the act of 1839 is continued in the act of July 8th, 1870, and in the Revised Stat-
520 utes. The 24th section of the act of 1870 (15 U. S. Stat. at Large, 201), provides that a patent may be obtained for an invention if it has not been in public use or on sale for more than two years prior to the application for such patent, unless it is proved to have been abandoned. This provision is embodied in section 4886 of the Revised Statutes. The 61st section of the act of 1870 (Id. 208), now section 4920 of the Revised Statutes, provides that it shall be a defence to a suit for the infringement of a patent that the thing patented had been in public use or on sale in the United States for more than two years before the application for the patent or had been abandoned to the public. The policy introduced by the act of 1839, and thus continued, is that the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it, and that if he does not apply within such time, but applies after the expiration
521 of such time and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent, or allowance, and even

though he was in fact the original and first inventor of the thing patented and so in public use,. Such public use for such length of time is made equivalent to absolute abandonment.

The use proved in this case was a sufficient public use or use in public to invalidate the patent. It was not a use for experiment, or a use in private or a private use. It was a practical use in public of the completed article. No secrecy was maintained or enjoined as to the article or its structure. The fact that the inventor, from time to time, declared that he intended to obtain a patent for the invention, and that his
522 delay was caused by ill health, cannot operate to destroy the peremptory consequence imposed by the statute because of the lapse of time in connection with the public use.

The bill must be dismissed with costs.

GEORGE GIFFORD, for the plaintiff.

JOHN B. STAPLES, for the defendants.

(Endorsed:) Circuit court of the United States for the southern district of New York. Frances L. Egbert, as executrix, &c., vs. Phillipp Lippmann & August Seligmann. Decision. Sept. 26, 1878. U. S. circuit court. Filed Sep. 26, 1878. John I. Davenport, clerk.

523 At a circuit court of the United States for the southern district of New York, held at the court-rooms in the post-office building, in the city of New York, on the 26th day of September, 1878.

Present, Hon. Samuel Blatchford, circuit judge.

FRANCES LEE EGBERT, EXECUTRIX,
vs.
PHILLIPP LIPPMANN & AUGUST SELIGMANN. } In equity.

This cause having been brought to a final hearing upon the pleadings and proofs, and after hearing William C. Witter, esq., and George Gifford, esq., on the part of the complainant, and J. B. Staples, esq., on the part of the defendants, it is ordered and decreed that the bill
524 of complaint in this action be, and the same is hereby, dismissed with costs.

SAM'L BLATCHFORD.

(Endorsed:) Circuit court U. S. for S. district of New York. In equity. Francis Lee Egbert, ex'r., vs. Phillipp Lippmann & August Seligmann. Final decree. J. B. Staples, sol'r of def'ts, 51 Broadway. U. S. circuit court. Filed Sept. 28, 1878. John I. Davenport, clerk.

525 United States Supreme Court.

F. LEE EGBERT, EXEC'X,
vs.
PHILLIPP LIPPMANN ET AL.

It is understood and agreed by and between the solicitors for the respective parties in the above-entitled cause that the complainant's models and exhibits therein may be retained by the solicitor for complainant, and the defendants' models and exhibits by defendants' solicitor, the same to be produced, however, at any hearing or motion in the cause, and subject to the inspection of the said solicitors or counsel at their request.

N. Y., October 25, 1878.

GEO. GIFFORD,
Compl'ts Sol'r.
J. B. STAPLES,
Def'ts' Sol'r.

526 (Endorsed:) U. S. Supreme Court. F. Lee Egbert, ex'r., vs. Philipp Lippmann et al. Stipulation as to possession of exhibits Geo. Gifford, esq., 32 Park Place, 1st story. U. S. circuit court. Filed Nov. 2, 1878. John I. Davenport, clerk.

527 United States circuit court, southern district of New York. In equity.

FRANCIS LEE EGBERT, EXECUTRIX, &C.,
vs.
PHILLIPP LIPPMANN & AUGUST SELIGMANN.

The complainant, Frances Lee Egbert, executrix, hereby appeals to the Supreme Court of the United States from the decree of the circuit court in this cause, and from the whole of said decree, because, as she alleges, the said decree is contrary to law, erroneous, and void; and she prays that a transcript of the bill, answer, depositions, and other proceedings in the cause be transmitted to the said Supreme Court, and that a citation to the defendants may be issued, citing them to be and appear at said Supreme Court, to be held at Washington on the
528 twenty-eighth day of October, 1878, to show cause, &c.

Dated October 5, 1878.

GEO. GIFFORD,
Solicitor & of Counsel for Compl't.

(Endorsed:) U. S. circuit c't, southern dist. N. Y. In equity. Francis Lee Egbert, executrix, vs. Phillipp Lippmann et al. Appeal. George Gifford, compl't's sol'r. U. S. circuit court. Filed Oct. 5, 1878. John I. Davenport, clerk.

529 Supreme Court of the United States.

FRANCIS LEE EGBERT, EXECUTRIX, &C., APpellant,
vs.
PHILLIPP LIPPMANN & AUGUST SELIGMANN.

Know all men by these presents that we, Francis Lee Egbert, of the city of New York, in the State of New York, and Isaac Serven, of said city, are held and firmly bound unto the above-named Phillipp Lippmann and August Seligmann, in the sum of one thousand dollars, to be paid to the said Phillipp Lippmann and August Seligmann, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators,
530 jointly and severally firmly by these presents, sealed with our seals and dated the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above named Francis Lee Egbert, executrix, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named Frances Lee Egbert, executrix, shall prosecute her said appeal to effect and answer all damages and costs, if she shall fail to make

said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FRANCES LE EGBERT, [L. S.]
Executrix.

I. SERVEN. [L. S.]

531 Sealed and delivered in the presence of—
JOHN A. SHIELDS,
U. S. Com.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frances Lee Egbert, of the city of New York, being duly sworn, deposes and says that she is worth the sum of one thousand dollars over and above all her just debts and liabilties

FRANCES LE EGBERT.

Sworn to this 5th day of Oct., 1878, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Isaac Serven, of the city of New York, being duly sworn, de-
532 poses and says that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

I. SERVEN.

Sworn to this 5th day of Oct., 1878, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) Supreme Court of the U. S. Frances Lee Egbert, executrix, appellant, vs. P. Lippmann et al. Bond on appeal. Approved as to form and sufficiency of sureties, Oct. 5th, 1878. Sam'l Blatchford, U. S. circuit court. Filed Oct. 5th 1878. John I. Davenport, clerk.

533 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of Now York.

To Phillipp Lippmann and August Seligmann:

Whereas Frances Lee Egbert, executrix has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said Phillipp Lippmann and August Seligmann, and has filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court at the city of Washington on the twenty-eighth day of October, 1878, to do and receive what may appertain to justice to be done in the premises.

534 Given under my hand at the city of New York, in the southern district of New York, in the circuit court, the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

SAM'L BLATCHFORD.

(Endorsed:) Supreme Court of the United States. Frances Lee Egbert, executrix, vs. Phillipp Lippmann et al. Citation.

Due and timely service of a copy of the within citation is hereby admitted this 5th day of Oct., 1878.

J. B. STAPLES,
Def'ts Sol'r.

U. S. circuit court. Filed Oct. 9, 1878.
JOHN I. DAVENPORT, *Clerk.*

535 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 534, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Frances Lee Egbert, as executrix of the last will and testament of Samuel H. Barnes, deceased, against Phillipp Lippmann & August Seligmann, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of November, in the year of our Lord one thousand eight hundred and seventy-eight and of the Independen e of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 335. Frances Lee Egbert, ex't'x of Samuel H. Barnes, dec'd, appellant, vs. Phillipp Lippmann and August Seligmann. S. New York C. C. U. S. Filed 12th November, 1878.

SUPREME COURT
FILED
JAMES H. MCKENNEY, CLERK

BRIEF FOR APPELLANT.

Supreme Court of the United States.

No 89.

FRANCES LEE EGBERT, EXECUTRIX OF SAMUEL H. BARNES, DECEASED,

Appellant,

vs.

PHILIP LIPPMAN AND AUGUST SELIGMAN,

Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

NEW YORK:
JOHN POLHEMUS, PRINTER, 102 NASSAU STREET, NEW YORK.
1881.

Supreme Court of the United States.

FRANCES LEE EGBERT, Executrix of Samuel H. Barnes, deceased, Appellant, *vs.* PHILIP LIPPMAN and AUGUST SELIGMAN. Appellees.	*In Equity, No.* 89, *October Term,* 1881.

Appeal from the Circuit Court of the United States, for the Southern District of New York.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from the decision of the Circuit Court for the Southern District of New York.

The case was decided against the complainant upon the sole ground that the complainant's own proofs showed a public use more than two years prior to his application for a patent.

This point does not appear to have been considered or mooted, save only in the opinion of the Court.

Appellants maintain that the use proven was *a mere experimental private use.* The cause turns upon that point only.

The brief in the Circuit Court, which we adopt as part of this brief, states the case fully.

Assignment of Error.

I.—The Court erred in not holding that the patent in suit was good and valid, that the title was in complainant, and that the defendants had infringed, as charged in the bill.

II.—The Court erred in holding that the prior use of the invention proven by complainant's witnesses was such a public use as to invalidate the patent in suit, whereas said use was, in point of fact and of law, a private and experimental use, and not a public use, within the meaning of the law.

III.—The Court erred in considering the defense of *abandonment*, because it was not set up in the answer as is required by sound practice.

IV.—The Court erred in holding that the denial in the answer that the invention had not been for more than two years in public use, was equivalent to an averment sufficient to justify a consideration of the question of abandonment or of prior use by the inventor.

V.—The Court erred in holding that two years public use prior to his application without consent or allowance of the inventor, was sufficient to constitute abandonment.

(*a*) Because such holding is contrary to law.

(*b*) Because such defense was not set up in the answer.

VI.—The decree is contrary to law, erroneous and void.

The point upon which the Circuit Court decided this cause, was not considered in the argument below.

We adopt herein the brief of Mr. Gifford in the case below, adding to it what is needful for this appeal—a consideration of the law of "public use."

This is a suit brought on Reissued Letters patent, granted to the complainant as Executrix of Samuel H. Barnes, deceased, dated January 7, 1873, numbered

5,216, for an improvement in Corset Springs, against the defendants for infringement of the patent, by making and selling such springs. The original patent was granted to said Barnes on the 16th day of July, 1866. There were four reissues intermediate the original and the patent sued on. The bill of complaint is in usual form.

The answer sets up various matters of defense. That of alleged prior use is the only one made the subject of testimony.

The defendants attempt to prove several independent prior uses of the invention of Barnes. These uses are alleged to have been by Philip Lippman, James Earwicker, Thomas Love, George H. Barnes, Edward E. Cargill, John L. Fitzpatrick, Mary A. Sherman, Charles Schneller, Jacob Geering and Mina Sebille.

A suit on a former reissue of this patent was tried on final hearing on pleadings and proofs, and decided in 1872. The decision was in favor of the complainant. The opinion of the Court is in 9 Blatch., 553. Although that decision was rendered on a former reissue, the remarks made therein by the Court on the nature of the invention are as applicable to the case now under consideration as they were to that case. The Court in that case page (555) says:

> "It may be stated that the terms "corset "steel," "corset spring," and "corset clasp," "are each and all employed by the trade to desig- "nate a pair of springs, steels, or stiffeners, con- "nected by suitable clasps, whereby they are "not only adapted to stiffen the front of the "corset, but to fasten the two edges of the same "together. * * * * *
>
> "The patent is attacked for want of novelty. "The evidence shows that the arrangement in a "pair, combined by clasps, on a corset of two "springs, each spring consisting of two metallic "plates, placed one upon another, fastened to- "gether at their centers, but so connected at or "near each end that they can play or move upon

"each other in the direction of their length, and "be prevented from sliding off each other lateral-"ly, did not exist before the invention of such "arrangement by Barnes. The arrangement is "useful and Barnes invented it."

There is no complaint made in the evidence that that case was not vigorously fought to the end. Messrs. Keller & Blake were for the defendant, and they made the best use of their valuable services to succeed. The allegation in the answer that testimony against the validity of the patent was accessible to the defendant, and that he received a gratuitous liscense, is not sustained by any testimony or attempted to be, is absolutely untrue and without any foundation whatever to justify it.

The infringing article in that case was the same as it is in the present case.

A suit was subsequently brought on the present reissue against Castle and others, and after considerable testimony had been taken, and the parties had been put to much trouble and expense, the defendants withdrew their defense and took a licence, but as that suit did not go to argument on final hearing, but was settled, the result of it will not in any way be depended on in the present suit. The present suit will be argued and submitted to the Court on the part of the complainant the same as if the suit against Castle and others had never been instituted.

The invention is of a marketable article to be manufactured and sold as an elastic framework, to be used in ladies' corsets. It is manufactured and sold separately from the corset, which is to contain it. This article is composed of a combination of parts, and consists of the two members of a pair, each member being composed of two or more metallic plates placed one on another and fastened together at their centers, and so connected at or near their ends, as to admit of their sliding on each other longitudinally, and to prevent their sliding off each other laterally.

The functions peculiar to the combination invented by Barnes are several.

1st. One indispensable function of the invention is to sustain lateral strain on the edges of the two parts.

2d. Another indispensable function of the invention is to unite the front edges of a corset. Take away that function and the thing invented no longer remains. Take away half of the pair and the pair no longer exists. The edges of the corset can only be united by the combination constituting a pair. One of the members of a pair cannot do it. The two members constituting the pair are indispensable.

3d. Another indispensable function of the invention is its support to the corset vertically in the direction of the length of the springs. If it did not do this, the corset would fall downward, and wrinkle and derange the dress of the wearer.

4th. Both sides of the corset must be supported at the same time. This office requires the presence and joint action of both springs; for although one of them can support one side of the corset vertically, that would be of no use unless the other side be supported in like manner, and at the same time.

5th. The device invented must sustain both the lateral and vertical resistance *at the same time.* To do this, the combination and combined action and operations of the two parts are indispensable.

Without the two springs co-acting to perform these offices jointly, and to produce this result, the invention would be useless. Therefore, the essence of the invention, and the thing important to be patented is the combination.

6th. Another function of the device is, that it must be adaptable to the form of that part of the person to which it is applied as a support to the body. The upper ends of the spring should turn outward, and the lower end turn inward. That is, they must be a *corset*-spring.

Having now endeavored to show that Barnes invented a patentable combination, consisting of a pair of of corset springs, each spring being composed of two or more plates, &c., I will next call attention to

THE PATENT.

1st. The patent describes the construction of each single spring of the combination, and also the manner and means of combining them.

2d. The two parts are shown in combination in the drawings of the patent.

3d. The patent describes the two parts in combination.

4th. Both the drawings show and the specification describes the means by which the two parts are combined.

The whole thing is described and fully described No doubt can arise on the sufficiency of the description. Question can only arise, if at all, on the claims and prior inventions.

The subject-matter of the patent is the combination of the two springs constituting the pair.

In the stating part of the patent the invention is stated to consist of the construction of one of the individual springs ; that is of one of the elements of the combination. But the statement constitutes no bar or objection to describing and claiming the combination. The elements of the combination may be new as well the combination, but whether the individual elements are or are not new is immaterial so far as a claim to the combination is concerned. It often happens that both individual elements and their combination are new and patented. If the combination described and claimed be new, it is immaterial whether the elements are new or old, and in such case it is certainly immaterial whether the elements are or are not stated in the patent to be

new or old. In this patent a combination is described, and as is contended, claimed, and nothing more is required. That the two springs are in a patentable combination has been already shown by explaining the functions and character of the invention. Parts of mechanism to be in patentable combination need not be permanently connected or always in contact with each other; it is sufficient if such connection exists when the device is in use, and when it is necessary to perform the work for which it was intended. Instances of this kind are numerous; they are such as the combination of the two parts of a clasp; the combination of a bayonet with the barrel of a gun; the combination of a bolt of a door lock with the keeper, the former being attached to the door, and the latter to the casing of the door; the combination of a lock and its key; the combination of a ploughshare with the other parts of the plough; the combination of a clevis with its bolt, and many others that might be mentioned.

Next to be considered are the claims of the patent. There are three claims; they are the following:

1. A pair of corset springs, each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length.

2. A pair of corset springs, each member of the pair being composed of two or more metallic plates placed one on another and fastened together at their centers, and so connected at or near end that they can move or play on each other in the direction of their length.

3. A pair of corset springs, each spring consisting of two or more metallic plates placed one on another, and so connected as to prevent them from sliding

off each other laterally, and to admit of their playing or sliding on each other in the direction of their length, the pair being provided with a clasp or clasps by which the two members of a pair can be connected and disconnected.

The words used in each claim to express the apparatus composed of the combination are "a pair of corset springs." The specification clearly explains in what sense these words are used. It states that they are used in the sense of a corset clasp; so that taking the specification and claims together, the claims mean the same as if the words *a corset clasp* were used in the claims instead of the words "a pair of corset springs."

The word pair, in common parlance, is used to express two kinds or classes of things, in both of which there are two members constituting the pair. One of these kinds of classes is where the two constituting the pair are distinct from each other and not used in *combination*, but only *simultaneously*, as for instance, a pair of shoes, a pair of earrings, a pair of vases, &c. The other kind or class of things which the word pair represents and is used to express, is where the two members constituting the *pair* are used in combination, as in the case of a pair of shears, a pair of spectacles, a pair of tongs, a pair of snuffers, or a pair of jaws. It is, in the latter sense that the word pair is used in this patent. Whether the word is used in the one sense or the other, depends upon the subject matter to which it refers, that is, as to whether or not the two members to which it refers as constituting the pair are used in combination and are useless out of the combination, such as a pair of pincers, a pair of tongs, or a pair of scissors. One of the members of the pair of corset springs stands in the same relation to the other member as does one of the halves or one of the blades of a pair of shears to the other member or blade. One of these springs would be as useless for the purpose for which they are intended as would

be one of the members or legs of a pair of tongs without the other.

Suppose a patentee were to describe in his specification two jaws for crushing quartz or other hard substances, each jaw having a peculiar construction, say a corrugated face, and should represent the jaws in the drawings of his patent in combined working order, and should then add a claim to a pair of quartz-crushing jaws having corrugated faces, could there be any doubt as to whether or not such would be a claim to a combination of the two jaws? Such would be as good a claim to such a combination as could be drawn. Well, the claim in the Egbert patent is exactly of that character. Two elements of a combination are described, and their combination is described and shown in the drawings. They are two elements which are as properly called a *pair* as are two jaws. A claim is added covering the pair when the elements are constructed in the way described.

Again, suppose one has invented, or has found in existence, two blades which had never before been combined. He puts them in combination, forming a pair of shears. He describes the two parts and their combination, and then claims a pair of shears when the two parts are constructed in the peculiar way described. What would such a claim be for? It would obviously and plainly be for a combination of the two parts composing the shears. The same is equally clear with a claim to a pair of *corset* springs, when each spring is constructed as described. It is clearly a claim to the combination of the two parts.

INFRINGEMENT.

There are three claims in the patent on which this suit is brought. The third is claimed to be infringed. This claim is for a combination, and consists of two members of a corset spring combined by clasps, each member being composed of two or more metallic plates placed on each other and so connected

as to prevent their sliding off each other laterally and to admit of their sliding on each other longitudinally. Sliding on each other longitudinally does not mean that one plate slides on the other at all parts of its length. The object of the separate plates sliding on each other longitudinally is to counteract the tendency of the inner plate or plates being separated and forced away from the other when the springs are bent. If the two springs to be fastened together at each end so that they cannot slide on each other, be bent, the inner spring will buckle and be forced away from the outer one. The specification describes the plates as fastened together at one place, and, therefore, they could not slide on each other at all parts of their length. Their mode of operation does not require that the plates should slide on each other logitudinally at all parts of their length but they are to be fastened together at one place, and allowed to slide on each other longitudinally at all other places.

One of defendants' springs is in evidence marked Exhibit B. An examination of this spring will show that it is identical with the spring specified in the third claim of the patent. The two plates of each member of the spring slide on each other longitudinally, and are fastened at the ends by clasps which provent their sliding off each other laterally. The two members are combined by clasps.

The infringement in this case is one of the most barefaced and malignant type.

1st. It is perpetrated by parties who are irresponsible pecuniarily.

2d. It is perpetrated by parties who are notorious as infringers of patents, and who avow in words and conduct that they have no respect for them.

3d. It is perpetrated by parties one of whom at least is unworthy of belief.

4th. The invention is not only so exactly copied that the most cursory examination reveals the in-

fringement, but the perpetrators of it affix to their steels, and display on their warehouse, by a sign 22 feet long and a foot wide, the word "Cantbustem," the complainant having a registered trademark for the word "Cantbreakem."

The defense which seems to be chiefly relied on, is prior use. There are ten alleged prior uses specified in the answer, and made subjects of testimony. They are the Sherman, Sebille, Barnes, Geering, Earwicker, Love, Schneller, Lippmann, Cargill, and Fitzpatrick.

The first six of the alleged prior uses, consisting of Sebille, Sherman, Love, Earwicker, Geering, and Barnes, are all of the same kind. Each of them consists of a corset steel, composed of two members combined by clasps ; each member is composed of two plates, on the other, and so connected as to slide on each other longitudinally, but they are not so connected as to prevent their sliding off each other laterally. The connection of the plates referred to in the specification of the patent, is a metallic connection which completes the spring with all its functions before it is applied to the corset. After the spring is put into the corset and sewed into the cloth, as is usually the case in making corsets, to a certain extent the plates are prevented by the cloth from sliding off each other laterally. But such means for preventing their sliding off each other laterally, is not what is contemplated or meant by the specification.

The means there described and represented in the drawings for preventing springs slipping off each other laterally if a metallic connection, making the article finished and marketable without its inclosure in the cloth.

Such is the case, also, with the defendants' corset springs. When the plates are wound with tapesor inclosed in leather, the wrapper stretches, while the metallic connection does not.

The corset steels which are the subjects of this

controversy are not made by corsetmakers according as they may receive orders, but in large manufactories, whence they are sent to parties who deal in them exclusively, and have nothing to do with corsets. They are done up in bundles, and then the bundles are packed in large cases at the factories, and shipped often many hundred of miles before they reach the dealers. They are then sold by these dealers to the corsetmaker, who is to use them by putting them in corsets. It would be impossible to subject the wrapped springs above spoken of to any such treatment without utterly destroying the wrapping, by reason of the friction of so great a weight of metal.

The Schneller, the Lippmann or the Cargill corset springs have nothing whatever to prevent the plates sliding off each other laterally, as appears by inspection of the Exhibits themselves.

It cannot be ascertained from the testimony what kind of a steel the Fitzpatrick steel was, except that it was double, and had the two plates rigidly riveted together at the ends.

No attention will be paid to the Stimpson springs, because the name of the witness was not pleaded in the answer, and the objection was properly taken.

But none of the alleged prior inventions were early enough to antedate the invention of Barnes.

Samuel H. Barnes made the invention which is the subject of the complainant's patent in the year 1855, between the month of January and May 1st. This is testified to by his widow, who is the complainant, and she is in no way contradicted or discredited. Indeed, her testimony in manner and matter bore such evidence of truth and fairness that no attempt was made to contradict it. (Record p. 15–17.)

In about 1863, he made a pair to try the effect upon a very stout lady. (Record p. 15–17.)

He did not apply for a patent until a short time before he died, because, in the language of his widow:

"From the time that I knew him until the

time he died, he was alway sick with consumption, poor, and low-spirited and in trouble." (Rec., p. 15.)

He always intended to patent it.

He finally nerved himself to patent it, as his wife says:

"In the hope of leaving something, as he thought, for my support." (Record p. 15–17.)

Further testimony in explanation of the cause of the delay, and the citation of cases showing that delay was justifiable in judgment of law, is deemed superfluous, because the defendants do not claim or set up in their answer, either *abandonment*, or *two years' prior use with consent or allowance of inventor;* nor have they offered any testimony on either of these defences.

PUBLIC USE MORE THAN TWO YEARS.

We now proceed to consider the point upon which the case was decided.

The Circuit Judge held that the patent was void, because of the public use of the invention for more than two years prior to the application.

He states the effect of the Act of 1839—in force at the time of the application—thus:

"That the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent first, and that if he does not apply within such time, but applies after the expiration of such time and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent, or allowance, and even though he was the original and first inventor of the thing patented, and so in public use. Such public use for such

length of time is made equivalent to absolute abandonment."

And he held that such abandonment took place in this case, in these words:

"The use proved in this case was a sufficient public use, or use in public, to invalidate the patent. It was not a use for experiment, or a use in private, or a private use. It was a practical use in public of the completed article. No secrecy was maintained or enjoined as to the article or its structure. The fact that the inventor, from time to time, declared that he intended to obtain a patent for his invention, and that his delay was occasioned by ill-health, cannot operate to destroy the peremptory consequence imposed by the Statute, because of the lapse of time in connection with the public use."

He states the substance of the testimony as to the public use; but in order to judge of the correctness of his conclusion it is necessary to scrutinize the evidence itself.

It is brief, and we will extract it all from the Record.

Mrs. Egbert, the plaintiff, proved that Mr. Barnes, in 1855, afterwards her husband, made the invention under these circumstances (Record, p. 15):

"Mrs. Cregier, a friend of mine, and myself were speaking about plain steels breaking, so that we could not keep a pair of plain steels in our corsets without breaking; Mr. Barnes was present, and being a very intimate friend of mine, said he thought he could make me a pair that would not break; the next time he came he brought me a pair; he said he made it."

After describing it exactly like the patented article she was asked,

"Q. What did you do with the pair so made and brought you by Mr. Barnes?

"A. I wore them, and they lasted me a long time.

"Q. When, if ever, did he make you another pair?

"A. In the early part of 1858.

"Q. Did you see him at work on this pair?

"A. Yes.

"Q. What was the intention of Mr. Barnes about patenting this invention, if you know?

"A. He always intended to patent it, but from the time that I knew him until the time he died, he was always sick with consumption, poor and low-spirited, and in trouble.

"Q. Did he finally nerve himself to patent it, and why?

"A. He did, in the hope of leaving something, as he thought, for my support.

"Q. Do you remember his making a pair for anybody else?

"A. I do.

"Q. For whom?

"A. For Mrs. Bower, to try the effect on a very stout lady.

"Q. About when was that?

"A. I think about 1863."

She was married to Mr. Barnes in 1863.

On page 16 she says:

"xQ. After the pair that you have stated were made for Mrs. Bower, when did Mr. Barnes, to your knowledge, make another pair of the same kind?

"A. In 1866.

"xQ. Then, between 1863, when he made the pair for Mrs. Bower, and 1866, you do not know that Mr. Barnes made any other double corset steels such as you have described?

"A. He did not make any, only what he made for me.

"xQ. Did he make any other for you than the pair you have referred to as made in 1855?

"A. I believe I have already stated that he made another pair for me in 1858; he also made another

pair for me while I was at Mrs. Bowers'; I cannot state exactly the time."

She said (page 17) that no person but herself and Miss Cregier knew of the making of the first pair, and no one but herself and Mrs. Bower of the pair made for the latter.

That from the first he talked of patenting it when he should have the means.

That she used them a long time, and ripped them from one corset and put them in another.

That they remained in the corsets all the time she wore them.

That she did not give them away, but thought she wore them out and threw them away.

JOSEPH H. STURGES (page 98) says that in 1863 Mr. Barnes spoke to him of two inventions, one of which was a corset steel, and that he went to his house to see them; Barnes said he had given out his sample a few days previous to some party to try (this was probably Mrs. Bower), "but, by the way," he said, "my wife has a pair in her corset which she has on;" Mrs. Barnes was present in the room at this time; "if my wife will take them out, I will show them to you;" Mrs. Barnes went out, and returned with a pair of corsets and scissors, and ripped them open and took the steels out; Mr. Barnes took them out and explained to me how they were made and how they were used, and all the principal points; he said he was going to get a patent for his invention (page 99).

ISRAEL BOWER (page 110) says that Barnes lived with him from August, 1863, to September, 1864, with his wife.

"He and his wife occupied the fourth story front hall bedroom, and in that bedroom I first saw the steels; he was getting them up; he had a sample in steel, and he also had a sample in, I think, wood or coarse paper; I saw him at work at these things,

and I asked him what he was doing or making; he told me what they were, and showed me the principle on which they would act, different from any others; I saw no more of these steels that I can recollect till the spring of 1866, that is, I saw no more as coming from him; he had given my wife some; he was then living in Jane street, right in the rear of my house; I used to call on him about once a week, sometimes twice; I think on this occasion it was in the month of May, or it might have been in the fore part of June; I called in there, and he had several pairs of steels looking them over; he said he was going to get them patented right away; I asked him why he hadn't done it before; the reason he stated was that he had been sickly, and had not felt like attending to it; he died in August of the same year."

The above is the whole testimony as to public use.

Was it such a use as, if continued more than two years, brought about "the peremptory consequence" of invalidating the patent afterwards obtained, as held by the Circuit Judge?

The legal principles which govern the subject are fully stated by Clifford, *J.*, in Jones *v.* Sewall, 6 Fish. 343, &c.

CLIFFORD, *J.*—"Patents otherwise valid may be avoided in a suit for infringement, by proof that the invention was in public use and on sale more than two years, with the consent and allowance of the patentee, before he filed his application for a patent, which is the next defense presented by the respondent. Inventions ceased to be patentable at one time, if permitted to pass into public use or to be on sale for any time, with the consent and allowance of the patentee, before his application for a patent; but the more recent act of Congress provides that such public use or sale shall not have any such effect, unless it was continued for more than two years

prior to such application. 5 Stat. at Large, 123; 5 Ib. 354."

"Full proof that an invention had been in public use or on sale, *with the consent and allowance* of the inventor, for more than two years before the application for a patent was filed in the Patent Office, is a good defense to such an action if the same is properly alleged in the answer. Agawam Co. *v.* Jordan, 7 Wall., 607; McClurg *v.* Kingsland, 1 How., 209; Stimpson *v.* Railroad, 4 How., 380; Shaw *v.* Cooper, 7 Pet., 318."

"Nothing short of proof that the invention was on sale or in public use, with the consent and allowance of the inventor, for a period exceeding two years, will support such a defense, as the party charged with infringing the rights of an inventor must bring himself fairly within the words of an act of Congress which justifies the acts charged as an infringement. Ryan *v.* Goodwin, 3 Sum. 518."

"Such acts if done without the consent and allowance of the inventor, are plain violations of his rights, and of course will not afford any justification to a subsequent wrong-doer. Wyeth *v.* Stone, 1 Story, 282."

"If the sale or use is without the consent or allowance of the inventor, or if the use is merely experimental, to ascertain the value, utility or success of the invention, by putting it in practice, that is not such a sale or use as will deprive the inventor of his title. Ryan *v.* Goodwin, 3 Sum. 518; Pitts *v.* Hall, 2 Blatch., 229; McCormick *v.* Seymour, 2 Blatch., 240."

"Such acts of an inventor, it is well held by Judge Story, are to be liberally construed as acts of an experimental character, nor is the inventor to be estopped by allowing a few persons to use his invention to ascertain its utility, or by any such acts of use or indulgence to others to use the same, as are not inconsistent with the clear intention to hold the exclusive privilege, and to secure the same by letters patent. Mellus *v.* Silsbee, 4 Mason, 111."

"Where the party has subsequently taken out a patent, the Court is not authorized to give effect to such a defense to a charge of infringement, except in cases where the proof is clear and cogent. Wyeth *v.* Stone, 1 Story, 281."

* * * * * * * * *

"Public use of an invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored unless it clearly appear that the use was solely for profit, and not with a view of further improvements or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice. Pitts *v.* Hall, 2 Blatch., 236."

"Inventors have a right to employ all means necessary and proper to enable them to perfect their inventions and to reduce the same to practice, and it is clear that no such experimental act can justly be viewed as legitimate evidence to support the defense of a prior unauthorized public sale or use of the invention, or a use inconsistent with the right to apply for a patent to secure the exclusive authority to make and use the invention, and to vend it to others to be used, as provided in the Patent Act."

* * * * * * * * *

"Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law, and Mr. Justice Nelson decided that such a defense could not be sustained, unless the acts of the party invoked for the purpose were corroborated by some declarations manifesting such an intention."

* * * * * * * * *

"When a party practices his invention merely for the purposes of experiment or completion, before he takes out a patent, the inference that he intends to surrender the invention to the public does not arise, and consequently a dedication to the public cannot be proved by evidence that shows only experimental practice by the inventor or his employes, whether in public or private. Such an inference is never favor-

ed, nor will it, in general, be sufficient to prove such a defense, unless it appear that the use, exercise, or practice of the invention was somewhat extensive and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters patent. Curtis on Patents, 3d Ed., Sec. 389."

"Exceptional cases arise, as when the invention, by acts of the inventor had gone into general public use and got beyond his control, without any effort on his part to restrain its general use, as in such a case it is held that he cannot resume the ownership dedicated to the public, and that his right to a patent is forfeited. Speaking of such a case, however, Judge Story said, in Mellus *v.* Silsbee, 4 Mason, 111, that the inventor is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege."

The manner in which these principles are to be applied to the case of an article or machine which must be used in order to test its qualities, value and durability, and the use of which for such purpose must in the nature of the case be more or less public, is fully shown by this Court in the recent case of

City of Elizabeth vs. *Nicholson Pavement Company*, 97 *U. S.*, 126,

which related to a pavement put down on Mill Dam avenue and used for sixyears under circumstances detailed on pages 133–134.

The question for determination was: "Was this a public use within the meaning of the law?"

Mr. Justice Bradley said:

"An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the

law. The effect of the law is that no such consequence will necessarily follow from the invention being in public use or on sale, with the inventor's consent and allowance, at any time within two years before his application ; but that, if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void."

"But, in this case, it becomes important to inquire what is such a public use as will have the effect referred to? That the use of the pavement in question was public in one sense cannot be disputed. But can it be said that the invention was in public use? The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use. Curtis, Patents, section 381; Shaw *vs.* Cooper, 7 Pat., 292."

"Now, the nature of a street pavement is such that it cannot be experimented upon satisfactorily except on a highway, which is always public."

"When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though during all that period he may not find that any charges are necessary, yet he may be justly said to be using his machine only by way of experiment ; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use within the meaning of the statute. So long as he does not voluntarily al-

low others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent."

"It would not be necessary in such a case that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine and ascertain whether it will answer the purpose intended, and made such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute."

"Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use within the meaning of the law."

"But if the inventor allows his machineto be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale within the meaning of the law."

"If, now, we apply the same principles to this case, the analogy will be seen at once. Nicholson wished to experiment on his pavement. He believed it to be a good thing but he was not sure; and the only mode in which he could test it was to place a specimen of it in a public roadway. He did this at his own expense, and with the consent of the owners of the road. Durability was one of the qualities to be attained. He wanted to know whether his pavement would stand, and whether it would resist decay. Its character for durability could not be

ascertained without its being subjected to use for a considerable time. He subjected it to such use, in good faith, for the simple purpose of ascertaining whether it was what he claimed it to be. Did he do anything more than the inventor of the supposed machine might do in testing his invention? The public had the incidental use of the pavement, it is true; but was the invention in public use within the meaning of the statute? We think not. The proprietors of the road alone used the invention, and used it at Nicholson's request by way of experiment. The only way in which they could use it was by allowing the public to pass over the pavement."

* * * * * * *

"In this connection it is proper to make another remark. It is not a public knowledge of his invention that precludes the inventor from obtaining a patent for it, but a public use or sale of it. In England formerly, as well as under our Patent Act of 1793, if an inventor did not keep his invention secret, if a knowledge of it became public before his application for a patent, he could not obtain one. To be patentable, an invention must not have been known or used before the application; but this has not been the law of this country since the passage of the act of 1836, and it has been very much qualified in England (Lewis *v.* Marling, 10 B. and C. 22). Therefore, if it were true that during the whole period in which the pavement was used the public knew how it was constructed, it would make no difference in the result."

"It is sometimes said that an inventor acquires an undue advantage over the public by delaying to take out a patent, inasmuch as he thereby preserves the monopoly to himself for a longer period than is allowed by the policy of the law; but this cannot be said with justice when the delay is occasioned by a *bona fide* effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended. His monopoly only continues for the

allotted period, in any event ; and it is the interest of the public as well as himself that the invention should be perfect and properly tested before a patent is granted for it. Any attempt to use it for a profit and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent."

Upon these principles, the question here is

"If a man seeing the needs of an intimate friend arising from defects in corset steels is led to invent a great improvement, and gives her two in succession to test its qualities, and with the intention of procuring a patent, the friend thus testing his invention meanwhile becoming his wife ; and further to try its value on a different female form gives one to a stout lady, also his friend, for that purpose, and such use on these two forms continues over two years, while he is delayed in obtaining a patent by sickness—such use being in the nature of the case secret from all others, and the article concealed by its covering even from the wearer herself, and never, in fact, shown but to one person, with a view to sell the patent soon after obtained—is such use legally *public* under the statute, so as to work a forfeiture of the Letters Patent, as a "peremptory conseqence" of this plan adopted by the inventor to secure a test of his invention ?

Mr. Barnes made an important improvement, now come into universal use. He tested it in the only way possible for such an article, and to the most limited extent consistent with his object. He always had, and adhered to, an intention to secure it by Letters Patent, but delayed by sickness and poverty, was only able to do it at the close of his life. He did it at last, hoping to keep a provision for his wife, who had enabled him to test it.

It is now held—when success is assured—that he forfeited by operation of law, all his advantages by the very means he took to secure them.

Such a result was never intended by the framers of the law, and is a perversion of its object.

The principle of such a forfeiture is *abandonment.*

It is applicable only to those who deliberately waive all claim to protection by giving the fruits of their skill to the public.

The principle is that an inventor shall not throw away his right to a patent and afterwards reclaim it.

This was always the law, but in 1836 the statute provided that proof that the invention had been in public use or on sale with his consent should be sufficient evidence of abandonment.

Then came the Act of 1839, which provided that such public use or sale must continue two years in order to furnish such proof.

Since that act he may use or sell his invention as widely as he pleases for two years without showing abandonment. But the fact of abandonment, even within that time, is open to other proof.

In this case there is no proof whatever of actual abandonment or any intention to waive his rights.

On the contrary there is plain proof of a constant intention and desire to keep them—accomplished at the close of his life.

The only question is, did he so put it in public use for more than two years as to furnish the proof of abandonment contemplated by the Statute, and thus to defeat his manifest intention, through the operation of the law? We submit that he did not.

The use must be such as would have shown an intention to abandon—if continued for any length of time—under the act of 1836, and which if continued two years after the law of 1839 would have worked a forfeiture under that law by showing such intention.

The use of a corset steel, concealed in the dress, by two intimate friends of different figures, for a short time, could never have been held to be a public use depriving the inventor of his rights under the act of 1836. If not then such a use continued

over two years, after 1839 could not produce such an effect.

The latter act only restricted to two years such public use as, under the act of 1836, would have worked a forfeiture at once.

The Circuit Judge held that public use for two years, even without the knowledge or consent of the inventor, would avoid the patent.

This is a harsh and unreasonable construction of the act of 1839. It must be read in connection with the prior act, and so read, it cannot be held that if a pirate steals the invention and uses it for two years in some remote quarter of the country without the knowledge of the inventor, it will destroy his rights.

Such a view is inconsistent with the decision in the Pavement case, and is repugnant to justice. The use must be the conscious voluntary use, evincing an intention to abandon. It must be an actual, public or general use as distinguished from a use for testing the invention or ascertaining its value and probable advantages, or for bringing it to greater perfection. It must, in general, be a use for the sake of profit.

It must be a use such as will be sought for after a patent for purposes of gain.

This was not such a use.

1. It was confined to two persons, both intimate friends and one afterwards the wife of the inventor.

2. The nature of the use was such as to conceal the article from all others.

3. It was the only kind of use possible to enable him to test its quality. He could not try it on himself.

4. The defect in the old article was its liability to break in long use, and constant wear for a long time was necessary to test its most valuable quality —durability.

5. Another object was adaptability to different forms—hence it was necessary to try it upon more than one; it was tried on but two—one thin and one stout—with this express design.

6. The inventor continued to work at it for years hoping to improve it before he applied for his patent.

7. No profit was derived or sought; no sale or even exhibition of the article was attempted.

8. If he had tried it for any length of time on his wife and his daughter it could not have been deemed a public use. Can it be so held when he tried it on one who was to be and did become his wife, and on one friend whose figure furnished a further test?

9. So far from being public was it, that when he proposed to sell his invention, just before his patent was obtained, he had to get his wife to rip it from her corset to exhibit it.

It was therefore *a strictly private, experimental use—without profit*—with a constant assertion that it was *not abandoned*, and with *the intention* to *procure a patent*, only delayed by sickness.

It comes clearly within the principles laid down in the Pavement case, which held a pavement used by the general public for six years for profit, to be not within the statute because it was experimental and did not evince a desire to abandon

Suppose it had been a truss, must the inventor have a rupture himself in order to test it, for the proper length of time—whether one year or ten—under pain of forfeiting his rights if he tried it on any friend?

The true principle is that an inventor may test his improvement by any methods consistent with its nature and uses just as long as he pleases, but he must not throw it open to the public, for gain or otherwise, and allow it to come into public or general use, or put it upon sale for more than two

years, because if he does so it will be the evidence pointed out by the statute that he has abandoned his right to a patent and then he cannot reclaim it.

It is not the law that he must keep it sacredly concealed and allow no individual to use it even for trial and without profit for more than two years, under pain of being held by the statute to the "peremptory consequence" of being presumed to have intended what he clearly did not intend, to abandon all the fruits of his skill.

The latter view was taken by the Court below, and it was erroneous.

Forfeitures and abandonment are not favored and must be conclusively shown.

Jones *v.* Sewall, 3 Cliff.
Singer *v.* Bransdorf, 7 Blatch., 521.
Elizabeth City *v.* Pavement Co., 97 U. S., 126.

Summary.

(A.) *Actual abandonment* was neither pleaded nor proved; therefore was not before the Court.

(B.) *Statutory abandonment* is two years' prior public use with knowledge or consent of inventor; this was neither pleaded nor proved, therefore was not properly before the Court.

Sanders *v.* Logan, 3 Wall., Jr., p.—
Pierson *v.* Eggle Screw Co., 3 Story, 402.

(C.) The prior use proved, was neither an abandonment, nor a *public* use; the sole effect, then, of that proof was to establish the date of invention, which ante-dated all the alleged prior uses set up by the defendants.

Elizabeth City *v.* Pavement Co., 97 U. S. 126.
Jones *v.* Sewell, 3 Cliff.
Agawam Co. *v.* Jordan, 7 Wall., 583.
Coffin *v.* Ogden, 18 Wall., 128.
Haselden *v.* Ogden, 3 Fish., 378.

Cahoon *v.* Ring, 1 Fish., 397.
Adams *v.* Edward, 1 Fish., 1.
Russell M'f'g. Co., *v.* Mallory, 10 Blatch., 140.
Shaw *v.* Cooper, 7 Peters, 292.
American Leather Co. *v.* Am. Tool Co., 4 Fish., 282.
Consol. Fruit Jar Co. *v.* Wright, 12 Blatch., 149.
Webster *v.* Carpet Co., 5 O. G., 522.

The decision of the Court below was placed wholly on the ground of abandonment, as evinced by a private experimental use, and should be reversed.

New York City.

J. C. CLAYTON,
A. Q. KEASBEY,
Of Counsel with Appellants.

Supreme Court, U. S.

IN EQUITY.

FRANCES LEE EGBERT., Exx. Appellant.

vs

PHILLIPP LIPPMAN,
AND
AUGUST SELIGMAN. } Appellees.

ARGUMENT FOR DEFENDANTS.

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Appellant.

vs.

PHILLIPP LIPPMANN.
AND
AUGUST SELIGMANN.
Appellees.

This is an appeal in the above named suit, in Equity, from the decree of the Circuit Court of the United States, for the Southern District of New York, Entered September. 28th. 1878, dismissing the complainants Bill,

BRIEF FOR ARGUMENT ON PART OF DEFENDANTS.

J. B. Staples, Counsel.

This action is brought for the alledged infringement of Complainants' Re-issued Letters Patent, No. 5,216, dated January 7th, 1873, for improvement on Corset Springs or Steels.

The claims of the invention are, in this re-issue divided and set forth in three clauses, as follows;

1. A pair of corset-springs, each spring consisting of two or more metalic plates placed one on another, and so connected as to prevent their sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length.

2. A pair of corset-springs, each member of the pair being composed of two or more metalic plates placed one on another and fastened together at their centers, and so connected at or near each end that they can move or play on each other in the direction of their length.

3. A pair of corset-springs, each spring consisting of two or more metalic plates placed one on another and so conected as to prevent them from sliding off each other laterally, and to admit of their playing or sliding on each other in the direction of their length the pair being provided with a clasp or clasps, by which the two members of the pair can be connected or disconnected.

These claims to invention belong to the sixth re-issue of the original Patent of July 17, 1866 and they present hardly a trace of the original from which they have sprung, or more correctly, have departed, They now cover every kind of corset-

springs in which the two members of the pair are made of two steels placed one above or upon the other, so as to slide upon each other longitudinally and not laterally–whether fastened at the centre or not; whether one of the two parts is longer than its coresponding member; whether they have connecting and disconnecting clasps or not; and whether they have the *slots and pins* claimed in the original patent or not.

The original patent bore date Jaly 17, 1866, No, 56,345—the application was in March of that year.

The specification describes "the two springs of the corset as having the ordinary clasps for fastening the corset about the waist:" it describes "the invention as "composed of two springs, or "metalic plates, placed one upon the other (the "one B. a little longer than the other B2), and "then secured at their center, or midway between "the two ends. At or near each end of the short "plates B2, of the two springs A A2, are short slots "a, extending in the direction of their length, "through which, project the rounded ends or heads "b, of fixed pins c, in the longer or under plates B, "by means of which slots, as the corset-springs are "bent, the plates constituting the same, can play "or move the one upon the other, the heads of the "plate C, preventing them from becoming disen-"gaged, or in other words, springing apart from "each other."

There is but one claim of invention in this original specification as follows:

"A corset-spring, consisting of the parts B, pro-

"vided with pins b, and slotted springs B2, riveted "as shown and having suitable clasps G, and hea- "ded rivets b, and of form corresponding to the "body of the wearer."

Now, there is nothing set forth in the original Patent as the invention, excepting the two parts one shorter than the other, secured in its place on the other at the center with the slots and pins, allowing movement longitudinally upon each other, and preventing them from becoming disengaged, or springing apart from each other.

Yet the re-issued patent now sued upon, in all the three claims, is silent as to any slots and pins, and as to one plate being shorter than the other; and the first and third claims are silent as to the plates being secured together at their centers--and all three of the claims are silent as to any means to prevent the ends of the steels springing apart.

The only invention in the original is the holding or *securing* together the plates, not only at their centers, by a rivet, but at their ends with slots and pins, for the purposes described; and it does not appear that it ever entered the mind of Barnes that this invention was for any thing else, or making the springs in any other way.

The claims to invention set up in the present re issue, are the offspring of the ingenuity of experts and counsel and have been through the changes in the five re-issues, aimed and designed to cover all the different varieties of double steels for corsets

in the market with a view to create a monoply this manufacture.

Barnes vs Straus, 9 Blatch. 553, was not up the patent as it now stands, but was upon the re-issue of August 31, 1869 (3d re-issue) The claim in that re-issue are set forth at page 555, *ve. batim*, the opinion of the Court, In every one of them, the invention is confined to steels *fastened together* at the centers; *connected together at their ends* by slots and headed pins as described; and the last of the claims makes mention of clasps by which the springs are combined (that is hooked or un-hooked), which, original invention, as set forth in the original patent, the defendants never have used or made, nor sold nor, so far as I know, did anybody ever make such spriugs as Barnes in the original patent described, except his successor or assigns

It is proper to remark here, that excepting the evidence to the French corset double steel springs referred to in Judge Blatchford's opinion, no evidence of prior use whatsoever, was given in the case of Barnes v. Straus.

THE EVIDENCE.

The evidence upon which the Court below based the decision dismissing the bill, is in the depositions of the complainant herself, and of another witness, Sturgis, introduced on the part of the complainant, also of Bower.

The deposition of the complainant is at p. 1 of the record; the deposition of Sturgis as to the corset steels being exhibited to him in 1863, is

"vided with pins b, and slotted springs B2, riveted "as shown and having suitable clasps G, and hea- "ded rivets b, and of form corresponding to the "body of the wearer."

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THE EVIDENCE.

The evidence upon which the Court below based the decision dismissing the bill, is in the depositions of the complainant herself, and of another witness, Sturgis, introduced on the part of the complainant, also of Bower.

The deposition of the complainant is at p. 16, of the record ; the deposition of Sturgis as to the corset steels being exhibited to him in 1863, is at

p. 98 of the record; that of Bower, p. 111.

The Court below, with characteristic sagacity, appreciated the effect of that evidence, as showing a public use with consent of patentee, more than two years before his application for the patent: the Court has with clearness and precision pointed out the effect of this statute upon this patent (see opinion, p. 353–4 of record.

So clear did the evidence and law upon this point appear to the Court, that no further examination of, or decision upon the large amount of other testimony taken by the defendants, or upon other points of law raised, was thought necessary. When the Court finds in the testimony of plaintiff herself and her witnesses undisputed evidence, which brings the plaintiff's case directly and obviously within the provisions of the statute, which is fatal to the patent, it would a pear to be superfluous for the court to examine and decide upon the other numerous questions raised and large amount of evidence on the part of defendants.

Counsel of appellees do not think it useful to attempt to add any comments or cite authorities in support of the decision of that court:

This appeal, however, removes the whole record, and there remains open for discussion the whole of the evidence of defendants as to prior public use.

This evidence is of an unusually complete character. and from many independent sources of prior public use.

The attention of the Court is therefore invoked to a condensed statement of that evidence.

1. Charles Schneller (Record p. 62.) He commenced the manufacture of corset-springs in 1857, in the city of New York, at 145 Elm Street; he there made every kind of corset-springs which the corset makers used—any kind or shape He says that all the time since he made the steels, he made the double-steels; he describes how he made the double-steels in 1857, and how he put on the clasps. "I put one clasp to keep the second steel with the first one, and do the same for the knobs." (Ans. to Q. 8) "Sometimes I put a rivet to keep the two pieces together, but no fastening at all." "I put the rivet in the middle of the steel" (ans. to Q. 9 and 10); then he is shown a pair of corset-steels, marked "Defendants' Exhibit No. 1, Sept. 1, 1875, Geering's deposition," and he says, the springs he made were like that. In his answer to Q. 15, he points out the only difference between this Ex. and the springs he describes as having been made,—*his* being riveted by the rivet of the middle clasp, while in this Ex. the steels are connected by a separate rivet; then "Defendants' Ex. No. 1, Sept. 3, 1875, Schneller I," being produced, he says, this is just the same as those made in 1857. Witness then states how many he made from year to year, from 1857 down to the present time—gives the names and residences of many persons for whom he made them—he made them for his own customers also—he states where and of whom he bought the steel to make his corset-steels. (The peculiar phraseology and construction of sentences of this witness, is owing to his being a German, not accustomed to express himself in English.)

2. Jacob Geering, (p. 54 of record) 63 years of age—corset manufacturer 32 years. In 1860 or 1861, made the double corset steels, constituting the pairs of springs—describes how he made them *secured* them together with the central rivet, headed the rivet by hammering—so as to prevent one steel from slipping off the other laterally —made steels like those represented in "Defendant's Exhibit No. 1, September 1, 1875, Geering's Deposition" (p. 56 57) made them after 1860,—during the eight years following 1860, made them for Mrs. Bowles, put them into corsets—corsets made to order—All the springs I so made had clasps on them to connect the double steels or pair together—thinks he made of this kind about 20 dozen a year and put them into corsets, the rest he knows about were made by Mr. Schneller (Q. 45) Mr. Schneller put the steels together from 1860 "to to-day,—now, sometime last week." he says the clotn was wrapped round the steels (as shown in the Geering Exhibit) in addition to the rivet which held the two steels the one upon the other.

It is proved by these witnesses (and there is no rebutting evidence)—by Schneller as far back as 1857: by Geering as far back as 1860, and continuously thence to the present time, that they have publicly made, used, and sold double corset-steels, so connected as to prevent them from sliding off each other laterally and to admit of their playing or sliding oneachother in the direction of their length (which answers to all that

is set forth in the first claim of this present re-issue); further, these double-steels—or pair, are provided with clasp or clasps (which makes them cover all that is in the third claim); further, they are fastened together at the centers, and so connected at or near each end that they can move or play on each other in the direction of their lengths (which covers all that is is in the second claim of the re-issue). The cloth wrapped round the steels as in the Geering Exhibit, connects the steels "at or near each end," and thus the whole alleged invention is entirely covered, and anticipated nine years before the date of the patent, by Schneller, and six years, by Geering.

3. Wm. B. Cargill (record p, 47) manufacturer of corset clasps and steels for thirteen years. Defendant's Exhibit, No. 4, Cargill steel, represents a pair of corset-steels, "presented to me by my son, manufactured by him in Waterbury, Ct., in the summer of 1863," (ans to Q. 4); witness then testifies that the very pair so made by his son in 1863, was put in evidence as an exhibit in the Castle suit, when he gave his deposition in that suit—and that he has never been able to get it back, or to find it, or learn where it is. He says (Q. 7) that the steels, Ex. 4, are a *fac simile* of those shown in his former deposition, as to the short piece placed on the outside clasps—they were unlike in this exhibit, width, shape of hook, shape of button, and riveting. At page 49 he describes the steels so made by his son—and the use they were put to; they were put into corsets and used by Miss Emma

Doolittle,—this about two weeks after they were made; they were seen by his wife, Mrs. M. L. Hamilton, Miss D. F. Hine, W. B. Cargill, and others, he suppeses; they were in the factory—lying on the bench, and other places—where the public had access to all parts of the shop.

Miss Doolittle (Record p. 113), above referred to, afterwards by marriage Mrs. Martin, says that she does not recollect that these springs were worn by her, or put into her corsets; [see her deposition in the Complainant's Record in the Castle suit]. She does recollect and state that Cargill shewed her a pair of corset steels in 1863, and they had three lengthening pieces—and she says she sees no difference between those shown her by Cargill and ex. 1., as both *had strengthening pieces.* (Record p. 113), as Mr. W. B. Cargill is corroborated in his evidence as to Miss Doolittle wearing the double steels, by Mrs. Jeanette Cargill, and by Edward E. Cargill, the fact must be regarded as proved, as to the makiug, and publicly using, or putting to use, and exhibiting these double steels in 1863, at Waterbury, Ct.

5. Maria L. Hamilton [record page 133]. She also confirmed Mr. Cargill's evidence as to the steels made in 1863, Waterbury by his son.

6. Edward E. Cargill [record page 139] says he saw the steel taken out of Miss Doolittle's corset.

7. John L. Fitzpatrick, [record page 143] he

produces two pairs of corstet steels, one pair made between 1st of January and April 1865, by him in Waterbury; made three or four pair similar to these; one pair of these steels was put in use in the fall of 1865, by Miss McNulty; she wore them in her corsets; he produces three pairs of corset steels—two made by him in 1865, one in 1866; these steels were made exhibits—[they have all disappeared and canuot be found.]

8. Jennie E. Fitzpatzpatrick, [record page 149] proves the fact that J. L. Fitzpatrick gave her a pair of steols in 1865, which she wore in her corsets until they were worn out. She remembers that "there was a long piece of steel on the under side"—and "that it was a double spring," [answ's. to q. 9: 10.]

The witness was inacurate in her description of the steels—but a fair construction of the meaning is, that the rivets on the ends of the steels which she mentions, were rivets which held the slots to hold the ends.

W. B. Cargill, in his deposition in this suit [deft's record page 47 ans. to q. 28], says that Fitzpatrick's steels shown him, had the "slots and rivets," this sustains the inference which is raised from Miss Fitzpatrick's evidence.

9. Joseph Myers, [record page 147], he says Fitzpatrick showed him his steels like Ex. 2, but he cannot tell the time, but it was when Fitzpat-

rick was at work for Strouse & Co.—and that he had been at work there but for a short time. [Answ's to q. 5 and 6.] Fitzpatriek in his deposition says that he went there April 11, 1865, [ans. to cross q. 23.]

10. Mary A. Sherman, of Brooklyn—corset-maker [Record p. 221]. First had knowledge of corset springs in which each springs of the pair was made of two or more plates of metal, in the fall of 1857, latter part of October or beginning of November, "I purchased "a pair of a lady who came round and sold them "by sample. She showed me these—being double. "They were two plates wound like that. [Witness "produces exhibit marked "Sherman."] She was "not in the habit of wearing them every day—so "I wore that set till 1860, then I commenced "manufacturing for myself. From that date up "to the present date I have made the double "steels, made them for my own goods, and for my "customers, sold them in my store to customers in "Philadelphia, Boston, New York and Brooklyn, "and about ten other branch stores, Eastern, "Western and Southern cities, and all, so that "when Can't break 'em came out, it was nothing "new to me. I did not think it was anything "extra."

"We are using these like complainant's Ex. C., "now; we like them better because they are "double all the way down."

These she bought in 1857, were like these, Ex-Sherman; there was no difference. She then states ans. to Q. 7), the names of over 20 persons and families to whom she has sold corset-springs like Ex. Sherman.

[By referring to Miss White's deposition in this present suit, taken 14th December, 1875, record page 67 ans. to q. 10—it will appear what the Sherman Ex. is.] Mrs. Sherman goes on to state how she knows that in 1857 she purchased the corset spring Ex. "Sherman."

She says the corset springs, like Fx. "Sherman" have in her trade in corsets, given better satisfaction than the "Can't break 'em" corset springs. In answer to cross q. 15 and 16, she says she opened the corsets to examine the steel purchased in 1857, and she describes them: "It was two plates wound together with muslin, hooked together with three hooks." She tells where and of whom she got steels—"she got some from a German, tempered." This was no doubt Schneller, who said in his deposition that he made some for Mrs. Sherman.

11. Josephine White. (Record page 67.)

12. Kate O'Donnell. (Record page 68.)

13. Sarah E. Gilchrist. (Record p. 70.)

These three last named confirm Mrs. Sherman's testimony: Josephine White produces and proves "White Ex. 1." Mrs. Gilchrist wore corsets hav-

ing the Sherman double steels, which she got from Mrs. Sherman. Miss White and Miss O'Donnell assisted Mrs. Sherman in making corsets and putting in the double steels.

14. Julius Seder (record, p. 226), employed in Mrs. Sherman's business as cutter and pressman, eleven years last January (this deposition was taken May, 1873, and therefore carries his evidence back to 1862), he saw the springs like Sherman Ex. the first year he was in Mr. and Mrs. Sherman's employ—at Crosby street, corner Grand, New York City. He says further on (ans. to q. 7) that his knowledge of the making up such corset springs extends from 1861, January, until the present time.

Mrs. Sherman's testimony as to the double steels having connecting clasps and knobs, and held together by the muslin wound around at or near each end, is corroborated by four witnesses, and she carries the date back to 1857—the others, all the way since to time of testifying. This proof is abundant, and beyond doubt or criticism. The Ex. "Sherman" shewn in the White Ex. 1, answers fully in all respects to the first and third clauses in the re-issued patent now sued upon.

15. James Earwicker (record, page 37) has made corsets having double steels, combined by clasps and knobs or rivets, and secured by wrapping strips of muslin round them, as shewn in Earwicker, Ex. 1—as far back as 1861, and from that time continuously since.

16. Charles Earwicker (record, p. 42), to the same facts and dates as last witness.

17. Eliza Earwicker (record, p. 219) to same facts.

The same remarks apply to the Earwicker double corset steels, as are above applied to the Sherman corset steels.

17. Mina Sebille (record, p. 65). Her testimony is chiefly important as confirming Schneller, from whom her husband and herself got double steels. She goes back to 1864, and says that before that he, Scheneller, made them for her husband.

18. Thomas Love (record, p. 66), corset-maker; been in the business 50 years; made and used in corsets double steels with clasps and knobs thirteen years ago (1862), and ever since, like Earwicker's. Sometimes covered them with muslin.

19. George H. Barnes (record, p. 60), corset manufacturer 30 years. He has manufactured corsets having double steels like Earwicker's. Commenced using the double steels in 1859, and has made about 100 pair each year since. *He sometimes bound them together, either with tape or a strip of muslin.* He produced a pair of double steels such as he has used in corsets, and it is marked "defendant's Ex. No. 2, Sept. 1st, 1875, Barnes's deposition."

20 Phillipp Lippmann (record, p. 197), manufacturer of ladies' bustles, corset clasps, steels, skirt material, etc. In 1859 or 1860, at 35 Jane street, New York, hs made double steels for corsets. He puts together and produces a pair of corset double steels made exactly as he made them in 1859-1860 (this was Ex. 23 of defendants in the Castle case, which has disappeared and cannot be found, but it is supplied in H. Ten Broeck's Deposition next referred to. Mr. Lippmann used and put many of these double steels into corsets brought to his store for repairs, where the steel had broken. He made in Jane street more than 75 pairs of these double c rset steels, and may be 300 or more. He explains with precision how he knows that 1859-60 was the date of making and using these double steel corsets.

21. Henry Ten Broeck (record, p. 73). Knew M. Lippmann in 1859-60 at 35 Jane street, New York; knew his business there; witness had his shop in the rear of 35 Jane street—carpenter's shop. Was in Lippmann's place of business as often as twelve times a day some days, and twenty times some days. Saw Mr. Lippmann work on the steels. "Saw him file rivets off, and take parts of others to make full sets of double ones. Saw, in 1859-60, at Mr. L's place, corset steels like 'Ex. I,' Ten Broeck's disposition, September 20, 1875." Saw 20 to 40 pair. This was off and on seven or eight months. Saw Miss Rosenberg there working at double steels, putting them into corsets, often. The exhibit produced by Mr. Ten Broeck consists of two double steels, held only at the

centers by a rivet, and provided with connecting clasps and knobs, and so as that the steels slide on each other longitudinally, and do not slide off laterally.

22. Hannah Rosenberg (record, p. 204) supports the evidence as given by Mr. Lippmann and Mr. Ten Broeck.

In the "Castle" evidence for complainant, Mr. Lippmann's reputation for truth and veracity was assailed. This was entirely gratuitous and malicious, every important fact as to the double steels of Lippmann and the dates, is proved independently of Mr. Lipmann's testimony, and his testimony might be struck out and the proof still remain complete In the present suit, 17 or 18 witnesses prove the attack on Lippman to have been without foundation.

Catharine Redmond (record, 214) has been a corset maker 20 years—in business for herself 14 years. She proves that double-steels were used by her in corsets like Earwicker's 15 or 20 years ago "Seventeen, or may be sixteen years ago (her deposition was taken in 1873), she put in the additional pieces of steel to make the double steels; the steels formed the clasp of the corset; has done the same thing every day, more or less, ever since. She did it at Bowles', corner Grand street and Broadway; she has sold corsets with such springs in them to a Mrs. Jacobs, Mrs. Farsdel, and to Mrs. Lanheimer. "We would sometimes wind a piece of muslin around the steels,

and sometimes sewed a piece over tightly, to keep the bone in."

Eliza Jacobs (see record, p. 218). She states that for the last 10 or 12 years (that is 10 or 12 years before March, 1873, when her deposition was taken), Miss Redmond has made her corsets, "using an inner steel inside of the s eel." She saw the steels herself, when she opened the corset.

Edward S. Renwick (record, p. 160-6 and 232-6).

William C. Hicks, (record, p. 168-173 and 236-240).

These witnesses are experienced and very inteligent experts, who gave evidence on the part of the defendants in the Castle suit.

In the testimony of these experts now referred to, they describe the corset steels and Exhibits of Earwicker, of Sherman, of Sebille, of Schneller, of Geering, which have been introduced in evidence by defendants; and they point out and describe wherein and how each of the devices set forth in the three several claims of the present Re-issued Egbert Patent of 1873, is embodied in and anticipated by the said several corset steels made and used by said Sherman and the others above named. From the various Exhidits and by the testimony of the several witnesses as to their common and public use, so many years back of Barnes' alleged invention, patent and application, it appears, conclusively, that every feature set forth in the three claims in the present Egbert Re-issue

are void for want of novelty; but if the essence or substance of Barnes' first patent and his real invention, as he himself supposed, is the use of the slotted holes and the headed rivets, with a short re-enforcing plate, then the evidence and explanations of these experts clearly shews that they are only common and well-known mechanical eqnivalents of those shewn in the said several Exhibits, and the re-issue is still void for want of novelty; besides which, it is not proven nor pretended that the defendants in this action ever used the slots and pins, or a short re-enforcing plate.

The complainants called ALEXANDER J. MAYER (record, p. 18, &c.) in this suit as a witness, and his testimony on the direct, was for the object of shewing that in the Castle suit, the decree was entered and acted upon in good faith. But his cross-examination shows the contrary. He says that he took part in the arrangements which attended the disposition made of the suit—it is apparent that he was the actor—he knew all that was going on. He says that he got information that the defendants' testimony of prior use did not anticipate the invention of Barnes from Mr. Witter, the plaintiff's attorney, and from nobody else! (Ans. to cross-q.'s 20 and 21.) When asked what Witter said to him about this (cross-q. 32, record, p. 21), he says that he could not remember, "only that his langnage struck me with great force, as he spoke *in a very serious tone;* the purport, as I understood it, was that they had evidence *in reserve*, dating back the invention; he did not state

to me what it was, nor did I ask him, but I did ask him if *he felt sure*, and he *told me he did*." The next thing he did, he consulted Mr. Marston, and he says, "*I expressed my feelings* that we could be antedated." Witness refuses to answer any questions, or give any information about the settlement or terms thereof. He says, as his reasons, "I do not care to give my firm's business away without their consent,' (p. 21-22). "I refuse to give any information of my firm's business." The issuing of the injunction was a part of the arrangement of giving a license to his firm and to Marston (p. 23, x.q., 28), so was the entering the decree. Being asked what became of the Exhibits used on the part of the defendants in the suit of Egbert against Castle, he says:

A. The last time I saw them was, I believe, at the office of Thomas P. How during the continuance of the suit of Egbert against Castle. They may be there yet, though I doubt it, as I have asked to see them, and Mr. How stated that he did not know where they were.

63 XQ. When did you ask Mr. How for them?

A. Some time during this year—during last summer.

64 XQ. Had not Mr. How then been retained on the opposite side to which he had been before acting?

A. Perhaps he had. In fact I believe he was.

65 XQ. Who retained him, do you know ?

A. The plaintiff, I suppose, in this case.

66. XQ. You knew that fact, did you not, when you went there to ask for those Exhibits ?

A. I did not know the fact, but, at the time of asking for their Exhibits, I am quite sure it was not in my mind. I went there with a different view altogether.

67. XQ. Do you know where those Exhibits, or any of them, now are, or in whose possession or under whose control ?

A. I haven't the faintest idea.

68. XQ. Do you know any way by which, or any person of whom any of these Exhibits can be obtained for use in this case.

A. I know nothing of the Exhibits; do not know where they are. other than I have stated; they never were under my control. I have taken no steps to hide them, and am absolutely unable to tell you any more than I have already done.

69. XQ. Will you please answer yes or no to the last question, which I desire to have read to you again ?

A. I know nothing about them.

123. XQ. Look at the printed paper now shown

to you, and state whether you have ever seen it before?

A. I have seen a number like it before.

124 XQ. Did not that come from your firm or from their place of business; did not it emanate from them?

A. It may; it probably did.

125. XQ. Look at the handwriting on the back of that, and state if you know whose handwriting that is?

A. The handwriting on the back is mine.

(Paper offered in evidence, and marked Exhibit No. 1, Dec. 4, 1875—Mayer).

Record p.p. 34:35

126 XQ. How many of these printed documents like the Exhibit just shown you were sent out from the firm of Jacobs, Strouse & Co.?

A. Perhaps ten or twelve, but I cannot tell definitely the quantity.

127 XQ. They were sent to dealers and customers in the trade I suppose?

A. They were sent to our customers.

130 XQ. Please listen to the first printed clause of the paper after the title;—"This cause having been brought to a hearing, on the pleadings and proofs therein, George Gifford, Esq., appearing for

complainant and Charles M. Keller, Esq, appearing for defendants." Do you not know that that statement in that clause is wholly untrue?

A. If it is untrue, George Gifford and Charles M. Keller where and are guilty of it, and as I have every confidence in the integrity of these gentlemen, I have certainly never entertained any such idea.

135 XQ. Were you present when counsel so appeared in Court?

A I was in the Court room at the time·

136 XQ. That degree was teken then by consent, was it not of the counsel of your firm?

A I understood it so.

This witness after being requested to ask the partners of the firm to produce a paper relating to the case of Castle. and the settlement, says: "They refused then and there to give such consent. I cannot therefore promise to do to day what you ask of me."

141 XQ. Please look at the paper now shown you, and state by whom that paper was got up and who had it printed if you know?

A. That paper was got up and issued by Jacobs, Strouse & Co.

(Defendants' counsel offers the paper in evdence' It is marked Exhibet No 2, Dec. 4, 1875. Mayer.) Record p. 36.

142 XQ. Were printed circulars of this kind circulated by the firm of Jacobs, Strouse & Co.?

A. They were sent to their customers.

143 XQ. About how many of these did you have printed?

A. I do not know the exact number, but am able to say that there were enough printed to supply a notice each to all the customers, and perhaps more.

Wesley Egbert, the husband of complainant a witness on the part of complainant, (record, pages 31–2–3), testifies as to his search for the missing exhibits, He also, he says, went to Mr. How and asked him for them; but he did not go to Mr. How until Mr. How had been re-tained by the complainants. He is unable to mention any services rendered by Mr. How under such retainer.

These singular disclosures drawn from the two last named witnesses, on cross examination, coupled with the issues of the circulars, (Ex, 1–2 of Mayer's deposition), in which it is falsely stated that there had been "another decree by Judge Blatchford,' and that the validity of the patent was established, and that this decision "covered all the forms of double corset-springs known to the trade," "and that by said decree all corset clasps composed of two or more plates are an infringement upon said patent"' said circular being signed by the complainant' and circulated and issued by the firm with which said Mayer was connected,

All these matters seem irreconcilable with the claim that this patent is valid, or is really regarded as such by the parties interested.

In conclusion, the following points are submitted, independantly of that upon which the Court below decided this case.

1 The first and third claims of the re-issue are invalid and void.

(a). Because they embody and claim as Barnes' original invention every conceivable kind of corset springs in which each member of the part is composed of two or more plates, *connected in any manner whatsoever*, or at any part whatsoever, so as to slide longitudinally and not laterally.

(b.) Because corset springs with double plates so connected as to slide on each other longitudinally and not laterally and having connecting clasps ,were well known and in common use by Sherman, Schneller, Geering, Earwicker, Geo. H. Barnes, Cargill, Love, Sebille, and other witnesses on the part of defendants many years before Barnes' original application.

(c.) Because the first and third claims are a departure from the invention set forth in the original patent and embrace devices not described in the specification or drawing.

(d.) Because it is not allowable to claim re-

sults by any and every means which will secure those results, as these claims attempt to do, and as is expressly stated is the invention in the paragraph of the specification next preceeding the claims.

(e.) Because it is clear that Barnes' original invention was limited to and described as the two plates. one shorter than the other, fastened at the centers and secured at the ends so as not to fly off, by the slots and headed pins; snd every successive re-issue of the original has been a departure from that; if it is claimed that these changes only represent mechanical equivalents, then it is answered;

First, a re-issue was not necessary. nor is it the province of a re-issue to embrace all possible variations.

Second, it is fatal to this patent to claim that it covers all kinds of double steels as mechanical equivalents, for then it claims and embraces every kind of steels shown to have been in use by defendants' witnesses many years prior to Barnes' alleged invention.

2. The second claim of the re-issue is invalid and void·

(a). Because it is an old and well-known device, long before Barnes' application, as shown by the evidence of Schneller, Geering, Lippmann, Ten Broeck, Cargill and others.

(b.) The remarks under subdivisions c. d. e. above, are applicable also to the second claim.

3. It is not proved, nor pretended, that defendants have ever made, or used or sold steels, fastened by slots and headed pins, or having one plate shorter than the other.

4. Barnes' alleged invention was no improvement on the steels known to be in common use years before; and its inferiority to those in use is clearly proved and pointed out by the experts, and many practical corset makers.

J. B. STAPLES,

Counsel of Defts., Appellees.

B

Purchase

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Woods

Jan. 5 1882

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

CHRISTIAN WORLEY AND HENRY McCABE, APPELLANTS,

vs.

THE LOKER TOBACCO COMPANY, GEORGE T. LOKER, AND CHARLES F. LOKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 7, 1879.

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1, 2, 3, 4, 5, 6, 7 UNITED STATES AMERICA,
Eastern District of Missouri, ss:

CHRISTIAN WORLEY ET AL., COMPLAINANTS,
vs.
LOKER TOBACCO COMPANY ET AL., DEFENDANTS.

Be it remembered that heretofore, to wit, on the 14th day of April, 1877, in the circuit court of the United States in and for said district, the following proceedings were had in the above-entitled case, to wit:

CHRISTIAN WORLEY ET AL., COMPLAINANTS,
vs.
LOKER TOBACCO COMPANY ET AL., DEFENDANTS.

This day come the complainants, by their solicitors, Messrs. Hatch and Parkinson, and file their bill of complaint against the defendants herein; and, on motion of said solicitors, it is ordered that subpœnas in chancery be issued against said defendants, returnable to
8 rules the first Monday, the 4th day of June, 1877. And the said bill of complaint is in words and figures following, to wit:

9 Circuit court of the United States in and for the eastern district of Missouri.

CHRISTIAN WORLEY AND HENRY MCCABE
vs.
LOKER TOBACCO COMPANY, GEORGE T. LOKER, and CHARLES F. LOKER.

Bill in equity.

Circuit court of the United States in and for the eastern district of Missouri.

CHRISTIAN WORLEY AND HENRY MCCABE
vs.
LOKER TOBACCO COMPANY, GEORGE T. LOKER, and CHARLES F. LOKER.
In equity.

To the honorable the judges of the circuit court of the United States in and for the eastern district of Missouri:

Christian Worley and Henry McCabe, residents of St. Louis, in the State of Missouri, and citizens of said State, bring this bill against the Loker Tobacco Company, a corporation organized under the laws of the State of Missouri, and engaged in business within said State, and having their principal office in the city of St. Louis, in said State,
10 George T. Loker, president, Charles F. Loker, vice-president of said company, said George T. and Charles F. Loker citizens of the State of Missouri, and residing at St. Louis, in said State.

And thereupon your orators complain and say that heretofore, and before the 22d day of August, 1876, your orator Christian Worley was the true, original, and first inventor of a certain new and useful improvement in manufacturing plug-tobacco, not known or used before said invention, and not at the time of his application for a patent in public use or on sale with his consent or allowance.

And your orators further show unto your honors that prior to the 22d day of August, 1876, the said Christian Worley assigned to Henry McCabe one-half of all his interest in said invention, and in any letters patent that might be granted therefor.

And your orators further show unto your honors that the said Christian Worley, being, as aforesaid, the inventor of said improvement, and being a citizen of the United States, made application to the Commissioner of Patents for letters patent in accordance with the then existing acts of Congress, and having duly complied in all respects with the conditions and requisitions of said acts, on the 22d day of August, 1876, letters patent of the United States, signed, sealed, and executed in due form of law, for the said invention or discovery, were issued to your orators, Christian Worley and Henry McCabe, assignee of one-half interest, whereby there was secured to them, their heirs, executors, administrators, or assigns, for the term of seventeen years from the 22d day of August, 1876, the full and exclusive right of making, using, and vending to others to be used the said improvement; which said letters patent are now of record in the Patent Office of the United States.

And for a further description of said invention your orators refer your honors to a copy of said letters patent issued as above set forth, which copy is hereto attached.

11 And your orators further show unto your honors that, by virtue of the premises, your orators, Christian Worley and Henry McCabe, became, and now are, the sole and exclusive owners of said letters patent, and the inventions and improvements described therein, and of all the rights and privileges granted and secured, or intended to be granted and secured, thereby. And that since they became the owners thereof, as aforesaid, they have invested and expended large sums of money, and have been to great trouble in and about said invention, and for the purpose of carrying on the business of manufacturing and finishing tobacco by the mode described and claimed in said letters patent, and making the same profitable to themselves and useful to the public; and that said invention has been and is of great benefit and advantage, and that tobacco was made according to said invention, and sold by said Christian Worley and Henry McCabe to great advantage to the public, and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orators; and your orators believe that they will realize and receive large gains and profits therefrom if infringements by said defendants and their confederates shall be prevented.

Yet the said defendants, well knowing the premises and the rights secured to your orators as aforesaid, but contriving to injure your orators, and to deprive them of the benefits and advantages which might and otherwise would accrue unto them from said invention, after the issuing of the letters patent as aforesaid, and before the commencement of this suit, did, as your orators are informed and believe, without the license or allowance and against the will of your orators, and in violation of their rights, and in infringement of the aforesaid letters patent, in the said city of St. Louis, and in other parts of the United

States of America, unlawfully and wrongfully, and in defiance of the rights of your orators, make, use, and vend to others to be used the said invention, and did make, use, and vend to others to be used tobacco made and finished according to said invention, and did manufacture and finish tobacco in the mode and by the instrumentali-
12 ties described and claimed in said letters patent, and that they still continue so to do; and that they are threatening to manufacture and finish said tobacco in accordance with and by the use of said invention in large quantities, and to supply the market therewith and to sell the same; and that they have committed and are committing all these alleged wrongful acts and infringements jointly, all in defiance of the rights acquired by and secured to your orators as aforesaid, and to their great and irreparable loss and injury, and by which they have been and still are being deprived of great gains and profits which they might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

And your orators further show unto your honors, on information and belief, that said defendants have sold large quantities of said tobacco, and have a large quantity on hand which they are offering for sale, and they have made and realized large profits and advantages therefrom, but to what extent, and how much exactly, your orators do not know, and pray a discovery thereof. And your orators say that the use of the said invention by said defendants, and their preparation for and avowed determination to continue the same, and their other aforesaid unlawful acts, in disregard and defiance of the rights of your orators, have the effect to and do encourage and induce others to venture to infringe said patent, in disregard of your orators' rights.

And your orators further show unto your honors that they have caused notice to be given to said defendants of said infringements, and of the rights of your orators in the premises, and requested them to desist and refrain therefrom; but they disregarded said notice and refused to desist from said infringements, and still continue to make, finish, and sell tobacco in accordance with the invention described and claimed in said letters patent.

And forasmuch as your orators can have no adequate relief ex-
13 cept in this court, to the end that the defendants may be compelled to account for and pay over the income thus unlawfully derived from the violation of the rights of your orators as above, and be restrained from any further violation of said rights, your orators pray that your honors may grant a writ of injunction restraining the defendants from any further construction or sale or use in any manner of said patented improvement in manufacturing plug-tobacco, or any part thereof, in violation of the rights of your orators as aforesaid, and that the tobacco machinery now in possession or use of the said defendants may be destroyed or delivered up to your orators for that purpose. And also that your honors, upon the entering of a decree for infringement, as above prayed for, may proceed to assess or cause to be assessed, under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orators have sustained by reason of such infringement, and that your honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the willful and unjust infringement by said defendants as herein set forth. And your orators pray also for a provisional or preliminary injunction, and for such other

relief as the equity of the case may require and as to your honors may seem meet.

May it please your honors to grant unto your orators a writ of injunction conformable to the prayer of this bill, and also a writ of subpœna of the United States of America, directed to the said Loker Tobacco Company, George Loker, president, and Charles F. Loker, vice-president, and commanding them to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem meet, and be required by the principles of equity and good conscience.

HATCH & PARKINSON,
Solicitors for Complainants.

HATCH & PARKINSON, *Counsel.*

14 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

On this 14 day of April, 1877, before me personally appeared Christian Worley and Henry McCabe, the above-named complainants, who, being by me first duly sworn, depose and say that they have read the foregoing bill of complaint subscribed by them and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to those matters 'he' believe it to be true.

CHRISTIAN WORLEY.
HENRY McCABE.

Subscribed & sworn to before me this 14th day of April, A. D. 1877.
M. M. PRICE, *Clerk,*
By A. P. SELBY, *Deputy.*

15, 16 Patent. 181512. Manufacturing plug-tobacco. Christian Worley, St. Louis, Mo., assignor of one-half his right to Henry McCabe, same place.

To all whom it may concern:

Be it known that I, Christian Worley, of St. Louis, in the county of St. Louis and State of Missouri, have invented a new and useful improvement in the mode of finishing plug-tobacco, of which the following is a specification:

The common way to proceed in finishing plug-tobacco is to press the bunches into plugs having the form seen in the retail stores. The plugs are next removed from the moulds in which they are pressed, and packed in boxes, and the boxes placed in a room, where the tobacco is sweated and cured. The plugs are afterward taken from the boxes, and subjected to a second pressing before they are packed in the boxes for sale.

My improved mode consists in finishing tobacco by placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat for several hours while they are tightly compressed between the plates, which are in contact with the broad sides of the plugs; and, finally, removing the box, and leaving the contents therein until cold, the whole process being adapted to give a fine and smooth finish to the wrapper, and, by putting the plug in proper condition, doing away with its tendency to bulge out at the sides, as plugs are apt to do when they have not been thus treated.

The plugs are taken from the finisher and packed directly in the boxes in which they are shipped.

The drawing is a perspective view of my finisher filled with tobacco-plugs, one side being removed to show the interior.

The finisher has a top, A, and bottom, B. Of its four sides, C D E F, the side C is made removable, for convenience in packing and unpacking. The top is also removable. The sides D F are secured to
17 the bottom by screws, G, which extend through the bottom from side to side. Surrounding the box upon three sides are horizontal straps, H H H, ending at the front side C in screws, *h*, which pass through the eyes of the strap-bars I I I, by which the front side C is held in place by nuts screwing on the ends *h*. J are stay-bolts running from side to side across the finisher above the top A. The top A consists of a metallic plate.

The courses of tobacco-plugs are shown at K, and the interposed metallic plates at L.

The process is as follows: The plugs, when fresh pressed, are taken from the molds, and a layer of them is laid over the bottom of the finisher. Over this course is laid a smooth metallic plate, L, and over the plate another course of tobacco, and so on, the tobacco and plates alternating to the top of the finisher.

The side C and top A are then put in place, and the finisher, with its center, subjected to extreme pressure, and then placed in a room containing very dry air, heated to, say, 140° Fahrenheit, and retained at that temperature for, say, eight hours, at the end of which time it will be found sufficiently cured, and may be at once removed from the finisher and packed in the boxes or caddies in which it is sold.

I consider it better, however, to allow the tobacco to cool in the finisher. In either case the plugs will be found to have a smooth and hard surface, better, indeed, than can be had by the old and tedious process, where the plugs are subjected to two distinct pressings.

By this process I am able to make use of wrappers costing not more than half the price of those used before my invention.

I am aware that there is not any novelty in, first, the simple finishing of tobacco by placing it in a heated room, and, secondly, the simple pressing of tobacco between metallic plates, and, therefore, I do not claim this distinct heating and pressing of tobacco broadly; but what I do claim as new and of my invention, and desire to secure by letters patent, is—

18 The mode of finishing tobacco substantially as described, consisting of placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat of about 140° Fahrenheit for several hours while they are tightly compressed between the plates which are in contact with the broad sides of the plugs and finally removing the box and leaving the contents therein until cold.

CHRISTIAN WORLEY.

Witnesses:
SAML. KNIGHT,
ROBERT BURNS.

(Here follows diagram marked page 19.)

20, 21 And the said subpœna in chancery so ordered to be issued is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

In the circuit court of the United States in and for said district.

The President of the United States to the Loker Tobacco Company, (a corporation), George T. Loker, and Charles F. Loker, greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri, on the first Monday of June next, at the city of St. Louis, then and there to answer the bill of complaint of Christian Worley and Henry McCabe, citizens of the State of Missouri, filed against you on the 14th day of April, 1877. Hereof fail
22 not. Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 14th day of April, 1877.

Issued at office, in the the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

MEM.—The defendants to enter their appearance in this suit in the clerk's office, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

Upon which writ is the following return of service by the marshal, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

I have executed this writ by delivering a copy thereof, together with a copy of the petition thereto attached, to the within-named
23 Loker Tobacco Company, by its vice-president Charles F. Loker, and a copy thereof to each of the within-named George T. Loker and Charles F. Loker, at St. Louis, in said district, this 17th day of April, A. D. 1877.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri,
By O. K. WHEELER, *Deputy*.

And afterwards, on the 8th day of June, 1877, the defendants filed their answer, which is in the words and figures following, to wit:

24, 25 United States circuit court, eastern district of Missouri.

CHRISTIAN WORLEY AND HENRY MCCABE, complainants, *versus* LOKER TOBACCO COMPANY, GEORGE T. LOKER, and Charles F. Loker, defendants.	In equity. No. 1024.

To the honorable the judges of the United States circuit court in and for the eastern district of Missouri:

The joint and several answer of the Loker Tobacco Company, and George T. Loker, president, and Charles F. Loker, vice-president of said company, defendant to the bill of complaint of Christian Worley and Henry McCabe, complainants.

These defendants, now and at all times hereafter saving and reserving

to themselves, and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the complaint's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or either of them to make answer unto, they, these defendants, severally answering, say that they admit on information and belief, that the patent was granted in the manner and to the complainant as
26 in said bill alleged, but they have no knowledge, information, or belief as to whether the said complainants are now the sole owners of said invention and letters patent, nor whether they have expended large or any sums of money in and about said invention, nor whether said invention has been or is to them of great or any benefit or advantage, and therefore they deny the same and leave the complainants to make such proof thereof as they may be advised.

Further answering, these defendants deny that the public generally have acknowledged and acquiesced in the claims of said complainants to said invention and letters patent, but on the contrary aver that said claims have been in every instance disputed, disregarded, and held to be void by all engaged in the trade of manufacturing tobacco, or who were in anywise conversant with the state of the art in relation to the subject-matter claimed in said letters patent.

Further answering, these defendants deny that they, or either of them, have at any time hitherto or are now making, using, or vending to others to be used the said invention or tobacco made and finished according to said invention, or have at any time hitherto or are now manufacturing and finishing tobacco in the mode and by the instrumentalities described and claimed in said letters patent, or that they or either of them are threatening or have at any time threatened to manufacture and finish said tobacco in accordance with and by the use of said invention, in large or any quantities, and to supply the market therewith and to sell the same, although these defendants would have full and perfect right so to do were they so disposed, as will be more fully shown in and by this their answer hereafter.

Further answering, these defendants aver that the said complainant Christian Worley was and is not the first and original inventor of said "improvement in manufacturing plug-tobacco" mentioned in said bill and claimed in said letters patent, but that long anterior to the alleged invention thereof by the said Worley the said process and mode of manufacturing plug-tobacco as set forth and claimed in said letters patent was known to and publicly used by the firm of George S. Shryock & Co., at their factory, situated at No. 216 North Com-
27 mercial alley, in the city of Saint Louis, Missouri, which facts these defendants expect to prove and establish by the testimony of George S. Shryock, Robert E. Lee, and Edward Geider, all residents of said city of Saint Louis; also that long anterior to said alleged invention of said Worley said process and mode of manufacturing plug-tobacco as set forth and described in said letters patent was known to and publicly used by Christian Peper, at his factory, on the east side of Main street, between Green and Morgan streets, in the city of Saint Louis, Missouri, which facts these defendants expect to show and prove by the testimony of said Christian Peper and of John G. Horman, both residents of said city of Saint Louis, Missouri.

Further answering, these defendants say that said letters patent mentioned in said bill are null, void, and of no effect for the reason that the invention therein described and claimed was in public use and on sale

at the city of Saint Louis, Missouri, and at the factory where the said Worley was employed, for more than two years prior to the application of said Worley for a patent, such public use and sale being made and prosecuted with the knowledge, acquiescence, and assistance of said Worley, said factory being, as these defendants are informed and believe, operated by the said complainant Henry McCabe, with the aid and assistance of said Worley as foreman.

Further answering, and as an additional defense to said action of said complainant, these defendants say that said letters patent are void and of no effect, for the reason that the specification thereof is indefinite and uncertain, and does not describe the alleged invention in such full, clear, and exact terms as to enable those skilled in the art to which it appertains to practice said alleged invention, or to understand exactly what invention is sought to be covered and claimed by said letters patent.

Further answering, these defendants, George T. Loker and Charles F. Loker, say that, saving and excepting as president and vice-president of said Loker Tobacco Company, they, nor either of them, have been or are in any manner engaged in the manufacture of plug-tobacco, but that as such officers of said company they have been and are now manufacturing such tobacco, but by a process and by instru-
28 mentalities in no wise infringing upon said letters patent or upon any right which can or may be claimed thereunder.

Wherefore these defendants humbly submit and insist that under the facts and circumstances as above alleged the said complainants have no right to any further or other answer to said bill, or any part thereof, than as above given, and no right of injunction, account, or other relief prayed for in said bill; and they, therefore, ask to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

LOKER TOBACCO CO.,
By GEO. T. LOKER, *Pres't.*
GEO. T. LOKER, *Pres't.*
CHAS. F. LOKER, *Vice-Pres't.*

SAM'L S. BOYD,
Defendants' Solicitor.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

George T. Loker and Charles F. Loker, being severally sworn, depose and say that they signed the above and foregoing answer, as president and vice-president of the Loker Tobacco Company; that they have heard the same read, and know the contents thereof; that so far as such contents are within their own knowledge said answer is true, and so far as the statements thereof are made upon information and belief they verily believe said answer to be true.

GEO. T. LOKER.
C. F. LOKER.

Subscribed & sworn to before me, this 8th day of June, A. D. 1878.
M. M. PRICE, *Clerk,*
By A. P. SELBY, *D. C.*

And afterwards, on July 2d, 1877, the complainants filed their replication as follows:

29 *Replication.*

Circuit court of the United States for the eastern district of Missouri.

CHRISTIAN WORLEY AND HENRY MCCABE
vs.
THE LOKER TOBACCO CO. ET AL.
} In equity. No. 1024.

The replication of the above-named complainants to the answer of the above-named defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto say that they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

HATCH & PARKINSON,
Solicitors for Complainants.

30, 31 And afterwards, at the September term, 1878, of said court, and on the 31st day of October of said year, the following proceedings were had in said case, to wit:

Decree.

CHRISTIAN WORLEY AND HENRY MCCABE, complainants,
vs.
LOKER TOBACCO COMPANY, GEORGE T. LOKER, and CHARLES F. LOKER, defendants.

This cause coming on for hearing on the pleadings, proofs, exhibits, and the arguments of counsel, and being duly considered, the court finds the equities for the defendants; and it is ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed, and that the complainants pay the costs herein to be taxed, and that execution issue therefor. And thereupon complainants, by solicitors, move the court to grant them an appeal herein to the Supreme Court of the United States, which is allowed upon the
32 complainants giving bond in the sum of five hundred dollars, to be approved by the court, or one of the judges; and upon the filing and approval of said bond, it is ordered that the clerk of this court make out and certify a transcript of the record and proceedings herein to said Supreme Court.

And afterwards, on the 2d day of December, 1878, at an adjourned day of said September term, the said complainants presented their appeal bond, which was by the court approved, and the said bond is in words and figures following, to wit:

Know all men by these presents that we, Christian Worley, as principal, and Louis J. Halthaus, as surety, are held and firmly bound unto the Loker Tobacco Company, George T. Loker, and Charles F. Loker in the full and just sum of five hundred dollars, to be paid to the said the Loker Tobacco Company, George T. Loker, and Charles F. Loker, their heirs, executors, administrators, or assigns, to which
33 payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 2d day of December, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at the September term, 1878, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Christian Worley and Henry McCabe, plaintiffs, and the Loker Tobacco Company et al., defendants, a decree was rendered against the said plaintiffs, and the said plaintiffs having obtained an appeal of the said court to reverse the decree in the aforesaid suit to the Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Christian Worley and Henry McCabe, plaintiffs, shall prosecute
34 said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

CHRISTIAN WORLEY. [SEAL.]
LOUIS J. HALTHAUS. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

The following testimony was submitted to the court on the trial of said cause:

35 *Prima-facie testimony.*

United States court, eastern district of Missouri.

CHRISTIAN WORLEY ET AL., COMPLAINANTS,
vs.
THE LOOKER TOBACCO CO. ET AL., RESPONDENTS. } In equity.

Testimony taken on the part of the complainants, under the sixty-seventh rule of practice, as amended, for the courts of equity of the United States, by Arthur E. Mooney, special examiner duly appointed by the said court to take depositions in said cause, Thursday, October 11th, 1877, at the office of Samuel S. Boyd, No. 506 Olive street, St. Louis, Mo.

Present, John E. Hatch, esq., counsel for complainants, and Samuel S. Boyd, esq., counsel for respondents.

CHARLES F. LOKER, being produced and sworn as a witness on behalf of the complainants, deposes and says:

Direct examination by Mr. HATCH:

Question 1. State your name, age, residence, and occupation.

A. 1. My name is Charles F. Loker; age, 28; residence, 2644 Chesnut street; occupation, tobacco manufacturer.

Q. 2. How are you connected with the Loker Tobacco Manufacturing Co.?

A. 2. Vice-president.

Q. 3. You are one of the parties to this case?

A. 3. Yes, sir.

Q. 4. Are you employed at the works where your tobacco is manufactured?

A. 4. Yes, sir; I am manager of the whole thing; called managing partner, I suppose.

Q. 5. Please state how many finishers you are now using in your works for finishing your plug-tobacco.

36 A. 5. I have twenty-one; use twenty as a general thing. The first I had made was a little awkward.

Q. 6. After the tobacco is put into the finisher, between the metal plates, please state how pressure is applied.

A. 6. By lever; there are four sheets three inches in length; screw-press.

Q. 7. What is the size of the screw?

A. 7. It is an ordinary screw, about three inches in diameter—between two and three inches.

Q. 8. How many threads to the inch?

A. 8. That I couldn't tell; that is something I never thought of.

Q. 9. As near as you can tell?

A. 9. I suppose about two.

Q. 10. When the tobacco is put into the press, how full is the finisher filled with tobacco before the cover is put on?

A. 10. In alternate layers, filled to the top.

Q. 11. About how thick is the cover?

A. 11. About an inch and a half probably it may be; some may be thicker than others.

Q. 12. About how far is this pressed down?

A. 12. Until it gets level with the edge of the finisher.

Q. 13. What is the height of the finisher?

A. 13. The interior is sixteen inches.

Q. 14. The tobacco, before it is put in there, is it not pressed under a hydraulic press?

A. 14. Yes, sir.

Q. 15. Please describe the construction of the heaters into which you put your tobacco in the finisher.

A. 15. Well, it a small room about eight feet in length and four feet in width; has six coils of pipe under a false floor of slats, and the heat comes up between the slats.

Q. 16. About what heat do you have in this room?

A. 16. I try to have about 130; sometimes it gets below and
37 sometimes above, just as steam is used in other parts of the factory. I have four other drying-rooms besides that.

Q. 17. About how long do you keep the tobacco in this heating-room?

A. 17. Put it in probably four o'clock or half-past four, and we sometimes leave it stay in the room until we open it the next day, but the steam is only on there from four o'clock until it dies out itself.

Q. 18. When did you put these drying-rooms into your works?

A. 18. Ever since I have been in the business, 1870; but this one,

especially for this purpose, I put on this floor in January, 1877, to make it more convenient.

Q. 19. Mr. Loker, did you ever go up to Mr. Worley's tobacco factory, Miller & Worley's, No. 805 N. Second street, to see the finishers that Mr. Worley was using there in finishing tobacco?

A. 19. I went up there to see Mr. Worley; I don't remember whether it was at the time he was with McCabe, or Miller & Worley; I went to see him, I know.

Q. 20. Did you take any one with you?

A. 20. I don't know whether I did or not.

Q. 21. What was your object?

A. 21. To get instruction in regard to the finisher. At that time I had no idea what the patent was.

Q. 22. You didn't know there was a patent on it?

A. 22. There is no patent yet; can't be any patent on the finisher.

Q. 23. You didn't know what the patent was?

A. 23. No, sir.

Q. 24. Did Mr. Worley show you his patent at that time?

A. 24. He showed me a pice of paper and says: "There are the papers for my patent;" and I asked him if the patent was on the finisher, and he said no, it was not. I asked him what it was on, he said
38 it was none of my business. He said that it would be for sale; I asked him what he would expect to charge for it, and he said he didn't know.

Q. 25. Did you make him any proposition to purchase it?

A. 25. No sir.

Q. 26. Made him no offer?

A. 26. No, sir.

Q. 27. Didn't you say you would like to use the process?

A. 27. I said I would like to use it if it was a success, but I didn't propose to pay him for using it, as I wasn't going to pay him for anything that I had been using a long time previous. At the time I had no idea that his process was putting it in a sweat-house, because I thought his patent was on the finisher.

(Cross-examination waived.)

(Signature waived by consent.)

At this point, by consent of the parties to said cause, I adjourned the further taking of this testimony until Saturday, Oct. 13th, at 10 a. m., then to be continued at this place.

ARTHUR E. MOONEY,
Special Examiner.

Pursuant to adjournment the parties met, and I adjourned the further taking of these depositions until the day of , there to be continued, at .

In the circuit court of the United States for the eastern district of Missouri.

CHRISTIAN WORLEY ET AL., COMPLAINANTS, *v.* THE LOKER TOBACCO COMPANY ET AL., RESPONDENTS.	In equity.

Testimony taken on the part of the complainants, under the 67th rule of practice, as amended, for the courts of equity of the United

39 States, before George Brown, a notary public within and for the State of Missouri and city and county of St. Louis, duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit court of the United States, acting by consent of parties as special examiner to take depositions in said cause, on the eleventh day of December, 1877, at the office of Samuel S. Boyd, No. 506 Olive street, St. Louis, Mo.

Present, R. H. Parkinson, esq., counsel for complainants, and S. S. Boyd, esq., counsel for respondents.

RICHARD BAXMEYER, being produced and sworn as a witness on the part of the complainants, deposes and says:

By Mr. PARKINSON:

Question 1. State your name, age, residence, and occupation.

A. 1. Richard Baxmeyer; age, 33; porter in a store; residence, 1402 North 13th street.

Q. 2. Were you ever engaged in the manufacture of tobacco? If so, when and where, and in what capacity?

A. 2. Yes, sir; I was working for Christian Peper. I suppose I commenced in 1856 or 1857; that was on Main street, between Morgan and Christy avenue, in the press-room.

Q. 3. How definitely can you fix the time when you began to work for Mr. Peper?

A. 3. I think it was in 1856 or 1857 I started to work for him.

Q. 4. Can you fix the time with certainty within a year or two?

A. 4. Yes, sir; I am sure I was working there in 1857.

Q. 5. How long did you continue to work for him in the press-room?

A. 5. I think it was 7 years I continued to work for him; 6 or 7 years.

Q. 6. Can you state what year you left him?

A. 6. No, sir; I don't know.

Q. 7. Describe the method of finishing tobacco in his establishment while you were there.

40 A. 7. Well, it was finished that time. It was often turned over in the moulds and gave it a finish, and very often put in finishers and then finished in there.

Q. 8. What kind of finishers were used?

A. 8. Wooden finishers.

Q. 9. What was done with the tobacco after being put in those wooden finishers?

A. 9. It was settled for an hour or so, and then packed out into boxes.

Q. 10. Was there any pressure applied to those wooden finishers?

A. 10. Yes, sir.

Q. 11. To the tobacco when in those wooden finishers?

A. 11. Yes, sir; finished off in the finishers with a small screw.

Q. 12. When it was taken away from this screw what was done with it?

A. 12. Packed into boxes.

Q. 13. And then what was done with it?

A. 13. Then it was generally seasoned in the sweat-house.

Q. 14. Was any pressure ever applied to it while in the sweat-house?

A. 14. No, sir.

Q. 15. Did you ever know of the tobacco being placed in the sweat-house between metallic plates while still subjected to pressure?

A. 15. No, sir.

Q. 16. Were the finishers in which the tobacco was pressed so constructed that it could remain under pressure when taken away from the press?

A. 16. No, sir.

Q. 17. What kind of a top had those finishers?

A. 17. An iron top like this letter-book press (indicating); iron top and iron bottom.

41 Q. 18. Was there any way of securing the top in place when removed from the press?

A. 18. No, sir.

Q. 19. Did you ever see any other kind of finishers than those you have described about the Peper establishment while you were there?

A. 19. No, sir.

Cross-examination by Mr. BOYD, counsel for defendants:

X Q. 1. When did you first commence to work for Mr. Peper?

A. 1. I think it was in 1856 or '7.

X Q. 2. How do you fix that date?

A. 2. I don't remember exactly the year I went to work for him; it was either in 1856 or 1857, in the spring, when I went to work for him.

X Q. 3. How do you know it was either in 1856 or 1857?

A. 3. I left there either in 1873 or 1874, and the time I was there was 6 or 7 years; that is the only way I can explain it.

X Q. 4. How do you know you left there in 1873 or 1874?

A. 4. Because I went in the army then.

X Q. 5. Where in the army?

A. 5. Right here in this town.

X Q. 6. How long were you in the army?

A. 6. About 3 or 4 months.

X Q. 7. What did you leave the army for?

A. 7. They disbanded. It was militia that they had in town here.

X Q. 8. What was the occasion of the militia?

A. 8. They sent us out in Missouri for awhile to keep out the guerillas.

X Q. 9. What did they want to send you out to Missouri for?

A. 9. To keep back guerillas from coming in.

X Q. 10. What time in the year was that?

A. 10. That was in the fall.

42 X Q. 11. Of what year?

A. 11. 1864, I think.

X Q. 12. Where did you go to work after you left the army?

A. 12. I went to work at Skinner & Prices'.

X Q. 13. For whom were you at work prior to your working at Mr. Peper's?

A. 13. I was attending store.

X Q. 14. Where?

A. 14. Corner of 11th and Biddle.

X Q. 15. Had you ever been engaged in the manufacture of tobacco prior to going to Mr. Peper's?

A. 15. No.

X Q. 16. What were your duties at Mr. Peper's?

A. 16. I was working around the moulds in the press-room—almost everywhere in the press-room.

X Q. 17. Who was foreman there?

A. 17. In the press-room a man of the name of Bertram Rudolph.

X Q. 18. All the time you were there?
A. 18. Yes, sir.
X Q. 19. What other pressman did they have?
A. 19. A gentleman by the name of Johnson.
X Q. 20. Who else?
A. 20. Another one by the name of David.
X Q. 21. Who else?
A. 21. A gentleman of the name of Frank.
X Q. 22. Frank who?
A. 22. I don't know his other name.
X Q. 23. Anybody else?
A. 23. Another one by the name of Louis; I don't know his other name.
X Q. 24. Any one else?
A. 24. Yes; a young man named Henry Husman.
X Q. 25. Any one else?
43 A. 25. Several others worked there, but I don't remember their names.
X Q. 26. Do you know the names of any other pressmen that worked there?
A. 26. Not in my time, I don't.
X Q. 27. You have given the names of all the pressmen that worked at Mr. Peper's while you worked there?
A. 27. There were several working there I forget the names of, but only for a month or two.
X Q. 28. You have given the names of all pressmen that worked for any length of time for Mr. Peper while you were working for Mr. Peper?
A. 28. Yes, that I know of.
X Q. 29. Do you know a man of the name of Horman?
A. 29. Yes, sir; he was foreman upstairs.
X Q. 30. Was he working there while you were working there?
A. 30. Yes, sir.
X Q. 31. What do you mean by "foreman upstairs"?
A. 31. He was running the rollers and packing leaf; he was preparing the tobacco before it was pressed.
X Q. 32. Where were the presses?
A. 32. Downstairs.
X Q. 33. You were doing, as I understand, generally anything you were called upon to do in the factory, were you?
A. 33. Down in the press-room, yes, sir.
X Q. 34. How do you say tobacco was manufactured there—plug-tobacco?
A. 34. It was generally put in the moulds and pressed first, and then a finish sometimes was given to it by turning them over in the moulds or putting them in wooden finishers.
X Q. 35. How was it put in wooden finishers?
A. 35. Between slats of tin and iron, and then there was a small pressure put on it, squaring the edges right smooth; after that it was packed out into boxes.
44 X Q. 36. How was the pressure applied?
A. 36. With a small bar.
X Q. 37. Was it kept under that pressure all the time until it was packed up into boxes?
A. 37. It was; sometimes for an hour, sometimes for an hour and a half.

X Q. 38. Did you ever sweat the tobacco there?

A. 38. They did; not in those finishers.

X Q. 39. What did they sweat it in?

A. 39. After it was packed in boxes.

X Q. 40. How packed in boxes?

A. 40. In square boxes where it was sold in, nailed up; after it was shut in boxes, packed in the sweat-house, three to five days, sometimes a week.

X Q. 41. How big boxes were those?

A. 41. They were all sizes, from six inches to eighteen inches.

X Q. 42. After it was taken out of these eighteen boxes, what was done with it?

A. 42. It was sold, I suppose; it was taken out in the store.

X Q. 43. Did you see all the tobacco manufactured during the time you were employed at Peper's?

A. 43. Yes, sir.

X Q. 44. You saw every box of tobacco that was manufactured during all the time you were there, did you?

A. 44. Yes, sir.

X Q. 45. You remember exactly how each box was manufactured, do you?

A. 45. Yes, I do that.

X Q. 46. Was it your duty to attend to the manufacturing of tobacco?

A. 46. I was called to do this, and at other times called to do that, so I knew; I was working from one place to another; I got at everything done in the press-room in the line of pressing tobacco.

45 X Q. 47. You did what you were told to do?

A. 47. Yes, sir.

X Q. 48. Who have you been talking to about this matter?

A. 48. Been talking to no one about it.

X Q. 49. Has nobody spoken to you about it?

A. 49. They spoke to me that they wanted me as a witness, that is all.

X Q. 50. For what?

A. 50. I don't know what it is about now.

X Q. 51. What did they state they wanted you as a witness for?

A. 51. How tobacco was manufactured at Peper's at the time I was working there.

X Q. 52. Did they state how it was manufactured while you working there?

A. 52. They didn't state any particular reason how it was manufactured, but to just give my evidence how it was pressed.

X Q. 53. Did they ask you how it was pressed?

A. 53. No.

X Q. 54. Before you came here you were never asked how tobacco was manufactured at Peper's warehouse, were you?

A. 54. No.

X Q. 55. Were any questions you about how tobacco was manufactured up there before you came here?

A. 55. No.

X Q. 56. Who spoke to you about coming here?

A. 56. Mr. Worley.

X Q. 57. When did he first speak to you about coming?

A. 57. Yesterday.

X Q. 58. Never before?

A. 58. No, sir.

X Q. 59. What did he say to you when he asked you to come?

A. 59. He asked me whether I could come up Tuesday morning, and whether I could find the place.

46 X Q. 60. That is all?

A. 60. Yes, sir.

X Q. 61. He didn't say what he wanted you for?

A. 61. No, sir.

X Q. 62. And you didn't know what he wanted of you?

A. 62. No, sir.

X Q. 63. And you didn't tell him anything about how tobacco was manufactured there?

A. 63. No, sir.

Redirect examination by counsel for complainants:

Q. 20. When you speak of going into the army in 1873 or 1874 do you refer to the regular army or the volunteer army?

A. 20. I don't know what they called them; they were drafted here—kind of shoved into the militia. We were caught in the street and enrolled. I don't know what they called it, the regular army or what they called it.

Q. 21. Did you mean "1873 or 1874," or "1863 or 1864"?

A. 21. 1863 or 1864; that is what I mean; not 1873 or 1874.

Q. 22. State whether or not it was during the war of the rebellion.

A. 22. Yes, sir; it was during the war.

Q. 23. Didn't Mr. Worley ask you any questions as to how they finished the tobacco at Peper's before you came up here?

A. 23. No, sir.

Q. 24. Did you tell any one how they finished tobacco there, or any thing about what they did?

A. 24. No.

Q. 25. Were you asked whether you knew how they did it or not?

A. 25. No, sir.

Q. 26. Did any one, before you came to this room this morning, ask you any questions about the method of finishing tobacco, or talk with you about it?

47 A. 26. No, sir.

Q. 27. As it was in Peper's establishment?

A. 27. No, sir.

(Signature waived.)

BERTRAM RUDOLPH, being produced and duly sworn as a witness on the part of the complainants, deposes and says:

Examined by Mr. PARKINSON:

Q. 1. State your name, age, residence, and occupation.

A. 1. Bertram Rudolph; forty years of age next 13th of April; residence, Twentieth and Biddle; I used to be in the tobacco business; I have been working in the country now for a couple of years.

Q. 2. Did you ever work for Christian Peper?

A. 2. Yes, sir.

Q. 3. In this city? If so, when and in what capacity?

A. 3. I worked in the press-room, pressing tobacco.

Q. 4. When?

A. 4. I went with him in 1857; started to work for him.

Q. 5. How long did you continue with him in that capacity?

A. 5. I continued there eleven years.

Q. 6. What was the method of finishing tobacco used there?

A. 6. We had moulds and had finishers. We would press in the moulds first, and run it in the finishers. Sometimes we turned it over in the moulds.

Q. 7. Did you ever know of the tobacco being pressed between metallic sheets, and kept under pressure in the sweat-room?

A. 7. Yes, sir.

Q. 8. Between these sheets?

A. 8. Yes, sir; not by Peper, though.

Q. 9. When did you first know of that being done?

A. 9. By Mr. Worley.

48 Q. 10. Was it done at Peper's establishment during the time you were there?

A. 10. Not while I was there.

Q. 11. When did you first know of its being done by Mr. Worley?

A. 11. That was in the year 1870, I think, when he first started to work it; 1869 or 1870.

Q. 12. Where was he working at that time?

A. 12. He was working up on Seventh, between O'Fallon and Cass avenue.

Q. 13. With whom?

A. 13. Mr. Roach and McCabe.

Q. 14. What were you doing there at that time?

A. 14. I was pressman there.

Q. 15. When did you begin to work as pressman there for Roach and McCabe?

A. 15. I worked with them on Second street till they moved up there, and then we fixed up there. I helped to move the machinery up. I think it was 1869 when they started to press; in the fall. I worked there through that winter and next spring.

Q. 16. How soon after you moved to Cass avenue did Mr. Worley begin to finish tobacco in the way you have described?

A. 16. We started just as soon as we got the machinery up. I could not tell you what day it was.

Q. 17. Who, besides Mr. Worley and yourself, had anything to do with the pressing of tobacco, or finishing tobacco, between metallic plates in the sweat-room, while you were there?

A. 17. Me and Mr. Worley.

Q. 18. State whether or not other persons were allowed to see the method of finishing tobacco.

A. 18. No, sir; we didn't let everybody see it. We kept it to ourselves.

Q. 19. State whether or not anything was said to you by Mr. Worley about letting other people see it.

49 A. 19. Yes, sir. Mr. Worley told me not to say anything about it, and we would see how it would work—make an improvement on tobacco.

Q. 20. What change, if any, did it make in the appearance of the tobacco turned out?

A. 20. It made a great deal. It made it look smooth and solid—made it more smooth and solid, and better keeping, too, I think.

Q. 21. Were the other men about the establishment allowed to see the process by which it was finished?

A. 21. They could see when they came down, when they was packing

it. They had to go through the press-room to go out in the yard or go home, and would look at it and see it.

Q. 22. Did any other men about the establishment, so far as you know, see the entire process of finishing—know just how it was done?

A. 22. Yes, sir; I expect there is some of the hands working there seen the finishers which we had, but they didn't see how the work was done; they seen the work after it came out of the finishers.

Q. 23. My question was whether any of them saw how the work was done all through.

A. 23. I expect they did. Some there seen it, but I don't think any outsiders went in there to see anything of it.

Q. 24. Who there in the establishment saw the process by which it was finished?

A. 24. Well, there was several men there; I know a fellow of the name of John Hobner seen it.

Q. 25. Do you know whether Hobner saw the whole work done, from the beginning to the end of it, or only saw the tobacco as it came out?

A. 25. He seen it when it came out; he seen it when it went in; he didn't see the sweating part.

Q. 26. Did you ever tell anybody at that time how the work was done?

A. 26. No, sir.

50 Cross-examination by Mr. BOYD, counsel for respondents:

X Q. 1. How many men were employed at this factory of McCabe's you have just spoken of?

A. 1. There were five hands there besides myself—six of us.

X Q. 2. Who was the head pressman?

A. 2. Myself.

X Q. 3. How many did you have to help you at the press?

A. 3. Nobody; sometimes Mr. Worley helped me; most part of the work I did myself.

X Q. 4. When Mr. Worley didn't help you to press, who would do it?

A. 4. I would do it myself.

X Q. 5. Did nobody ever help you except Mr. Worley?

A. 5. Yes, sir; afterwards I had a little boy help me once in a while; helped me to pump.

X Q. 6. Is this the way tobacco was manufactured in 1869? The plugs were put into the finisher with metal plates between them, and then they were pressed down?

A. 6. Yes, sir.

X Q. 7. A top put on, and the finisher put in the sweat-room, heated, and allowed to remain there some time, and then taken out and allowed to cool, and the tobacco, after it had cooled, you packed in caddies for sale; is that the way?

A. 7. Yes; that was the way.

X Q. 8. The tobacco was sold from those caddies, was it not?

A. 8. Yes, sir; it was sold as it came out, packed. It was packed in caddies, and a weight was put on it, and then it was sold.

X Q. 9. That was commenced in the fall of 1869?

A. 9. Yes; in the fall of 1869.

X Q. 10. How large was your sweat-room?

A. 10. Our sweat-room was about 8 by 10, I think.

X Q. 11. How did you heat it?

A. 11. With a stove.

51 X Q. 12. Had you ever used that sweat-room before this process?

A. 12. Yes, sir; we used it on the old style; the way they used it was to put them in caddies and sweat it; pack it out of the old finishers and pack it in caddies and sweat it there; they were never sweat with the finishers before.

X Q. 13. It was the same sweat-room you used when you sweat tobacco in caddies?

A. 13. Yes, sir.

X Q. 14. After you begin this process, instead of putting in caddies, you put the finishers directly in the sweat-room?

A. 14. Yes, sir.

X Q. 15. Was the press you used when you put the tobacco in the finishers between plates the same press you had used before when you packed in caddies and sweat in caddies?

A. 15. No; we would take it out of the moulds and pack it in the finishers and run it down with one of those box-screws—get it down—get it solid—and then put bolts across so as to keep it solid in the finishers, and then we would take the finishers and put them in the sweat-room.

X Q. 16. Was the screw with which you pressed it in the finishers the same that you used when you pressed it in the caddies?

A. 16. No; that was a box-screw we used to give a solid pressure, and we would run two bars across the top of the box; it was clamped with iron bars, so the pressure could not come up; tobacco will swell when it gets in heat, and we put bars across to hold it down when sweat in the sweat-house, as it will swell occasionally; and took it out and packed it in caddies.

X Q. 17. Did you ever use the box-screw before you put the finishers into the sweat-house?

A. 17. Yes, sir; with caddies.

X Q. 18. It was the same box-screw you used with caddies?

A. 18. Yes, sir.

X Q. 19. It occupied the same place in the factory, did it?

52 A. 19. Yes, sir.

X Q. 20. Was your sweat-room and this screw on the same floor?

A. 20. Yes, sir.

X Q. 21. How many floors were there in the establishment?

A. 21. Two.

X Q. 22. Which floor was this on?

A. 22. The first—pressing.

X Q. 23. What else was done on the first floor?

A. 23. There was nothing but pressing tobacco; the hydraulic pressure machinery was all there; upstairs, the second floor, was the rolling-room.

X Q. 24. Who worked in the lower room?

A. 24. I did.

X Q. 25. Nobody else?

A. 25. No; except once in a while a boy would help me; come down to help pull the flattening.

X Q. 26. Where did you let the finisher cool, in the sweat-room or take it out?

A. 26. Take it out; it could not cool in the sweat-room.

X Q. 27. Then the only change which you made after you began to

use these finishers was that you *you* put the finishers in the sweat-room instead of the caddies?

A. 27. Yes, sir; put the finishers in the sweat-room with sheets of tin, sweat them with plates of tin, and then packed them afterwards in caddies, and then we would not sweat no more afterwards.

X Q. 28. Do you suppose anybody about the establishment ever saw you put those finishers in the sweat-room?

A. 28. No; I don't hardly think there was.

X Q. 29. Why not?

A. 29. Because they used to get down before I got through, and I used to put them in in the evening and leave them in there for a certain time, 3 or 4 days, according to the condition the tobacco was in.

53 X Q. 30. Who attended to the stove in the sweat-room?

A. 30. I did.

X Q. 31. Did nobody else ever touch it?

A. 31. Yes; once in awhile a boy upstairs would come down and put in a shovelfull of coal or so.

X Q. 32. After you began to use these in 1869 did you manufacture all your plug-tobacco in that way?

A. 32. Well, they did as long as I was there; I went away in the latter part of 1870. I don't know whether Mr. Worley got any more improvement on it afterwards or not.

X Q. 33. Did the tobacco have a smooth appearance when it came out from between the plates?

A. 33. Yes, sir; it looked very nice, smooth and glossy.

X Q. 34. Was there any complaint made that you know of in regard to the quality of the tobacco made by that process while you were there?

A. 34. No; I seen no complaint at all.

X Q. 35. Who was the proprietor of the establishment?

A. 35. At that time it was Mr. Roach and McCabe.

X Q. 36. Was he ever in the press-room?

A. 36. They used to come in sometimes in the evening; during the day they were round; they were the proprietors of the factory, and of course had the right to look round.

X Q. 37. He knew exactly how this was done?

A. 37. I expect he did; I don't know though; he didn't see nothing of it nohow.

X Q. 38. Didn't he see the tobacco in the finisher being pressed?

A. 38. He seen when I took it out; he didn't how we worked with it—I don't think he did.

X Q. 39. What do you mean when you say "he didn't how we worked with it"?

A. 39. He didn't know how it went in the sweat-house.

X Q. 40. What do you mean when you say "he didn't know how it went in the sweat-house"?

54 A. 40. How it went in the finisher.

X Q. 41. What do you mean by "how it went in the finisher"?

A. 41. We put it in the finisher, me and Mr. Worley, and Roach & McCabe didn't see anything of it till it was fit to come out; sometimes Roach & McCabe were there when we would pack it out.

X Q. 42. What was the difference in the manner of putting that tobacco into the finisher and pressing it from that followed when you put it in the caddy and pressed it?

A. 42. We tried an experiment to see if we could not make an improvement on tobacco in the working of it.

X Q. 43. When you put the tobacco in the caddies and pressed it did you use metal plates?

A. 43. No.

X Q. 44. You simply packed it layer by layer and then put it in the press?

A. 44. Pressed it down so as to keep the head down.

X Q. 45. When you used metal plates you put into the finisher first a layer of tobacco and then a plate, and then a layer of tobacco and then a plate, and pressed it and put the head on?

A. 45. No; we put on an iron top and two bolts across the top of where the box-screw was put, and sent it to the sweat-house.

X Q. 46. There was a top put on that finisher to keep the tobacco down, was there not?

A. 46. Yes, sir; then 2 bars went across.

X Q. 47. Then it was taken from there and put in the sweat-house?

A. 47. Yes, sir.

X Q. 48. Before the caddy was put into the sweat-house, was it not?

A. 48. Yes, sir; but not since this has been improved; we didn't put the caddy into the sweat-house any more.

X Q. 49. What difference was there in the two processes;
55 was there any difference except that instead of putting the caddy into the sweat-house you put the finisher into the sweat-house?

A. 49. Yes, sir.

X Q. 50. That is the only difference?

A. 50. That is the only difference.

X Q. 51. Did you aim to keep about the same heat when you put the caddy in as you did when you put the finisher in?

A. 51. Yes, sir; about the same degree.

X Q. 52. How big was that finisher?

A. 52. The finisher was 12x12—18.

X Q. 53. How do you know it was 1857 when you went to work for Mr. Peper?

A. 53. Because I know.

X Q. 54. How do you know it was in 1857?

A. 54. That is the time I went to work for him, in 1857.

X Q. 55. How do you know that was the time?

A. 55. I should think I ought to know when I went to work for him.

X Q. 56. Can you give any reason why you know it was in 1857?

A. 56. I could not give any more reason; I was peddling; I was selling peanuts and apples.

X Q. 57. At the time you went with him?

A. 57. At the time I went to work for Mr. Peper; I was a boy then. Mr. Peper told me I ought to be ashamed of myself going round with a basket peddling, and he says he would give me a better job; and he told me to go to work, and I went to work for him; I started in the press-room.

X Q. 58. How do you know that was in 1857?

A. 58. Because I know; I ought to know my age.

X. Q. 59. How old were you when you went with him?

A. 59. 16 years.

X Q. 60. How do you know when you left him?

A. 60. I know when I left him; I guess I ought to know that.

56 X Q. 61. How do you know?

A. 61. Because I quit him.

X Q. 62. How do you know it was in 1868 you quit him?

A. 62. I know it was in '68.

X Q. 63. How do you know?

A. 63. I ought to know the year and the day of the year; if I wouldn't, I wouldn't know anything.

X Q. 64. Do you know anything from which you are able to tell why you remember it was in 1868 you left Peper's?

A. 64. Yes, sir.

X Q. 65. What were your duties there at Peper's?

A. 65. I had charge of the press-room.

X Q. 66. What do you mean; that you were head pressman?

A. 66. Yes; foreman of the press-room; some call it foreman; I always called it in charge of the press-room.

X Q. 67. At Peper's?

A. 67. Yes, sir.

X Q. 68. How long were you foreman in the press-room?

A. 68. Eleven years.

X Q. 69. You went right in there as foreman of the press-room, did you?

A. 69. No; I went there about the middle part of the summer of 1857, and then I stayed till next spring, and March I went as foreman.

X Q. 70. Who were employed there as pressmen above a year during the time you were there?

A. 70. There was a man on of the name of Louis Gronneman; he quit, and Mr. Peper put me in charge of the press-room.

X Q. 71. Who have you been talking to about this matter?

A. 71. I have not been talking to anybody.

X Q. 72. How came you to come here?

A. 72. By Mr. Worley ordering me up as a witness.

X Q. 73. What did he order you up for?

57 A. 73. He wanted to see me as a witness; that is all I know of it.

X Q. 74. Did he tell you what he wanted you as a witness about?

A. 74. No; he didn't tell me nothing more, except he told me he wanted me to come up; I asked him what it was about, and he said it was a little case he had.

X Q. 75. Didn't tell you the nature of the case?

A. 75. No.

X Q. 76. He didn't say anything about what he wanted you to testify?

A. 76. Not one word.

X Q. 77. Until you came here, you didn't know what your testimony was to relate to?

A. 77. Of course I knowed pretty near what it was; he asked me to come up.

X Q. 78. How did you know pretty near what it was?

A. 78. Because I had heard others once talking about it.

X Q. 79. Who?

A. 79. Some of the boys.

X Q. 80. Who?

A. 80. Some I heard saying I had to come up as a witness of Worley's on the tobacco factory—finishing.

X Q. 81. You say till you came down you didn't know what your testimony was wanted about?

A. 81. No more than I do now: I just came here to see what I was up here for.

X Q. 82. Did nobody ever ask you, before you came here, how tobacco was manufactured at Peper's warehouse?

A. 82. No, sir; well, he often asked me before when I was working there; not at this time.

X Q. 83. Nobody has?

A. 83. No; he asked me when I was working, a great many times, about manufacturing tobacco at Peper's; he never done it here since I have been up here.

(Signature waived.)

58 A. MILLER, of lawful age, being produced and duly sworn as a witness on the part of the complainants, deposes and says:

Examined by Mr. PARKINSON:

Question 1. State your name, age, residence, and occupation.

A. 1. My name is A. Miller; residence, 1017 North Sixth street; occupation at present manufacturing tobacco, in company with Mr. Worley.

Q. 2. Were you ever in any way connected with Christian Peper in the manufacture of tobacco?

A. 2. Yes, sir; I went to Christian Peper's in 1862.

Q. 3. In what capacity?

A. 3. I was at most anything for the first year; the second year I attended to the books, and, more or less, something of everything till 1868, when I took an interest in the firm, one-fourth interest in the manufacture of tobacco.

Q. 4. How long did you continue with him?

A. 4. Up to 1876; the first of January, 1876, I was a partner there.

Q. 5. What opportunities did you have of knowing the method of manufacturing tobacco there?

A. 5. I was though the factory every day; I was there more or less, often a dozen times.

Q. 6. How was tobacco finished there?

A. 6. After it was rolled, it was pressed in the moulds; for the first few years we had nothing; we used wooden finishers with an iron plate inside; but in later years we used iron finishers.

Q. 7. While there did you ever see or know of any tobacco being finished by being placed between metallic plates in the finisher, subjected to pressure, and while under pressure put into the sweat-house and kept under pressure there?

(Counsel for respondents objects as leading.)

A. 7. No, sir; it was never done while I was there.

59 Q. 8. Was anything ever said to you by Mr. Peper, or any one in the establishment, about any such method of finishing tobacco as referred to in the last question?

(Counsel for respondents objects as leading.)

A. 8. No.

Q. 9. Have you ever known of such a process being used? If so, when and where?

A. 9. Well, I didn't know it until we started ours, and commenced manufacturing for myself and Mr. Worley, in 1876. I knew there was something going on in McCabe's, but didn't know what it was. I never seen it to know how it was done.

Q. 10. Please state whether or not there is any peculiarity in the appearance of tobacco so finished by which it can be distinguished.

A. 10. Well, it makes it more smoother and glossy; you can always tell it. By having it in the caddy it will always be more or less rough; it has not this finish on.

Q. 11. State whether or not any of the tobacco sold by Christian Peper, while you were connected with him, had this appearance.

(Counsel for respondents objects as leading.)

A. 11. I never seen it.

Cross-examined by Mr. BOYD, counsel for respondents:

X Q. 1. When did you leave Mr. Peper's establishment?

A. 1. I left it about the 15th of February, 1876.

X Q. 2. What was the occasion of your leaving?

A. 2. Mr. Peper thought he had better make a change. We could not exactly agree on certain matters. I thought I would draw out.

X Q. 3. The reason of your leaving was on account of disagreement between you and him?

A. 3. That is all.

X Q. 4. What did you say your duties were while you were employed by Mr. Peper?

A. 4. I was first doing anything—portering; everything. The
60 second year I took charge of the books, and after that done most anything—bookkeeping; anything coming along, in fact.

X Q. 5. Did you ever do any work in the factory?

A. 5. I have done work there, but was not employed to do it—not ordered to do it. I might have set down to do some work, but never was ordered to do it.

X Q. 6. When did you leave Peper's?

A. 6. 1876, about the middle of February, I think it was.

Redirect by Mr. PARKINSON:

Q. 12. Did you have any interest in the business while with Mr. Peper?

A. 12. Ever since the 1st of January, 1868, up to the 1st of January, 1876, I was one-fourth partner of the firm.

(Signature waived.)

Stipulation.

It is stipulated by counsel on both sides that the time for taking testimony on either side may be extended to the February rules, 1878.

JOHN HOBNER, being produced and duly sworn as a witness on the part of the complainants, deposes and says:

Examined by Mr. PARKINSON:

Q. 1. State your name, age, residence, and occupation.

A. 1. I will be thirty-two on the 26th December; my name is John Hobner; tobacco business.

Q. 2. How were you employed in the years 1869, 1870, and 1871?

A. 2. I was employed at Mr. McCabe's factory, rolling tobacco.

Q. 3. At what place?

A. 3. I was up between O'Fallon and Cass avenue and between Sixth and Seventh streets.

61 Q. 4. Were you ever in the press-room there?

A. 4. Yes, sir.

Q. 5. Did you ever notice the appearance of the tobacco turned out there in 1870 and 1871?

A. 5. Yes, sir.

Q. 6. What, if anything, was there about it that attracted your attention?

A. 6. It was that it turned out a slicker piece of tobacco than any others I ever seen before—smoother.

Q. 7. Did you know at the time how the tobacco was finished?

A. 7. I didn't know—didn't know how. I saw they had a different way than I ever seen before that.

Q. 8. Did you make any effort to find out how it was finished?

A. 8. I used to look around to see, but I could not get to make out any way how it was.

Q. 9. Were the workmen and other persons coming to the factory generally admitted to see how this was done?

A. 9. They did sometimes. I don't know whether they seen how it was done. They came in there with some of them.

Q. 10. Did you ever know of anybody being there to see how it was done—how the tobacco was finished—aside from the workmen in the place?

A. 10. I could not say. I know I have been there with a certain person myself, but I could not say whether he picked it up there or how.

Q. 11. What do you say?

A. 11. I have taken a fellow up there myself; been looking round the factory yonder.

Q. 12. Did you show that person how they finished the tobacco?

A. 12. No; I didn't show it to him.

Q. 13. Did you know at the time how they finished it?

A. 13. I didn't know it either.

62 Q. 14. Who of the workmen there knew how it was done, or did it, so far as you know?

A. 14. I could not say anybody but Mr. Worley. Perhaps the pressman. I don't know that. Mr. Worley, I guess he knew.

Q. 15. Can you state whether or not any effort was made to keep the method of finishing this from observation, from the notice of other people?

A. 15. I don't-understand.

Q. 16. Do you know whether any pains were taken there to prevent other people seeing how this was done?

A. 16. Yes, sir.

Q. 17. What do you know about it?

A. 17. I know that it was kept from them as much as possible; tried not to have it known.

Cross-examination by Mr. BOYD, counsel for respondents:

X Q. 1. What is your business?

A. 1. Tobacco business.

X Q. 2. With whom?

A. 2. Mr. Worley; Miller & Worley.

X Q. 3. Christian Worley, you mean?

A. 3. Yes, sir.

X Q. 4. How long have you been employed by him?

A. 4. I believe since May, last year.

X Q. 5. In 1870 how did they make that tobacco there, as near as you can tell?

A. 5. They turned out a finished plug—slick, smooth.

X Q. 6. Did they press that tobacco at all?

A. 6. Yes, sir; certainly.

X Q. 7. How did they press it?

A. 7. Pressed it in the moulds; took it out of the moulds and put it into boxes.

X Q. 8. What sort of boxes?

A. 8. Into boxes about that high. (Indicating.)

X Q. 9. Put in metal plates?

63 A. 9. Tin.

X Q. 10. A layer of tobacco and then a layer of tin?

A. 10. And then tin.

X Q. 11. And then a layer of tobacco?

A. 11. Yes, sir.

X Q. 12. After they put that into the box with tin what did they do to the tobacco; did they press it then?

A. 12. They would press it a little, I guess, to put it down in the box, to get in a certain amount, or how I could not say.

X Q. 13. Did you not see them pressing it into the box?

A. 13. I have seen it sometimes.

X Q. 14. What did they use to press it; did they use a screw-press?

A. 14. Yes they used a screw.

X Q. 15. After they had screwed it down did they put a head in?

A. 15. They put in a head; yes.

X Q. 16. How did they hold that head in?

A. 16. Put in two iron bars.

X Q. 17. Did they keep it under that press?

A. 17. I could not say; I have never stopped there to see all of it.

X Q. 18. Do you know how long they kept it under that press?

A. 18. No, sir; I could not say.

X Q. 19. When they took it out of the press what did they do with it?

A. 19. I didn't stop there that long, not to my own seeing that I seen it; from what I know, though, they go to work and put them in the drying-house in the evening; I have probably seen it sometimes, but not always.

X Q. 20. You saw them, some time in 1870, take it out of this press in the evening and put it into the drying-room?

A. 20. Yes, sir; I guess I did.

64 X Q. 21. The drying-room is what is sometimes called the sweat-room?

A. 21. The sweat-room or drying-room.

X Q. 22. When would they take it out from that sweat-room or drying-room? You say they put it in the evening; when would they take it out?

A. 22. I could not say; probably in the morning.

X Q. 23. You have seen them take it out in the morning?

A. 23. Perhaps I seen them take it out at 10, or 1, or 2, or 3 o'clock.

X Q. 24. Next morning?

A. 24. During the day; I don't know what day exactly.

X Q. 25. When they took it out from there what did they do with the tobacco?

A. 25. Packed it into boxes—caddies.

X Q. 26. Then what did they do with those caddies?

A. 26. Well, they put them into the store-room or place.

X Q. 27. Were they ready for sale when packed in those caddies?

A. 27. Yes, sir.

X Q. 28. Those caddies were afterwards sold, were they?

A. 28. Yes, sir.

X Q. 29. How early in 1870 do you think you saw them do this; did you see them do it as early as January or February, 1870?

A. 29. No, I am not positive of that; I could not say exactly when, but they have done it before August or November—December—September.

X Q. 30. You are willing to swear, are you, that some time before August or November, 1870, you saw them do this?

A. 30. That is after August or September; yes, sir.

X Q. 31. 1870?

A. 31. Yes, sir.

X Q. 32. What time in 1870 did you go to that factory to work?

65 A. 32. Perhaps I been working all that year, all 1870.

X Q. 33. When you first went there, in 1870, what did they press their tobacco in; did they press it between metal plates?

A. 33. I could not say; probably they did press it the same way then.

X Q. 34. You think when you first went there they pressed it in the same way as you saw them do it in August and November?

A. 34. I think they did. I am not certain, but I think they did; I ain't certain, though.

X Q. 35. What was your business there; what did you do?

A. 35. I was rolling tobacco.

X Q. 36. How many other rollers were there?

A. 36. About four more.

X Q. 37. How many helpers did you have?

A. 37. We had stemmers, one or two.

X Q. 38. Did each roller have a stemmer?

A. 38. I could not say whether they had or not; they need one or two.

X Q. 39. Didn't each roller at that factory have at least one or two stemmers to help him?

A. 39. Yes, sir.

X Q. 40. This pressing was on the lower floor, was it not?

A. 40. Yes, sir.

X Q. 41. Right where you went downstairs from upstairs?

A. 41. Where you go in downstairs.

X Q. 42. You went right by it?

A. 42. You can go by it or not go by it.

X Q. 43. You generally went by it, didn't you?

A. 43. Sometimes.

X Q. 44. How near the door was it?

A. 44. The press-room?

X Q. 45. Yes, sir; near the outside door?

A. 45. I don't know; it was all downstairs.

66 X Q. 46. Was the whole lower floor used as a press-room?

A. 46. It was, all but a place again as big as this here, about.

X Q. 47. All but a place about 17 feet square?

A. 47. It is more than that; again as big as this.

X Q. 48. How many presses did they have there?

A. 48. I could not say.

X Q. 49. Did they have more than one?

A. 49. They only had one hydraulic press; one press, that is, to press all of it.

X Q. 50. Was this press, that they used to press it when the plates were in, an hydraulic press?

A. 50. No.

X Q. 51. How many presses of that kind did they have?

A. 51. They might have two or three; I could not say.

X Q. 52. Was the hydraulic press the press they used when they pressed the tobacco into the moulds?

A. 52. Yes, sir.

X Q. 53. And then two or three other presses to press it after it was in the boxes, between plates?

A. 53. Yes, sir; they could use them for that purpose; whether they used one, two, or three, I don't know which.

X Q. 54. Whereabouts was the sweat-room?

A. 54. The northwest corner of the building, lower floor.

X Q. 55. How near this screw-press?

A. 55. The mould-press?

X Q. 56. Not the hydraulic press; the hand-press.

A. 56. The others?

X Q. 57. Yes, sir.

A. 57. I could not say; as much as across the street here—near, not quite.

X Q. 58. What was the sweat-room; how was it constructed?

A. 58. They had a place downstairs where they had a stove
67 in, and dug out in the ground; they had a stove down in that; the sweat-room was downstairs to sweat tobacco, and the drying-house was upstairs to dry lumps.

X Q. 59. Do you mean the drying-room was on the second floor?

A. 59. Yes, sir.

X Q. 60. All heated by the stove sunk in the ground?

A. 60. Yes, sir.

X Q. 61. About how much would those finishers weigh when they were filled with tobacco, with the plates in them; were they pretty heavy?

A. 61. Pretty heavy; I couldn't say how much they would weigh.

X Q. 62. Would they weigh 20 pounds?

A. 62. Oh, yes; I guess 80 pounds.

X Q. 63. How did they get that finisher from under the press into the sweat-room?

A. 63. Sometimes—I don't know; they would take it different ways, I guess.

X Q. 64. How did you ever see them do it anyway?

A. 64. I have seen them take it there on what you may call with those big screws on—on the railroad track that they have presses on. They have probably a truck or probably a car, I don't know which.

X Q. 65. Did that track run directly into the sweat-room?

A. 65. No.

X Q. 66. Then from that track the finisher would be lifted into the sweat-room, would it not?

A. 66. It would have to be fetched in there—yes, lifted in or carried in.

X Q. 67. Did you ever help to put it in?

A. 67. No.

X Q. 68. Who used to put it in?

A. 68. They had a pressman there, and a boy, I guess.

X Q. 69. While you were there did they manufacture tobacco in any other way than this?

68 A. 69. Yes, sir; they have.

X Q. 70. How did they manufacture it?

A. 70. They used to work it without these boxes or slick gloss.

X Q. 71. How did they do then?

A. 71. Take it and put it into moulds, press it, and then turn it and press it again, and then take it out, I guess, and pack it, as much as I know. I am not a pressman myself; but that is the way I have seen it done.

X Q. 72. Although you are not a pressman yourself, you understand generally how tobacco is manufactured, don't you?

A. 72. As much as I know of; I don't know the whole.

X Q. 73. What part don't you know?

A. 73. I might not have no understanding; I might see a good deal and have no understanding how to work it exactly.

X Q. 74. What part of that don't you understand how to work?

A. 74. I didn't understand how to work this, how to get this slick gloss on the tobacco; I didn't know how that was done.

X Q. 75. How did you think that it was done?

A. 75. I didn't know how; I could not know; I thought they used some stuff.

X Q. 76. Thought they put something on it?

A. 76. Yes, sir.

X Q. 77. You say that you didn't know what produced this slicky appearance of the tobacco?

A. 77. I didn't know, not at that time.

X Q. 78. You know at that time that they took the lumps from the moulds and put them into the finisher with metal plates?

A. 78. Plates or sheets.

X Q. 79. And put it under one of those hand-screws?

A. 79. Yes, sir.

69 X Q. 80. And then put the finisher into the sweat-room and let it stay some times, and then take the finisher out of the sweat-room and pack the tobacco right in caddies for sale?

A. 80. Yes, sir.

X Q. 81. But you say you didn't know what made the tobacco look slick?

A. 81. No.

X Q. 82. You supposed they did something else besides that?

A. 82. I did.

X Q. 83. Do you know how to press tobacco?

A. 83. I do not.

X Q. 84. Do you think you could now take tobacco after it has been pressed into moulds and put it through this process?

A. 84. I could not say.

X Q. 85. You could pack it into the finisher with metal plates?

A. 85. I could pack it.

X Q. 86. You could put a head on the finisher and screw it down?

A. 86. Certainly.

X Q. 87. You could take the finisher and put it in the sweat-room?

A. 87. Yes; if I had help.

X Q. 88. You could let it stay there, could you not?

A. 88. Yes, sir.

X Q. 89. Then you could take it and open the finisher and put the tobacco into the caddies?

A. 89. Yes, sir.

X Q. 90. You could have done that in 1870, could you not?

A. 90. I could have done that, but I never knew anything about any slicky gloss.

X Q. 91. You supposed they made it by putting on something to make it slick?

A. 91. That was my idea that time.

70 Redirect examination by Mr. PARKINSON:

R. Q. 1. In whose employ were you this last season?

A. 1. Miller & Worley.

R. Q. 2. What doing?

A. 2. Rolling tobacco.

(Signature waived.)

JOSEPH OPPERMANN, being produced and duly sworn as a witness on the part of the complainants, deposes and says:

Examined by Mr. PARKINSON:

Question 1. State your name, age, residence, and occupation.

A. 1. Joseph Oppermann; 33 years of age; residence, 2001 Columbus street; saloon-keeper.

Q. 2. State whether or not you ever purchased any tobacco of Mr. McCabe.

A. 2. Yes, sir.

Q. 3. State when you first purchased of him, and where his place of business was.

A. 3. Well, the first I bought of McCabe was in the year 1870; at that time I kept a cigar-manufacturing business.

Q. 4. Where was McCabe's place of business?

A. 4. At the time I bought from him it was between Cass and O'Fallon, and between Sixth and Seventh, in the alley.

Q. 5. Do you know Christian Worley?

A. 5. Yes, sir.

Q. 6. Do you know whether or not he was with McCabe at that time?

A. 6. Yes, sir.

Q. 7. State whether or not there was anything peculiar in the appearance of the tobacco that you noticed at the time.

A. 7. Well, I have heard Mr. Worley saying that—in 1870 or 1871, I could not recollect exactly which—that he was getting up a new patent finisher.

71 Q. 8. My question is, whether or not you noticed anything about the tobacco you purchased in 1870?

A. 8. No, sir.

Q. 9. Looked just like any other tobacco?

A. 9. The same thing.

Q. 10. Did you ever notice anything peculiar about any tobacco purchased there?

A. 10. Well, in 1871 I did.

Q. 11. What was it?

A. 11. It was smoother tobacco than I got from Mr. McCabe.

Q. 12. What, if anything, did you notice about its appearance?

A. 12. Then I went and asked Worley about this, and he told me he was trying a new finisher; I was up at the factory at that time.

Q. 13. Did he tell you how he made this tobacco?

A. 13. No.

Q. 14. Did you know how it was made or finished?

A. 14. No.

Q. 15. What, if anything, did you notice about it?

A. 15. I found it smoother than it was before.

Q. 16. What year did you say this was?

A. 16. 1870 or 1871; I am not right sure.

Q. 17. When did you go into business for yourself?

A. 17. 1869.

Q. 18. Can you tell about how long after you went into business it was you bought this tobacco?

A. 18. I bought some from him in 1870, some in 1871, and 1872. I suppose I bought some in 1874.

Q. 19. You can't tell which year you first noticed this?

A. 19. No.

Q. 20. Can you tell whether it was before 1872 you first noticed this?

72 A. 20. Yes, sir; I bought some in 1870, I know, of Mr. McCabe, but not of this kind. Of this kind in 1871.

Cross-examined by Mr. BOYD, counsel for respondents:

X Q. 1. Did you buy this kind of him after 1871?

A. 1. Yes, sir.

X Q. 2. Was that as smooth in 1871 as that which was bought afterwards?

A. 2. It was smoother.

X Q. 3. Then it had a better appearance in 1871 than it did afterwards?

A. 3. It had a better appearance after 1870 than it had before 1871 and 1872.

X Q. 4. Which looked the best, that made in 1871 or that made in 1872?

A. 4. 1872.

X Q. 5. How was that made in 1873?

A. 5. I don't know whether I ever bought any in 1873; I can't recollect.

X Q. 6. Did you buy any in 1874?

A. 6. I don't know, sir, whether I bought some in 1874. I may have bought a caddy now and then, at different times.

X Q. 7. How much did you buy of him in all?

A. 7. I could not tell; may be a caddy now and then, sometimes two.

X Q. 8. Do you think you have bought a dozen caddies in all of him?

A. 8. Yes, sir.

X Q. 9. How many more than a dozen?

A. 9. I suppose I bought about 3 or 4 dozen from him.

X Q. 10. Did you pay any more for this than for any other plug-tobacco?

A. 10. No, sir; I don't believe I did; not to my recollection.

X Q. 11. It was sold about the same price?

73 A. 11. Yes.

X Q. 12. You say you went up to McCabe's factory in 1872 or 1871?

A. 12. I can't recollect whether it was in 1871 or 1872.

X Q. 13. What did you go up there for?

A. 13. I went up to see the boys working there, and give them an order for some tobacco.

X Q. 14. What were they doing when you were up there?

A. 14. The men upstairs were rolling. The pressman was working downstairs. I didn't pay no attention to him, and then Mr. Worley showed me the gloss of the tobacco; the smoothness of it.

X Q. 15. Where was the tobacco that he showed you?

A. 15. Right downstairs, in the press-room.

X Q. 16. Was it in the finisher?

A. 17. No; he had a plug lying there, and he showed it to me.

X Q. 17. Did he show you his finisher?

A. 17. No; I didn't look at that.

X Q. 18. He told you, then, this was made in the new finisher, did he?

A. 18. Yes, sir.

X Q. 19. Did you see the finisher there?

A. 19. I seen a lot of boxes standing round there, what we call finishers. I didn't examine them.

X Q. 20. Did you see the sweat-room?

A. 20. Yes, sir; I seen the sweat-room before that.

X Q. 21. Did you see it then?

A. 21. No; I didn't go near the sweat-room.

X Q. 22. Where was the finisher you saw?

A. 22. I seen it standing in the press-room.

X Q. 23. What did it have in?

A. 23. I could not tell you whether it had any tobacco in or whether it was empty.

X Q. 24. Was it under the press?

74 A. 24. No.

X Q. 25. Was the head on?

A. 25. I couldn't tell you.

X Q. 26. Was there any finisher under the press at the time you were there?

A. 26. I paid no attention to it.

X Q. 27. How do you know the finisher was not under the press then?

A. 27. I know this was not, because this was standing on one side; I didn't examine the finisher at all.

X Q. 28. Was the pressman working when you were there?

A. 28. Yes, sir.

X Q. 29. What was he doing?

A. 29. Filling up some sets—moulds.

X Q. 30. What was he doing with the moulds?

A. 30. Filling them up and putting them in the screws.

X Q. 31. How many pressmen were there there?

A. 31. One that I seen.

X Q. 32. Nobody helping him?

A. 32. No; not that I know of.

X Q. 33. How many men did you see employed while you were there?

A. 33. I have seen four or five working upstairs and one down in the press-room.

X Q. 34. Four or five rollers upstairs, you mean?

A. 34. Yes, sir.

X Q. 35. How many stemmers did they have?

A. 35. I could not tell you; some 8 or 9, or 9 or 10.

(Signature waived.)

Counsel for complainants requests that the witness Robert E. Lee be produced for further cross-examination, he having learned since the witness left the stand some facts affecting his testimony, about which he desires to further cross-examine him.

75 Counsel for respondents replies to that that he refuses to produce said Lee for cross-examination unless the case is opened for further testimony-in-chief on behalf of respondents.

Counsel for complainants requests counsel for respondents to state upon the record whether his evidence in defense has been closed, unless opened on some such condition as mentioned in the foregoing statement.

Counsel for respondents replies that the record will speak for itself.

Testimony taken December 20, 1877.

J. R. HARRIS, being produced and sworn as a witness on behalf of complainants, deposes and says:

Examined by Mr. PARKINSON:

Q. 1. State your name, age, residence, and occupation.

A. 1. J. R. Harris; present residence, Shelbina, Missouri; tobacconist; fifty years old, nearly fifty-one.

Q. 2. How long have you been engaged in the manufacturing of tobacco?

A. 2. I can't say, since my early remembrance; on my own account since 1855 until the last three years, or in connection with others.

Q. 3. In what places?

A. 3. First, Kentucky—Boone County, Ky.; Hannibal, Mo.; Lexington, Mo.; Quincy, Ill.; and St. Louis, Mo.

Q. 4. Were you ever in any way connected with George S. Shryock, of this city, in business?

A. 4. Yes, sir.

Q. 5. When?

A. 5. I think my operations commenced in the spring of 1873.

Q. 6. Where did you get the machinery for your manufactory?

A. 6. It was owned by Mr. Shryock; the firm of Shryock and Company.

76 Q. 7. How did you finish tobacco at that time?

A. 7. If you will ask whether I did or did not do certain things, I would prefer.

Q. 8. I would rather you would answer the question.

A. 8. It takes a good deal of talking to do that. I take it for granted I am before two attorneys who want the facts of the case, and in order to expedite the work I make that remark. I can give you the details, if you wish it.

Q. 9. Please describe the mode of finishing tobacco used in your establishment after you went into partnership with Mr. Shryock, with special reference to the manner of sweating it, if any sweating was done.

A. 9. None, sir.

Q. 10. How long were you in partnership with Mr. Shryock?

A. 10. It closed during the panic. The date of it was, I think, in 1874; was it not? Probably 1873 was the date.

Q. 11. About how many months or years did the partnership continue?

A. 11. It was inside the first year, I think; it closed for want of means to run on.

Q. 12. Do you know anything about a mode of finishing tobacco by subjecting it to pressure in the finishers, and, while confining it under pressure there, sweating it in the sweat-room? If so, what is your first knowledge of such finishing?

A. 12. I know of it only from hearsay.

Q. 13. When did you first hear about such a method of finishing tobacco?

A. 13. Some time during last fall; this year.

Q. 14. State whether or not anything was ever said to you, while in partnership with Mr. Shryock, about such a method of finishing tobacco; if so, by whom?

(Counsel for respondents objects as leading.)

A. 14. No one ever spoke to me, I believe, sir. I think I have said I never heard of it till this fall.

77 Q. 15. How extensive has your opportunity been for knowing the different methods of manufacturing tobacco, especially of finishing?

A. 15. It ought to be, sir, equal to the average of men, if not greater; I have done more than an average business.

Cross-examination by Mr. BOYD, counsel for respondents:

X Q. 1. When you went with Mr. Shryock, the special purpose of your partnership was to manufacture a new kind of tobacco, was it not?

A. 1. I don't know whether you could call it new; what I did was the result of my experience; I don't know that it could be called new.

X Q. 2. It was what you called "Jubilee Twist"?

A. 2. That was one of the brands.

X Q. 3. It was for the purpose of manufacturing a plug tobacco on which you secured a patent, was it not?

A. 3. We secured a patent on the style of Jubilee Twist.

X Q. 4. It was for the purpose of manufacturing that that you went to Mr. Shryock, was it not?

A. 4. That was one of the brands; it was not the whole object, because I worked on every class; I governed and controlled the mode in all classes of work.

X Q. 5. Was not the inducement that Mr. Shryock had for taking you into partnership the representations that you made in regard to this patented mode of manufacturing tobacco?

A. 5. I can't tell what his inducement was.

X Q. 6. Was not the manufacturing of this kind of tobacco to be the principal business that you and Mr. Shryock were to carry on?

A. 6. I take it for granted that the inducement would be, as manufacturers, to sell that which the trade would call for.

X Q. 7. Did not, while you were with Mr. Shryock, you manufacture principally under those patents?

78 A. 7. I can't say, sir, as to that. I think it is likely that brand predominated.

X Q. 8. That was for a peculiar shape of twist, was it not?

A. 8. Yes, sir.

X Q. 9. Such that when it was completely manufactured it would present somewhat of a pear shape, and rough on its outside?

A. 9. Rough, do you say?

X Q. 10. Yes, or irregular in surface?

A. 10. It was irregular.

X Q. 11. Not smooth?

A. 11. The object was to be smooth; it was smooth, but, after all, irregular-smooth; that is to say, the surface would be smooth, as far as looks would be concerned, save that unevenness.

X Q. 12. It had an irregular surface, but smooth?

A. 12. Yes, sir.

X Q. 13. Would it have had that irregular surface which you sought to give it provided it had been sweated and pressed?

A. 13. No more so.

X Q. 14. What?

A. 14. Not any more so; not on that account.

X Q. 15. Would not sweating and pressing it, after your plugs had been twisted into shape, have destroyed the irregular surface?

A. 15. No; not pressed in that way.

X Q. 16. If it had been pressed in the way that Worley's patent calls for, would it not have spoiled the uneven surface you desired to give it?

A. 16. If I understand his system, it is entirely different from this.

X Q. 17. Is his system adapted to the manufacture of the kind of tobacco you wished to produce under those patents?

A. 17. In this shape, you mean?

X Q. 18. Yes.

79 A. 18. No; of this particular brand it would not.

X Q. 19. Can you tell exactly how long you were with Mr. Shryock?

A. 19. No, not exactly; I can't, because we commenced in the spring, and we finally ceased to operate some time during the panic, the same or the coming year.

X Q. 20. As a matter of fact, wasn't the panic in the fall of 1873?

A. 20. That is simply my memory; it is not distinct, but that is my memory; I think it was in 1873; it might have run into the year 1874 before our dissolution, or, rather, ceasing to exist as a firm.

Further examination by counsel for complainants:

Q. 16. Please describe the arrangement of the sweat-room in the factory where you and Mr. Shryock were at the time you went into it.

A. 16. Do you speak of the inner arrangement?

Q. 17. The arrangement with reference to the press-room.

A. 17. Of the sweat-house?

Q. 18. Yes.

A. 18. It was like all other sweat-houses known to all old manufacturers, only on a very small scale.

Q. 19. How large and where was the entrance to it?

A. 19. My memory is the entrance was at the front steps leading from the north. There were two buildings occupied—the upper story of two buildings. There was a bulge between the walls, and it was at the head of the entrance to the north room.

Q. 20. Was the entrance to the sweat-room from the outside or inside of the building?

A. 20. The entrance was inside the building—you mean to the sweat-house?

Q. 21. I said to the sweat-room.

A. 21. Yes, sir. This room was inside of the main building; as a matter of course, it must have been inside.

80 Q. 22. How was this entrance to the sweat-room situated with reference to the stairs?

A. 22. As I remember it, immediately at the head of the stairs.

Q. 23. About what was the size of the sweat-room?

A. 23. My memory is not distinct, but I should guess about six feet square, six feet horizontal measure; the height was greater than that.

Q. 24. Was there anything peculiar about the finishers on hand when you went there?

A. 24. The only peculiarity about them was they were very old style, sir, rather out of date.

By Mr. BOYD:

X Q. 21. Wooden or iron finishers?

A. 21. Wood, with iron bands—held together with iron bands.

X Q. 22. Made strong by iron bands?

A. 22. When you say made strong by it, manufacturers know that they are not strong in that sense of the word; wooden finishers will give, while iron finishers hold their place, from pressure. That is the objection I have against wood.

X Q. 23. All wooden finishers, you say, give?

A. 23. Yes, sir.

X Q. 24. Did these give any more than any other wooden finishers?

A. 24. No.

X Q. 25. Where was Mr. Shryock working when you went with him?

A. 25. I can't give the number; it was on Commercial alley, as you term it.

X Q. 26. Were you with him when he moved?

A. 26. Yes, sir.

(Signature waived.)

81 And the said WILLIAM REAGAN, being about the age of 40 years, and having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Question 1. What is your name, age, residence, and occupation?

A. 1. My name is William Reagan; I am about 40 years of age; I reside at 1321 North Twelfth street, St. Louis; am a tobacconist by occupation.

Q. 2. Did you ever work for Christian Peper? If so, when and in what capacity?

A. 2. Yes, sir; I worked for Mr. Peper, I believe, in 1868, I think, or 1867 I commenced with him. I was foreman in the press-room.

Q. 3. How long did you continue to work there?

A. 3. I continued to work there until, I believe, 1873 or 1874. I am not sure which of the two years.

Q. 4. How long did they finish tobacco there?

A. 4. They used to turn them over in moulds, the biggest part of them; small work they used to put in the finishers; generally used to turn over everything.

Q. 5. What did they do after they took it out of the finisher?

A. 5. They put them in caddies.

Q. 6. What then?

A. 6. Put them in the sweat-house.

Q. 7. Did you ever see tobacco finished in any other way at that place.

A. 7. No, sir.

Q. 8. Where did you work last year?

A. 8. For Mr. Worley.

Q. 9. How did you finish tobacco there?

82 A. 9. In the finisher.

Q. 10. How was it packed in the finisher?

A. 10. Packed between sheets.

Q. 11. What was done after it was packed?

A. 11. Put in the sweat-house.

Q. 12. Was anything done after packing it, before putting it in the sweat-house?

A. 12. No, sir; pressed it in the moulds first before going in the finisher.

Q. 13. State whether or not there was any pressure applied to the finisher before they were put in the sweat-house.

(Objected to by respondents' counsel as leading.)

A. 13. No, sir; there was no pressure; all the pressure was to go in the moulds, and put the pressure on afterwards in the finisher.

Q. 14. You are speaking of the way they finished at Worleys?

A. 14. Yes, sir.

Q. 15. Do you know Robert E. Lee?

A. 15. Yes, sir.

Q. 16. State whether or not you saw him at Worley's while you were working there.

A. 16. Yes; he came in one morning, I believe it was; I can't say whether June or July.

Q. 17. What year?

A. 17. This year.

Q. 18. Did you have any conversation with him?

A. 18. Yes; I was opening one of these finishers, when he came and sat down alongside of me, and he looked at the tobacco and said that was as nice tobacco as ever he saw, and he took hold of the plug and looked at it and rubbed his hands over it, and he said, "That is smooth; none of them can beat it." Said he, "That is the prettiest finished tobacco ever I saw," he says. "Well, yes," says I, "in a small style and in a kind of a small way;" and he says, "Yes; it is a wonder that some of
83 these old tobacco manufacturers couldn't see into this thing in time, of finishing off this tobacco. None of them ever saw it," he says, "until Worley got it up." So he spoke while I was packing the finisher, and he asked me then for a piece of that tobacco, and he said he "would like to have it, that that was good tobacco," and I gave him a piece out of a caddy that was open, and he stopped and talked to me then about an old pressman he had had working for him at Shryock's; he is dead, and I told him, "Yes," says I, "he is as just as mean a man, I guess, as yourself." I meant that way any way, and he thought to get me into the press-room; that was what he was working for; he thought he would get me in, and was coming around in that way, but I guess he seen that I knew he was telling lies, and he walked off after getting a piece of tobacco.

Q. 19. How were the tops of the finishers used at Worley's; that is, how were they secured down?

A. 19. The top of the finisher there was one of those sheets on top, then a thick iron over that, then bolts going across to keep the pressure on it, so it could not move. The bolts went through and through the finisher—two bolts.

Q. 20. How did you get the top down into place?

A. 20. By putting the pressure on; had to push down hard enough to get the pressure on.

Q. 21. Then how was it fastened in place?

A. 21. Sometimes with a key, a kind of nut; turned them on with nuts.

Q. 22. Was this before or after you put them in the sweat-room?

A. 22. Before we put it into the sweat-room.

Q. 23. When did you first see tobacco finished in this way?
A. 23. Never until I went last year to Mr. Worley's.

Cross-examined by S. S. BOYD, Esq., counsel for respondents:

X Q. 1. When did you first go to Worley's?
A. 1. I believe it was last April; was twelve months, I think.
84 X Q. 2. That is in April, 1875?
A. 2. Yes, sir.
X Q. 3. Where were you working before you went there?
A. 3. I worked for Mr. Peper.
X Q. 4. How did you force the head into the finisher at Worley's?
A. 4. By pressure from a screw.
X Q. 5. A hand-screw?
A. 5. Yes; had a lever.
X Q. 6. How many turns did you take on the lever?
A. 6. Well, pulled them down hard enough to get the bolts in.
X Q. 7. About how much above the sides of the finisher did the tobacco come before you put the head in, or was the tobacco simply on a level with the upper edge of the finisher?
A. 7. Well, it was level with the top of the finisher.
X Q. 8. How thick was the head of the finisher?
A. 8. I believe it was about an inch and a half or so; I forget now; about an inch and a half below before we put in the bolts. We had to pull them down low enough for them to put in the bolts.
X Q. 9. How high was your finisher?
A. 9. I guess about that high. (Indicating.)
X Q. 10. Two feet?
A. 10. Well, it might not be two feet.
X Q. 11. Well, if it might not be two feet, how much might it be?
A. 11. I never measured it.
X Q. 12. Can you give any idea how high it was?
A. 12. I guess it was about that high. (Indicating.)
X Q. 13. (After measuring the height indicated.) About twenty-two inches, then?
A. 13. Yes, about that.
X Q. 14. What did you use to press your tobacco in the moulds?
85 A. 14. A hydraulic pump.
X Q. 15. Any more force used there than you used on your finisher?
A. 15. Certainly; there must be.
X Q. 16. A great deal more, wasn't there?
A. 16. Oh, yes, sir.
X Q. 17. About how much more; ten times as much?
A. 17. No; well, about ten times, I guess; as much as two men could pull.
X Q. 18. When did you say you had the conversation with Mr. Lee?
A. 18. Some time this year, about June or July.
X Q. 19. What did he come there for?
A. 19. I can't say what he came there for.
X Q. 20. Did you know him before?
A. 20. Yes.
X Q. 21. Where?
A. 21. I knowed him in 1861, down at James S. Price's.
X Q. 22. Were you employed there?
A. 22. Yes, sir.
X Q. 23. What were you doing there?

A. 23. In the press-room.
X Q. 24. How many pressmen did you have at Worley's?
A. 24. Two.
X Q. 25. Who besides yourself?
A. 25. Two more boys; well, they were as tall as you.
X Q. 26. I say who besides yourself?
A. 26. There was two in it.
X Q. 27. Two boys?
A. 27. Well, they were young men, but they were not getting men's wages though. They were about twenty or twenty-one years of age.
X Q. 28. How did you say the tobacco was manufactured by Mr. Peper?
86 A. 28. Pressed on the moulds; they used to turn them over; sometimes they would put an odd set into the finisher, but that was according to the work. If it was a small work, we would put them into the finisher, that they could not take too long a time to turn them. After coming out of the finisher, we would put them in caddies or boxes; into caddies they generally put the small work; and then put them in the sweat-house.
X Q. 29. Did you ever see plates used there?
A. 29. Never; never used them in that way.
X Q. 30. How did they use them?
A. 30. They of course put plates into this finisher; took them off these plates into the caddies, and then put the caddies in the sweat-house.
X Q. 31. What did they put the plates in the finisher for?
A. 31. To finish them off, like.
X Q. 32. And then pressed the tobacco into the finisher, didn't they?
A. 32. Yes, sir.

Mr. PARKINSON:

Q. Was it in 1875 or 1876 that you went to work for Worley?
A. It was last year that I went to work; this is 1877.

By Mr. BOYD:

X Q. 33. What makes you think it was last year?
A. 33. Well, I know it was.
X Q. 34. What time last year?
A. 34. Last year, it was about April, I believe—I think it was in April—that I started in with Worley. First of last April is twelve months, I think.
X Q. 35. Who were you working with before you went to Worley's?
A. 35. With Peper.
X Q. 36. What did you leave for?
A. 36. Well, me and Peper's step-son had a few words, and so I quit. I was hired by the year there at Peper's.
87 X Q. 37. Then you had a quarrel, and that was the reason you left?
A. 37. No quarrel, but they wanted to find fault with me; so I quit rather than to have any words with them; but I could have demanded my wages for a year if I had wanted to, but I didn't.
X Q. 38. Did they pay your wages?
A. 38. Yes; until I quit.
X Q. 39. But you were not paid for the rest of the year?
A. 39. I never asked it, as long as I quit myself.
(Signature waived.)

And the said JOHN MCNAMEE, being about the age of thirty years, and having been by me first cautioned and sworn to tell the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by Mr. PARKINSON:

Q. 1. What is your name, age, residence, and occupation?

A. 1. My name is John McNamee; am a tobacconist; thirty years of age; residence, 1230 North Seventh street, St. Louis.

Q. 2. Where did you work in 1871–'2?

A. 2. I worked for Mr. Lee in 1871 and 1872—that is, part of 1872. I worked for Mr. Worley before I started in for Mr. Peper.

Q. 3. Who was in company with Mr. Lee at that time?

A. 3. Mr. Shryock.

Q. 4. What work did you do?

A. 4. I was working in the rolling-room.

Q. 5. Were you ever in the press-room there?

A. 5. Yes; going into the shop I had to go into the press-room—that is, to go to the rolling-room.

88 Q. 6. How often would you be there?

A. 6. Morning and evening, and sometimes at noon, when I would go to dinner, I would have to go through; and if I wanted a drink of water I would have to go down there.

Q. 7. Did you see how they were finishing tobacco?

A. 7. Yes, sir.

Q. 8. How was it?

A. 8. Well, they put it under the hydraulic press; then they put it into the iron finishers, and took it from the iron finishers and packed it in caddies or butts, just according to the size of the lump they had. They used to sweat them in the sweat-house after they had it in the caddy.

Q. 9. Can you state whether they sweat it in the finisher or in the box into which they put it after taking it out of the finisher?

(Objected to by counsel for respondents as leading.)

A. 9. They sweat it in the box or caddy.

Q. 10. Did you ever see it sweat in any other way there?

A. 10. No, sir; not there.

Q. 11. Or finished in any other way?

A. 11. No, sir.

Cross-examined by S. S. BOYD, Esq., counsel for respondents:

X Q. 1. When did you go to work for Mr. Lee?

A. 1. In 1871. I worked for him previous—before that.

X Q. 2. At the time you speak of now, when did you go to work?

A. 2. 1871.

X Q. 3. What time?

A. 3. I guess about July or June; I quit Mr. Worrell that spring some time, and went to work for Peper, and Mr. Lee came after me to go to work and make some pound lumps?

X Q. 4. When did you leave Lee?

A. 4. I left him in 1871. He sent me over to Springfield to work for another firm; he was over there himself too.

89 X Q. 5. Then you went to Lee in June of 1871, and left him in 1871?

A. 5. Well, I left him for a while; I went to Springfield and worked

there a month or so; he was there himself; and then I came back and was idle some time, until about February.

X Q. 6. Of 1872?

A. 6. Yes; and then worked a short time, and then closed down again.

X Q. 7. What did they close down for?

A. 7. I have no idea.

X Q. 8. How long were you at work for Lee in St. Louis at that time?

A. 8. Well, I should judge about two or three months; that is, in 1871 I mean.

(Signature waived.)

And the said JAMES KINNEY, being about the age of 31 years, and having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by Mr. PARKINSON:

Q. 1. What is your name, age, residence, and ocupation?

A. 1. My name is James Kinney; I am 31 years of age; residence, 822 Markley; occupation, tobacconist.

Q. 2. State whether or not you ever worked for Shryock & Co.

A. 2. Yes, I worked for Mr. Shryock; I worked for him in 1869, and worked for him awhile in 1870, and awhile in 1872.

Q. 3. In what capacity?

A. 3. Rolling.

Q. 4. Were you in the press-room at all while there?

A. 4. Yes, sir.

90 Q. 5. How frequently?

A. 5. Well, I used to come down out of the rolling-room and go through a part of the press-room in getting out of the factory and then when we went to get our wages on pay-night I had to go the whole length of the press-room to the other end of the office; the office was on the press-room floor.

Q. 6. Did you see how they were finishing tobacco?

A. 6. Yes; I saw how they were finishing tobacco.

Q. 7. How did they finish tobacco.

A. 7. They put it into molds; first put it under the hydraulic, and then took it from there and put it in a large iron finisher, and took it out of the finisher and packed it in caddies or butts according to the size of the lump.

Q. 8. What was done with it after it was packed the last time?

A. 8. Well, it was put in caddies or butts and put in the sweat-house.

Q. 9. Do you know whether or not those caddies or butts were taken out of the boxes in which they were sweat, after being taken out of the sweat-house?

A. 9. Well, they were supposed to be sweat just as they are put in the caddies or butts, not supposed to be put in any boxes afterwards that I could see.

Q. 10. Are they unpacked again before they are sold?

A. 10. No, sir; I think not.

Q. 11. Did you ever see tobacco finished in any other way there?

A. 11. Not in that factory.

Q. 12. Where did you work last year?

A. 12. For Mr. Miller and Worley.

Q. 13. How is tobacco finished there?

A. 13. Well, they finish on this new process of his; this new style of finish which puts it between tins, puts the finisher in the sweat-house.

Q. 14. What kind of a top is on this finisher?

91 A. 14. On this new finisher?

Q. 15. Yes.

A. 15. There is an iron plate. I should think it is about from a quarter to half to an inch thick. It goes on top. That is to press down, and bolts go through on top of that, from one side of the finisher to the other, and nut-screws on the other side.

Q. 16. Is the top fastened down before it is put in the sweat-house?

A. 16. Yes, sir.

Q. 17. How do you keep the top in place?

A. 17. Well, they pack the finisher full and then put it under a small screw, and use the pressure of a small lever to pull it down until they get it to a certain depth below the top of the boxes, to get the plates in, or bolts through, I mean.

Q. 18. Anything placed between the layers of tobacco and the finisher?

(Objected to, as leading, by respondents' counsel.)

A. 18. There is the tins placed between the layers.

Q. 19. When did you first see the top of the finisher in this way?

A. 19. The first time I saw it go through the regular process was in Worley's shop. That is the first time I noticed the finisher, and I never saw what it was used for until about a year, ago in Ryan's shop.

Q. 20. Do you know Robert E. Lee?

A. 20. Yes, sir.

Q. 21. Did you ever have any conversation with him about his testimony when on the stand in this case?

A. 21. Yes, sir. He made the remark to me one day in the saloon corner of 7th and Clark avenue—he asked me, or says he, "What does Mr. Worley think about this case?" I says, "I don't know;" and he says, "I thought Worley was smarter than what he is." Says he, "There was a question," says he, "I looked for him to ask me while I was on the stand which would have done him some good."

92 Q. 22. Was anything more said about this question?

A. 22. No, sir; nothing more.

Q. 23. Did Mr. Lee ever say anything to you about the finishers used by him?

A. 23. Yes; he asked me—he says, "Jim, you must have seen them finishers in my shop down there," he says. "Why, no, Bob," I says, "I didn't know you had anything there of that kind. You must have kept it a secret;" and he says, "I did keep a secret;" says he, "I told my pressman if he told anybody I would discharge him."

Cross-examined by S. S. Boyd, Esq., counsel for respondents:

X Q. 1. When did you go into Worley's?

A. 1. In 1876.

X Q. 2. What time?

A. 2. A few days after he started in to work. I can't remember the month exactly.

X Q. 3. In whose employ were you prior to that time?

A. 3. In Loker's employ.

X Q. 4. Prior to being in Loker's employ with whom were you?

A. 4. I was in Mr. Shryock's employ, when I quit there to go to work for Loker.

X Q. 5. Prior to being in Shryock's employ with whom were you?

A. 5. I was working in several different factories; worked for Mr. Cole, of Walnut street, before I went to Shryock's.

X Q. 6. Always worked as a roller?

A. 6. Yes, sir.

X Q. 7. You say you never saw tobacco pressed between tins until you saw it at Worley's place?

A. 7. No, sir; not go through the regular process; not that kind.

X Q. 8. What do you mean by regular process?

A. 8. That is the process he used.

93 X Q. 9. What process did you see?

A. 9. I saw it in the old style, what I call the old style; that is, take it from the hydraulic out of the molds and put it in the old iron finisher, and take it from there and pack it in the caddies or boxes.

X Q. 10. In this old iron finisher were metal plates placed between the layers of tobacco?

A. 10. Yes; tin plates were used.

X Q. 11. Any pressure applied there in the old iron finisher?

A. 11. Yes.

X Q. 12. The head was forced in, the same as now, by Mr. Worley?

A. 12. Well, they forced down the pressure on it in the old finisher.

X Q. 13. About how much pressure did they use?

A. 13. Well, I can't say how much pressure it took.

X Q. 14. About how far did they force down the head in the old finisher?

A. 14. I can't say they forced it down; it is according to how much work. Sometimes they would force it down, may be, six inches from the top, and sometimes they didn't fill the finisher plumb to the top.

X Q. 15. How much did they force it down at the top from the level to which they filled the finisher?

A. 15. From the level?

X Q. 16. Yes; to which they filled it.

A. 16. Well, I say they forced it down according to what amount of tobacco they had got in the finisher. Sometimes they didn't fill it more than half full, and sometimes they filled it to the top.

X Q. 17. When they filled level with the top, how far did they force down the top of the tobacco?

A. 17. They forced it down, I should say, about three inches.

94 X Q. 18. More than they do now?

A. 18. Yes.

X Q. 19. Well, the pressure that you applied to the tobacco, when it is put in the moulds by means of the hydraulic press, is a great deal more than that you apply by means of the screw-press, is it not?

A. 19. Yes.

X Q. 20. Do you know anything about the heat they used to use in sweating the tobacco?

A. 20. No, sir; I do not.

X Q. 20. Do you know anything about the heat they use now?

A. 21. No, sir; I do not.

X Q. 22. Do you know anything about pressing tobacco, practically?

A. 22. No, sir; I never worked in the press-room.

X Q. 23. Was your attention called to the method of manufacturing, and the particular method of pressing tobacco, while you were in Shryock's factory?

A. 23. No, sir; my attention was just as anybody's would be working in a factory, passing through and noticing one thing and another. I stayed there sometimes five or ten minutes talking to the foreman.

X Q. 24. When the finisher was under pressure could you tell whether there were any plates inside of the finisher?

A. 24. No, sir; not when it is closed up.

X Q. 25. When the sweat-room was closed up could you tell what was in it?

A. 25. No, sir; I could not.

X Q. 26. Did you always see what was put in the sweat-room?

A. 26. No, sir; I did not.

X Q. 27. Did you always see how tobacco was packed in the finisher?

A. 27. No, sir; I didn't say so.

95 X-Q. 28. Did you always see what was done with the tobacco after it was taken out of the sweat-room?

A. 28. No, sir.

X Q. 29. Your work was upstairs, wasn't it?

A. 29. Yes, sir.

(Signature waived.)

And the said HENRY BURLEW, being about the age of 50 years, and having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Question 1. What is your name, age, residence, and occupation?

A. 1. My name is Henry Burlew; I was 50 years old the 5th of last November; my residence is 1126 North 20th street, St. Louis; occupation, tobacconist.

Q. 2. How long have you been engaged in the tobacco business, and what opportunities have you had, if any, to become familiar with the process of manufacturing and finishing tobacco? State fully.

A. 2. I have been in the tobacco business 37 or 38 years; that is, I have been engaged in it all my life nearly, except 2 or 3 years. Went in when I was seven years old.

Q. 3. In what capacity have you worked at different times?

A. 3. I have been roller and foreman most of the time for different parties.

Q. 4. For what establishment have you been foreman?

A. 4. For Miloen & Marsman, Cincinnati, for 15 years; then I was carrying on the business for myself afterwards some 10 years, and I have worked in different factories; worked in Louisville for Holbrook,
96 and for Danoman and Drummond in Atton, and Leggett & Myers here, and I am foreman for McCabe now.

Q. 5. How have the establishments in which you have worked compared in the extent of their manufacture, in the average, with the tobacco manufactured throughout the country?

A. 5. They have been about as large as any in the country. Drummond's is about 1,400,000 lbs. a year, the year I worked for him; and Leggett & Myers, you know what their establishment is; and Holbrook, in Louisville, I worked for him; and I had a pretty good shop myself once, large factory; and Miloen's factory is a large factory in Cincinnati.

Q. 6. When did you work for McCabe?

A. 6. It is two years next April, the 20th I think, I went to work for him.

Q. 7. How did you finish tobacco there?

A. 7. I finished it by putting it in the finisher with tins between, then put it in the sweat-house and sweat it with tins between the lumps, and then took it out when it was cold.

Q. 8. What is done to the finisher after the tobacco is packed in it?

A. 8. It is pulled down; there are ribs of iron on top to hold it in position, and while it is in the sweat-house to keep it from bulging out between the tins.

Q. 9. How did you get the tobacco in its place?

A. 9. Pressed it down with a press.

Q. 10. When did you first see tobacco pressed in this way?

A. 10. When I went there to work, Worley, he went away and I took his place, and that is the first time ever I seen it. He showed me how to do it, how to manage it, and I did so. He told me how long to keep it, and so on, and I done according to his instructions.

Q. 11. Please state what, if any, advantages you have found to obtain in this way of finishing tobacco, as compared with other methods in use before.

A. 11. There are several advantages, in my judgment, over
97 the old way for making the tobacco. It don't require no oil, and it makes it smooth, makes it solid, and ready for the market quicker. When it gets cold you can turn it out the next day if you want to, and it will not bulge out of the box, but will stay in its place. In the old way—you would have to keep it in the box some time before it becomes solid and fit for the market. The way I used to make it before I used to have tobacco made four months ahead, and could not turn it out to dry, because if a damp day would come, or anything of that kind, it would swell it, and it would bulge out and make it soft, so that it didn't give satisfaction; but in this way, after it gets cool out of the sweat-house, you can leave it with no head on at all, and it will not bulge at all because it becomes solid—as we call it, kind of dead—and it won't bulge or give at all, but in the other way it will. Take it out of the old-fashioned finishers, and we used to pack it in boxes right away and put the heads on, and it would have to remain some time before we could turn it out to customers, or it would become soft—not so firm. Then, besides, it brings out the oil in the wrapper; the pressure from the head, the gradual pressure, brings out the oil. That lasts on it and gives it a gloss, where if you were to put oil on it it would not do. It would spoil the tobacco. We used to use oil to keep it from sticking to the tins, but now we don't use any oil, and that is an advantage. And another thing, if it is damp when you pack it in its place, it will dry out immediately all that dampness, especially on the ends; otherwise the tobacco would likely mould on the box. That dries out the dampness. Tobacco cannot always be got in just the right order to press. When we press it sometimes and think it is in right order we are mistaken. It is owing to the kind of leaf it is made of. When dampness comes to the box it will get mouldy. This heating process dries out that dampness, and that is an advantage. And then it brings out the oil, so that when you open the box you can pull off a plug, and it is as smooth as glass. From this heat, or pressure that the heat gives to it against the tins, it makes the little fibers and
98 ridges of the tobacco that is rough—smoothes them out. If you have ever seen the lumps when it comes together, you will notice they are rough little fibres, and it brings them down and it makes

it smooth as glass, and then the oil, it brings it out, and the oil will last on the top, where artificial oil will not last, but would spoil it. We don't use a bit of oil at all. I used to use barrels and barrels when working for other parties. That expense is done away, and this leaves it on the top to keep it from sticking, because, in old times, if we put it in the caddy it would stick and pull off half of the wrapper, but this don't do it. That is an advantage I have found since I was in the business. I never saw it used anywhere before, and had I, I certainly would have used it.

Q. 12. What happens to the oil when you apply artificial oil?

A. 12. It will mould; make streaks of mould through the lump. It will finally get rancid and make the tobacco smooth if it was used before, because we could not get the surface smooth to keep it from sticking in the old fashioned-way. Press it down to-day and put it in the box in the old-fashioned iron finisher and let it stand may be all day; sometimes pull it down and let it stay, if we didn't want to use it, and take it out the next, and we would have to pack it right away in the box. Heat makes it expand, makes it smooth, and it comes back to its position, and won't give at all. That is the difference, and you can sell the tobacco the next day, if you want to, if it is cold. At least we have done it, and do do it, for you can't do it the other way; it wont't give satisfaction, but swells up.

Q. 13. How long would you have to keep it on hand the other way?

A. 13. I used to have it four months ahead sometimes; and the longer I kept it the better it would be the other way, because more firm; but you take it from the press and sell it the next day, it would come back on you and swell up.

Q. 14. Have you ever had any trouble from the swelling of the oil pressed out of the tobacco becoming rancid, where it is finished as you finished it at McCabe's?

99 A. 14. Oh, no; that is the natural oil in the leaf forced out by heat. It gives it that gloss. We put a heavy wrapper outside always, so it has more body in it than anything else, and this heat brings that oil of the tobacco to the surface and gives it that gloss, coming in contact with the tins between each layer, and with iron plate also. They must all be level to make them even in the pressure, the same as in the old finisher, only they don't give it that rich, glossy appearance which Worley's and McCabe's tobacco have.

Q. 15. Have you any specimen of tobacco finished in the old way?

A. 15. McCabe told me to press some in the old and new way, and I did so.

Q. 16. Will you produce it?

A. 16. Yes, sir.

(Specimens were produced and marked Exhibit A, new method, and Exhibit B, old method.)

WITNESS. They were both put in at the same time and taken out at the same time. One is the new way and one is the old way.

Q. 17. How does the gloss of such a cake as this compare with that produced on the better quality of tobacco?

A. 17. The finer the tobacco the finer the gloss. I had no tobacco of a better kind when I made this. We stopped work this week, and that is the only kind I had. I could have got a finer tobacco, but I could not have had it in the old way, because we don't make any that way. I will add this, the heat brings out all the fibers, as I explained a while ago.

Cross-examined by S. S. BOYD, Esq., counsel for respondents:

X Q. 1. You say by this process you use no oil?

A. 1. No, sir.

X Q. 2. In no part of it?

A. 2. No part at all. Just washed the tins and rubbed them; after they are washed, rubbed them with a rag.

100 X Q. 3. Do you use any oil at all on tobacco that has passed through this process?

A. 3. No, sir.

X Q. 4. Or in connection with it?

A. 4. No, sir.

X Q. 5. How do you prevent tobacco from sticking to the molds?

A. 5. We wash them.

X Q. 6. With what?

A. 6. Water.

X Q. 7. Didn't you wash your moulds with oil?

A. 7. No, sir.

X Q. 8. Never?

A. 8. No, sir; not black tobacco. The first time we wash them, making black tobacco. They get dirty, and we put oil on the black tobacco.

X Q. 9. Do they use oil on bright tobacco?

A. 9. Yes; oil on the tins.

X Q. 10. Do you state as a matter of fact that all manufacturers who do not use this process have always used oil, whether they made bright or black tobacco?

A. 10. I do not say all; I say all as far as I know did, but I don't know all; but I know a man asked me the other day if I wasn't using oil, and I told him no.

X Q. 11. Then you mean to say, as far as you have been engaged in manufacturing tobacco, you have always used oil, whether manufacturing bright or black tobacco?

A. 11. Yes; always did.

X Q. 12. Does not this glossy appeaarnce depend a good deal on the pressure which you apply?

A. 12. Well, the pressure on those is not very great.

X Q. 13. I am not talking about that.

A. 13. Well, I don't understand you.

101 X Q. 14. Does not the glossy appearance which tobacco will present when finished depend a good deal on the pressure which is applied to the tobacco?

A. 14. I suppose the pressure would make a glossy appearance, of course, more than it would if not pressed at all; that is, pressed down as heavy. It don't want much pressure, because it throws it out of shape.

X Q. 15. Suppose you press tobacco in a mould, and allow it to lay some little time, will it not present a glossy appearance when taken out?

A. 15. No; not in the moulds.

X Q. 16. In the iron moulds?

A. 16. Well, it makes them smooth surface, of course—pretty smooth surface; iron will, and so a wooden one will. It will not make it have that gloss that tin will. The pressure on tin in the finisher makes the smoothness; of course that is the finishing part of it, but the moulds don't give it the gloss. An iron mould might make it look a little more glossy than a wooden one, but it don't give it this gloss and smoothness,

because the edges are left on them; and put them in the finisher, with the tins between them, and it makes the finish, gives it that smoothness and the look that we want on it.

X Q. 17. Do you use iron moulds at McCabe's?

A. 17. Yes; iron and wooden, mostly wooden; only one set of iron moulds in our house.

X Q. 18. Then you are not accustomed to use iron moulds, are you?

A. 18. Yes; I used them when I was in business. I had as fine machinery as anybody. Wooden moulds are not used any more now, except in small factories, and they are doing away with them.

X Q. 19. In which kind of moulds was that tobacco manufactured that you have there, which you say is manufactured under the old process?

A. 19. Both were pressed in wooden moulds. We have no iron
102 moulds of this shape in the house. Both were pressed at the same time, the same goods, the same work, and the same casing.

X Q. 20. How do you mean both pressed at the same time?

A. 20. In the same set of moulds, the same filling.

X Q. 21. Taken out at the same time?

A. 21. The same time; put in the new press at the same time, and the old press at the same time. Mr. McCabe told me to do it, and I did it, of the same leaf and wrapper.

X Q. 22. How did you put what you call the old piece of tobacco in the finisher?

A. 22. Put it in the finisher under the screw; pulled it down as we always do.

X Q. 23. What did you put in the finisher besides tobacco?

A. 23. Blocks.

X Q. 24. Did you put a metal plate on top?

A. 24. A tin plate and a block on top of it, and a block on top of that, the same as we always do, and the same as this (indicating), only this is in a different box. This is in a box they used in the drying-house, when we put it in to sweat to make this gloss on it.

X Q. 25. Then these two were put in the finishers at the same time, and subjected to the same pressure?

A. 25. Yes, sir; taken out this morning, both at the same time. The pressman took them out.

X Q. 26. Were they submitted to precisely the same pressure?

A. 26. They were in the same set of moulds, pulled under the same hydraulic.

X Q. 27. After they were taken out of the moulds where were they put?

A. 27. One in the old style of finish, and the other in the new style of finish.

X Q. 28. How was the old style of finisher constructed?

103 A. 28. Made with an iron band around it, keys to key it up, or screw it up, the same as under the old style; use either one. All square boxes hold so much, filled full and pulled down, the same as the other, only didn't have much pressure on; it didn't want it. We pull it in the moulds light or hard, but didn't pull this any harder than that (indicating), because we don't want it to be different from the others. We roll it then in the dry-house, and keep it there until a certain time, until we want to take it out, and then pack it and let it get cool. That is the difference.

X Q. 29. Now, if you will answer my questions we will get through a good deal quicker.

A. 29. I will.

X Q. 30. What was done with that old piece of tobacco when you took it out of the mould?

A. 30. We put it in the old-fashioned finisher.

X Q. 31. Was a metal plate put on top of that piece of tobacco?

A. 31. Yes.

X Q. 32. How many layers of that tobacco did you have in that finisher?

A. 32. I think only five or six.

X Q. 33. How many layers of tobacco did you have in the new finisher, in which the other piece was placed?

A. 33. It was full.

X Q. 34. How much pressure did you apply to the old finisher?

A. 34. I can't tell exactly; I don't know how much; pulled it as we would by rule, as I have been used to pull it in the old-style way, as it was done before. I don't know how much pressure we put on it; used the hydraulic; I can't tell; didn't have a gauge of a certain pressure. We always pull it as hard as we think right, what we think it ought to be, and give it the same pressure, but didn't have it gauged at all.

104 X Q. 35. Did you use the hydraulic pressure with the finishers?

A. 35. On the old style we did; yes, and retainer.

X Q. 36. Then I understand that the old piece of tobacco was first pressed in a mould under hydraulic pressure?

A. 36. Yes, sir.

X Q. 37. And then taken from the mould and put in the finisher again and pressed by hydraulic pressure?

A. 37. No.

X Q. 38. Then you didn't use the hydraulic pressure on the finisher?

A. 38. Yes, on the old style of finisher; but we didn't need it, because this only had a few layers, and we did it with hand to make it just what we wanted it; of course we didn't run it under, because we out-used five or six layers in the finisher, and that is the reason we didn't put it under the hydrauiic.

X Q. 39. Which gives the most pressure, the hydraulic pressure or the hand-press?

A. 39. The hydraulic.

X Q. 40. In the old style you used the hydraulic?

A. 40. Use it now and all the time in the moulds, and also in the finisher.

X Q. 41. Then if in the old-fashioned style of finisher you used the hydraulic pressure after the tobacco was put in the finisher, and you were asked to make a specimen of tobacco according to the old style, why didn't you submit it to the hydraulic pressure while it was in the finisher?

A. 41. Didn't need it for four or five layers; there was plenty of pressure without it; didn't need it; it was all the same process, except that we didn't want to mash it all to pieces by putting it under the hydraulic. If we had there wouldn't have been much left of it.

X Q. 42. If you had put it under the hydraulic, and put on it the pressure that you used to put on it when the thing was full, would that tobacco present a smoother appearance than now?

105 A. 42. Not a bit; the same thickness; no difference.

X Q. 43. Then you say if you had used the hydraulic pressure on the tobacco it would have been all the same thickness as now?

A. 43. If I had filled it as it ought to have been, yes.

X Q. 44. Suppose you had the same pressure on that you used to put on?

A. 44. Why, it would have mashed it out of all shape; would have spread it out. With only five layers it would have mashed them to dust. We must get the finisher full, and then we can put all the pressure on that we want to put on; but we knew there were but five layers, and didn't propose to put it under the hydraulic.

X Q. 45. Suppose you had filled that old finisher with tobacco just as you used to, and had put the hydraulic on, would you have used the same pressure then that you used at this time?

A. 45. Oh, yes.

X Q. 46. Do you say, as a matter of fact, that the finished appearance of the tobacco does not depend at all on the amount of pressure you apply?

A. 46. Well, you have to apply a certain amount of pressure to keep the tobacco in shape, what we call manufacture it, press it down, and make it look rich, and when we put it in the finisher, with tins between, that gives it the finish and gloss, and that is why we put it in the finisher, to give it a finishing process; but of course we have to run it through moulds, and pull hard on the moulds—very hard; of course we pull harder when we fill the finisher full, because with 200 lbs. in it we have to pull a heap harder, and when we put it in the finisher it is to give the finish. Then, with the tins between, the tins give it that smoothness and make it look better, and it pulls apart better.

X Q. 47. What do you say now; does it make any difference in the smooth appearance of the tobacco whether you apply a high degree or low degree of pressure to it in the finisher?

106 A. 47. Well, the finisher ought to be pulled very hard. The moulds are pulled the hardest. They ought not to be pulled very hard, because it makes lumps, and they will go into one another; each lump is not the same size, and one will go into the other; therefore we don't pull as hard in the finisher as in the hydraulic.

X Q. 48. Do you pull harder in the old process or the new, in the finisher?

A. 48. Oh, in the old; the new process we don't pull so hard, because we pull in the moulds pretty hard, and put it in the new process; it becomes hard in the dry-house. The tobacco gets soft, and if you pull it as hard as the other it will cake into one another in the edges. It gets very soft in the dry-house.

X Q. 49. Do you press it any harder in the moulds in the new process than the old?

A. 49. Oh, I don't know that we do.

X Q. 50. You don't aim to?

A. 50. No, just aim to press it just so hard. Bright tobacco, or very dry, we have to pull it very hard, about as hard as we can.

X Q. 51. In both cases?

A. 51. Old and new, both.

X Q. 52. But when you get to the finisher you apply less pressure in the new process than the old?

A. 52. Oh, yes.

X Q. 53. Now, this old piece of tobacco was taken out of the finisher and put into the caddy, was it?

A. 53. It has not been in the caddy.

X Q. 54. What did you do with that old piece of tobacco which you took out of the finisher?

A. 54. Laid it on a box.

X Q. 55. Has the old piece been sweat?

A. 55. No; put one in at the same time as the other, and took both out at the same time. They have never been sweat. This is the one (indicating) that has been in the new finishing process, and the other has not.

107 X Q. 56. Has the old piece ever been sweat at all?

A. 56. Oh, no.

X Q. 57. In the old style, when you turn out tobacco, don't you always sweat it?

A. 57. Years ago we used to sweat tobacco, most everybody, but of late years they do not.

X Q. 58. How do they keep it from swelling?

A. 58. As I told you, they have to lay it there until it gets age, when you take it out of the finisher before it swells up, and put it in the caddy, and put the pressure on, and nail it down, and it takes four months before it is fit for market, and then after it was turned out I have seen it swell, but this won't do it.

X Q. 59. Don't you sometimes use gum to prevent its swelling?

A. 59. A good many people do.

X Q. 60. That prevents it, don't it?

A. 60. I don't think it prevents its swelling. It is used to make it have a glossy appearance when you cut it open. They use a good deal of sugar now to harden, and some think it helps to give tobacco a body, make it closer together, as you might say, that is more adhesive, but I thought it was done to give gloss.

X Q. 61. Do you find any advantage, as far as selling is concerned, by the use of gum?

A. 61. There might have been; I don't know; I always had tobacco enough ahead.

X Q. 62. Do not manufacturers, as a matter of fact, use gum to prevent tobacco from swelling?

A. 62. Well, some say so.

X Q. 63. How much heat did you have with that new process?

A. 63. We ran it to 130 or 140 degrees; built a fire in the evening generally, unless it is ordered in the afternoon, and run it on' day and night and the next day in our place, because it is a frame; but it would not require it in a brick place so much.

108 X Q. 64. Then you took about 36 hours, all day and all night and all the next day?

A. 64. Yes; in our place.

X Q. 65. Thirty-six hours?

A. 65. Yes; that is, we aim to make it that way, but have no particular gauge about it. It is pretty hot in there sometimes; sometimes in the morning it cools down.

X Q. 66. Is this Mr. McCabe Henry McCabe?

A. 66. Yes, sir.

(It is stipulated by counsel that complainants may produce the patent sued on, or a certified copy of the same, at the hearing, to be used with like effect as if offered in evidence at the time of the taking of the deposition.)

And the said CHRISTAIN WORLEY, being about the age of 40 years, and having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy

aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Question 1. What is your name, age, residence, and occupation?

A. 1. My name is Christain Worley; age, 40 years next March; residence, 1411 Salisbury street; I am a tobacconist.

Q. 2. Are you the patentee of the same name referred to in the patent here in suit?

A. 2. Yes, sir.

Q. 3. Were you ever in the employ of Christian Peper, of this place?

A. 3. Yes, sir.

Q. 4. When, and in what capacity?

A. 4. I was rolling for Mr. Peper; I guess it was 1855 or 1856. I can't tell the year; it might have been 1857. I worked up to about 1858 or 1859.

109 Q. 5. About how many years?

A. 5. I guess I worked for him 4 or 5 years at that time; I worked for him several times.

Q. 6. What work did you do there?

A. 6. I was roller, rolling tobacco.

Q. 7. Did you see anything of the work in the press-room?

A. 7. Oh, yes; them days we used these old-style presses, before we had any hydraulic presses. Mr. Peper is the first man that ever had a hydraulic press in St. Louis, I think. His rollers would have to go down about eight or ten times a day, and help to pull the press with a long lever, and of course we went to the press-room every time we went down. The rollers worked up stairs.

Q. 8. When did you first know of any tobacco being finished in the method described in your patent here in suit?

A. 8. Well, that was in the winter of 1869 and spring of 1870.

Q. 9. Where were you working at that time?

A. 9. I was working for Mr. McCabe.

Q. 10. At what place?

A. 10. I started to work for him on Second, between Elm and Myrtle. From there I moved in 1869. I think it was along in July or August that we moved between 6th and 7th, and O'Fallon and Cass avenue, and the factory was on the alley.

Q. 11. It was at this place, the one on Cass avenue and 7th, was it, that you first——

A. 11. Yes; that is where I first done this, along in 1869 and spring of 1870. Well, we went to work pretty early that next year.

Q. 12. How soon after you moved to this place, near Cass avenue and 7th, did you begin to use this mode of finishing tobacco?

A. 12. I guess two or three or may be four months.

Q. 13. What kind of finishers did you use then?

A. 13. Before these new finishers?

110 Q. 14. At this place on Cass avenue.

A. 14. I used both the old finishers and my own.

Q. 15. How were your own constructed?

A. 15. At that time the first start I made at it came about in this way: We moved—I think it was in July or August; I am not certain those were the months; I think McCabe can tell about that better anyhow. We lost two months of work by moving and fixing up, and when we got to work up there we were short of stock, and we worked pretty late that fall, and McCabe was saying we would have to go to work early next

spring, and I told him we would have some bother. We always had to go to work early in the spring, and that the trouble was that when you manufacture tobacco early in the spring, if you don't sweat it in the caddy, and you would sell it off, and they would open it, the first damp day that we would have it *it* would swell and bulge out, and it would even swell if it was not damp. I am talking now about bright tobacco. And if you sweat it in the caddy it would stick together a good deal, and when you take it apart, take out a plug or wrapper, it would be apt to tear, and I suppose all manufacturers are troubled that way. Then the idea struck me that if I would sweat it between tins that the swelling and sticking to one another would not have that effect; it would not swell so much; so I had a couple of boxes there that I tried it in, and they worked first rate; that is, I didn't do much of it that way, just filled them up in the day time and put them in the dry-house and kept them in all night. Sometimes, when I first did it, I used to keep them two or three days, to see what effect it would have, and then I found it worked pretty well, and I put a couple of iron strips on them. Before I used to take butts and put wood screws in to hold the heat in, but they would always bulge out; the heat would make them swell, and the heat would bulge out.

Q. 16. Did you make any change in these finishers, after the first?

111 A. 16. Well, the first was just simply these boxes; then the next I had made I got strips and put around them—thin strips. Two bolts run through to hold down the head, and I kept it down, a strip at the top and the bottom. Of course, it was not very strong about handling them, and putting them in there five or six or seven times they would come apart and bulge out, and was not strong enough.

Q. 17. How many different kinds of finishers did you have made, or how many ways did you have the finishers made?

A. 17. Well, I have been having them made different ways, pretty near, I guess, four or five different ways. The first was, as I say, with wood screws. Then I got two bands around the top and bottom; then I got one strip up on the side—thought that would keep it from bulging out; and then I got an iron finisher made; and then after that again I had them made just as I have got them now.

Q. 18. When did you have the iron finisher made?

A. 18. That was in the winter of 1873; I tried it in the spring of 1874.

Q. 19. You mean the winter of 1873–'4 or 1872–'3?

A. 19. 1873–'4.

Q. 20. How did the iron finishers work?

A. 20. They would not work at all.

Q. 21. Who helped you use these first finishers, if anybody?

A. 21. The first ones of all?

Q. 22. Yes.

A. 22. Well, Rudolph; he was working for me at that time.

Q. 23. Where were they used?

A. 23. In the press-room.

Q. 24. What persons knew how you were finishing it, as far as you know?

A. 24. Well, I don't remember any of them knew just how I was finishing it, except Rudolph; he just seen what I had done. I

112 didn't try to let anybody know; I suppose I showed some of the tobacco, because it came out so nice I couldn't help but show it.

Q. 25. Did you describe the process to anybody?

A. 25. No, sir.

Q. 26. How about Mr. McCabe?

A. 26. Oh, I told him about it after I had been working some time.

Q. 27. You were in his employ at the time?

A. 27. Yes.

Q. 28. Was anything said between you and McCabe, or you and Rudolph, about having other people know what was being done?

(Respondents' counsel objects to the question as leading.)

A. 28. No; we always tried to keep it secret; that is the rule among manufacturers; they don't let one another know what they are doing.

Q. 29. In what way did you try to keep it secret?

A. 29. Well, it was an out-of-the-way place where we were at, and I told several of the hands not to say anything about what we were doing—pressmen particularly.

Q. 30. When did you begin to put tobacco made in this way on the market?

A. 30. Well, I guess just the same as ordinary tobacco; we put it on the market to see what effect it would have.

Q. 31. My question was when you began to put it on the market.

A. 31. Well, we put it on the market in 1870.

Q. 32. In what quantity did you make it in this way in 1870?

A. 32. Well, only used two of these boxes.

Q. 33. Did you use them steadily?

A. 33. Well, you could not use them steady, because after they were filled that is all I had at that time. Of course while they were
113 in the dry-house, and after they were taken out they would have to cool off, and it would take two or three days; every two or three days we would get out about seven caddies.

Q. 34. How steadily, during 1870, did you use them?

A. 34. Well, just as I say, about every three days; two or three days we would take out these two, and then worked the old way besides.

Q. 35. Did you keep this up through the year?

A. 35. Yes, sir.

Q. 36. How did you find the tobacco took in the market?

A. 36. Well, I never heard any complaint; appeared to take right well.

Q. 37. How have you found it to take in the market since that time?

A. 37. Well, it takes very well; better than the old ordinary way.

Q. 38. Does it ever come back upon you?

A. 38. Well, yes; I have had some tobacco come back.

Q. 39. You have had some finished in this way come back upon you?

A. 39. Well, yes; one caddy last year turned mouldy.

Q. 40. What was the fault?

A. 40. Well, that I could not tell how it got mouldy; it might have got wet, or something of the kind, in a damp place.

Q. 41. How much have you had come back on you?

A. 41. Only had one caddy returned that was damaged since we have been in the business, and I have had some before that, when I was with McCabe.

Q. 42. How much?

A. 42. Well, that I can't say.

Q. 43. Has a good deal of it come back upon you?

A. 43. Oh, no; very little; I don't suppose there is twenty packages in all the time I worked for McCabe come back; that is, that it was spoiled or anything the matter with it.

Q. 44. Have you with you some of the tobacco finished by both processes, and, if so, will you please produce it?

114 A. 44. Yes, sir.

(Specimens produced and marked Exhibits No. 1 and No. 2, Worley tobacco.)

Q. 45. Was this tobacco finished for the purpose of being produced here?

A. 45. No, sir.

Q. 46. Where did you get it?

A. 46. I just opened a box, at least a boy did, and took it out. We haven't manufactured any for three weeks.

Cross-examined by S. S. BOYD, Esq., counsel for respondents:

X Q. 1. What was the trouble with the first finisher you had, when you first used this process?

A. 1. There was no trouble with that, except the very first I tried that way. I didn't have no way of fastening them; sometimes would nail them up, but they were not no finishers; they were boxes, what we call butts.

X Q. 2. And the tobacco, when it came out of those, looked bright and glossy, as with the present finishers, didn't it?

A. 2. Well, no; didn't look as well as now.

X Q. 3. Why not?

A. 3. I think I have got better finishers now; they hold together better; at that time they got loose.

X Q. 4. You mean, then, that the difference in appearance now from that that you first made under this process was owing to the fact that the finisher you now use is stronger than the finisher you used at first?

A. 4. Yes, sir.

X Q. 5. Then your experiments when you first used this process was to get a strong finisher, was it?

A. 5. Yes, sir.

X Q. 6. Is it not a matter of fact at that time there were finishers in use in tobacco factories, as a matter of fact, only for that purpose?

115 A. 6. There were finishers used, but they were too big, and were not constructed in such a way that I could use them that way.

X Q. 7. How were they constructed as to prevent your using them that way?

A. 7. Well, the old ordinary finishers were some that were finished with iron bands. At that time we had an iron finisher, which was just set on what we call a retainer, pretty much the same as a press; no bottom to this finisher and no top; put in your tobacco and fill it up a certain distance, one set or two set of molds, and put a plug in there, just enough to run it down with the retainer. If you wanted to put it under the hydraulic you could do it; a great many would finish it that way, but then they would have to take the retainer out from the hydraulic and put it in its place, and of course it would stay there until you wanted to take it out of the finisher again.

X Q. 8. Then, what you had to do was to take that old finisher and put a bottom to it and make it portable?

A. 8. No, you could not handle the old finisher.

X Q. 9. Make it small enough to handle?

A. 9. If you made it small enough to handle it would be too thick. The wood is about that thick. (Indicating.) The head would not keep in place.

X Q. 10. Can your process be carried on in any box, provided the box is strong enough and has a head arranged properly?

A. 10. Yes, sir.

X Q. 11. So, then, in 1869 this was perfected, with the exception that you didn't then have exactly the kind of box you wanted. Is that a fact?

A. 11. Yes, and there is another—what effect this way of heating between the tins would have on the tobacco.

X Q. 12. When did you find out what effect it would have on the tobacco?

A. 12. Well, it looked well; but a person can't very well tell,
116 when you put up tobacco in the spring, how long it is going to keep, and I didn't know but these tins, the heat, might have some effect that would harm it.

X Q. 13. Well, when were you satisfied in your mind that this process was a benefit and not an injury on the tobacco?

A. 13. After a year or two; after it got among the trade and I seen it took well, and I never had any of it returned.

X Q. 14. Do you mean to say it took you a year or two to determine whether this was an injury or a benefit to the tobacco?

A. 14. Well, yes, I think it took a year or two, because we didn't make much with our facilities.

X Q. 15. Then, until the last of July, 1871, you were not satisfied whether this was an injury or a benefit to tobacco?

A. 15. Well, I guess in 1871 I was satisfied it worked well.

X Q. 16. Then you say in 1871 you had no doubts about this being a benefit to the tobacco, and the tobacco made in this way was better than the tobacco made in the old way?

A. 16. Yes, I think that was my opinion at that time.

X Q. 17. Has that opinion changed since?

A. 17. No.

X Q. 18. In the beginning of 1872 was your opinion any stronger or weaker in regard to the benefits of this process?

A. 18. Well, for a while, in 1872 I didn't work it in this way.

X Q. 19. Why?

A. 19. Well, these finishers—the boxes I had—were so bulged up from using them they were of no account. They would bulge out on the sides, and I could not get a smooth edge on them, and I done away with them for a little while and discharged the men I had working for me. I think it was in 1871, and I didn't then work at it again until 1872 some time.

X Q. 20. You didn't stop because you lost your faith in the process, did you?

A. 20. No, sir.

117 X Q. 21. That that you put up in the spring of 1870 you sold the same as you did your other tobacco?

A. 21. Yes; just put it in the same pile with the balance made the other way. Some—of course some caddies were kept just to see what they would do for ourselves.

X Q. 22. Then you did keep some caddies from 1870 to 1871, to determine what effect it had on the tobacco?

A. 22. Kept some of the tobacco; I don't know whether a full caddy.

X Q. 23. In 1871 the appearance of the tobacco satisfied you that the process was a good one?

A. 23. Yes, sir.

X Q. 24. In 1871 did you continue to sell this tobacco in the market?

A. 24. It was sold. I manufactured and McCabe sold it.

X Q. 25. With your permission?

A. 25. I was working for him.

X Q. 26. Did you ever object to his selling it?

A. 26. No, sir.

X Q. 27. How were you working there; on a salary?

A. 27. Salary.

X Q. 28. In 1872 was this sold on the market?

A. 28. That that was put up that way was sold.

X Q. 29. In 1873?

A. 29. Yes, sir.

X Q. 30. How much of it did you put up in 1872; more than in 1871?

A. 30. No; less.

X Q. 31. How much did you put up in 1873?

A 31. We put up more in 1873 than we ever put up before, I guess.

X Q. 32. How did you press your tobacco in the moulds; with what sort of pressure?

A. 32. Hydraulic pressure.

118 X Q. 33. When you got to the finisher what sort of pressure did you use?

A. 33. Hand-press.

X Q. 34. Suppose you used the hydraulic press to give it the same pressure as the mould, what effect would it have?

A. 34. These finishers would not stand that—the new ones.

X Q. 35. With a finisher that would stand that, what would be the effect?

A. 35. If the work was in a little soft weather it would make the plugs run into one another.

X Q. 36. Then the fact is that if, after this tobacco is taken from your moulds and packed into the finishers—if you subjected it to the pressure that it had previously received in the moulds, that the plugs would have run together?

A. 36. Yes, provided it was in soft weather.

X Q. 37. Suppose you had pressed it in the moulds in the ordinary way, and then packed it up in the finisher with plates between, and subjected it to the same pressure it had in the moulds, the effect then would have been to make the plugs run together, wouldn't it?

A. 37. Yes; it would cause the plugs to run into one another.

X Q. 38. And destroy its market value in a measure?

A. 38. Of course, it would not look as well as otherwise.

X Q. 39. Wouldn't it to that extent destroy its market value?

A. 39. Yes.

X Q. 40. Then, is it not a fact that after the tobacco is packed in the finisher your object is to give it as little pressure as will be necessary to force the head down?

A. 40. Well, no, not as little pressure, but to give it as much pressure as you can with a little press like that. We had a hand-press with a wheel on, and a little lever about three feet long. We used it

119 sometimes to pull it down pretty solid, but don't press near as hard as we could on the hydraulic press—not by a good deal.

X Q. 41. This tobacco in the moulds is subjected to hydraulic pressure?

A. 41. Yes.

X Q. 42. Very severe?

A. 42. Yes.

X Q. 43. Then it is packed in your finisher; how much above the edge of the finisher is the tobacco brought, or is it brought merely to a level?

A. 43. The tobacco comes right up to the edge of the finisher, perhaps a little over, before it is run down. The bolts are about an inch and a half or two inches. The bolts run through together, and then the pressure is brought to bear on the tobacco in the finisher, and is sufficient to bring it down to an inch and a half, or perhaps two inches.

X Q. 44. How thick is your head?

A. 44. We generally use an iron plate; that is about half an inch thick.

X Q. 45. How much below the edge of the finisher does the iron plate have to go to allow you to put the bolts in?

A. 45. About an inch and a half.

X Q. 46. How deep is your finisher inside?

A. 46. I guess about fifteen inches deep; the head is very thick—at least the bottom part is about two or three inches thick. The finisher itself, I think, is about eighteen or nineteen inches. I haven't ever measured.

X Q. 47. When did you first see the finisher constructed according to the one described in this patent?

A. 47. That was in 1874, I think.

X Q. 48. What time in 1874?

A. 48. In the spring of 1874.

X.Q. 49. How did that differ from the one you used in 1873?

A. 49. We made it more stronger; made iron bands to it.

120 X Q. 50. Simply a difference in strength, was it?

A. 50. Yes, sir

X Q. 51. How many men did it require to force the head of your finisher in?

A. 51. Sometimes one and sometimes two.

X Q. 52. Did it ever require two men to do it?

A. 52. Oh, yes, very often.

X Q. 53. You say that you have a wheel-screw, and one gets one side and one on the other?

A. 53. Yes.

X Q. 54. What is the diameter of your wheel?

A. 54. About two feet, or two feet and a half.

X Q. 55. Then you have a leverage of about a foot if the wheel is two feet in diameter?

A. 55. Yes.

X Q. 56. When they used the lever how many men did it take?

A. 56. Sometimes one and sometimes two; it is according to how the men would be busy; if two were at it both would run it down.

X Q. 57. Before January, 1876, did they always sweat the tobacco?

A. 57. The manufacturers? No, I can't tell what they all did. Some did and some did not.

X Q. 58. Was it the general custom to do it before January, 1876?

A. 58. Well, yes, it was the general custom to sweat tobacco.

X Q. 59. Wasn't a good deal of tobacco made before that time without sweating?

A. 59. There was tobacco made, I think, without sweating; yes?

X Q. 60. Have you any doubt about that?

A. 60. No, I have no doubt about that; I know there was tobacco made without sweating.

121 X Q. 61. It was pressed in moulds?

A. 61. Yes.

X Q. 62. And then put in the finisher with metal plates, and there pressed and packed from there to the caddy?

A. 62. Yes.

X Q. 63. How many manufacturers did you ever know that manufactured their plug-tobacco in this way; pressed it in the molds, then took it from the molds and put it in the box, sweat it in that box, removed it from that box and repacked it into another, and then pressed it in that second box?

A. 63. Five or six or seven doing it now.

X Q. 64. Prior to January, 1876?

A. 64. Well, I don't know of anybody but Ryan.

X Q. 65. Well, was this a common mode of finishing plug-tobacco: "Press the bunches into plugs, having the form seen in the retail stores. The plugs are next removed from the moulds in which they are pressed, and packed in boxes and the boxes placed in a room where the tobacco is sweat and cured. The plugs are afterwards taken from the box and subjected to a second pressure before they are packed in boxes for sale." Prior to January, 1876, was that the common mode of manufacturing plug-tobacco?

A. 65. No, sir.

X Q. 66. Before January, 1876, did you ever know of its being manufactured in that way?

A. 66. By anybody else but myself?

X Q. 67. Yes.

A. 67. Yes; by Ryan.

X Q. 68. In your specification here you have said that is the common way of manufacturing plug-tobacco; that is not correct, is it?

A. 68. I don't know.

X Q. 69. What I have read is a literal quotation from your specification of the patent now in suit; is that a correct statement?

122 A. 69. No, sir; that cannot be a correct statement.

X Q. 70. Well, in January, 1876, or prior to January, 1876, what was the common mode of manufacturing plug-tobacco?

A. 70. Well, just pressed it in moulds and then put it in these iron finishers, and leave it to stand according to the time, an hour or two or three hours, may be four or five, or a whole night, and then take it out of the old finishers and put it in boxes, caddies, or butts.

X Q. 71. Prior to January, 1876, did you ever know of plug-tobacco being finished by subjecting it to two pressures after it was taken from the mould, two separate pressures after it was taken from the mould?

A. 71. No, sir.

X Q. 72. Then, as a matter of fact, the common way of manufacturing plug tobacco prior to January, 1876, was to give it but two pressures, one in the mould and the other in the finisher?

A. 72. Yes, sir.

X Q. 73. Have you ever manufactured your plug-tobacco by this process, by taking the tobacco from the finisher while it was hot and putting it in the caddies?

A. 73. No, sir; generally let it cool off.

X Q. 74. What do you think would be the effect suppose you were to remove it from the finisher in a heated state and pack it into caddies; would it have the same glossy appearance?

A. 74. I think not.

X Q. 75. Would you get the same advantage in this process, as far

as the prevention of bulging is concerned, if you packed it hot in your caddies?

A. 75. Well, that I don't know; I never packed any heated.

X Q. 76. What is your opinion?

A. 76. If you were to take it out hot, I think the wrapper would stick to the tins.

123 X Q. 77. If it stuck to the tins then this glossy appearance would not be upon it, would it?

A. 77. No; it would tear the wrapper.

X Q. 78. Then you don't consider, do you, that your process can be carried out so as to present this glossy appearance, to prevent the bulging, unless you let the tobacco cool in the finisher before you pack it in the caddy?

A. 78. Yes.

X Q. 79. How long do you let your tobacco remain in the finisher after it is placed in the sweat-house?

A. 79. We place it in the sweat-house in the evening; generally leave it there all night and take it out next morning, and we have got enough so we can let them. That is taken out next morning, stands the next day, and then we unpack.

X Q. 80. You say you put it in in the evening; what time in the evening?

A. 80. Well, start the fire about 4 o'clock; get the place pretty hot; put them in before we start the fire, sometimes one or two after the fire is started; get them pretty hot, and at 6 o'clock we leave; fill the stove with coal and let them remain in there till morning.

X Q. 81. How early in the morning do you take them up?

A. 81. When the men come to work, about seven o'clock.

X Q. 82. Then they were in there from 14 to 16 hours?

A. 82. Yes; sometimes make a fire later, sometimes sooner.

X Q. 83. What is the shortest time you ever kept them in there?

A. 83. Oh, I have kept them in there not more than four hours.

X Q. 84. If you keep them in only 4 hours will that produce this result?

A. 84. It won't produce as good a result as to keep them in a little longer.

124 X Q. 85. What would be the difference?

A. 85. I don't believe you would get quite as much settling; the heat has the effect to make them solid.

X Q. 86. Which produces the better effect, the 16 hours or the 4 hours?

A. 86. Well, I think the 16 hours produces the best effect.

X Q. 87. What was the occasion of your only putting them in 4 hours?

A. 87. Well, it was very light, natural-leaf work, that is, very bright and thin work, and it was pretty well dried, and I didn't try to get much heat on.

X Q. 88. Then you kept it in 4 hours owing to the peculiar nature of the tobacco?

A. 88. Yes.

X Q. 89. Suppose you had kept that tobacco in 10 hours, what would have been the result?

A. 89. I don't know that the result would have been any different, only that it would get a little more firmer, get a little dryer, I suppose, from the effect of the heat.

X Q. 90. What did you get your heat from there?

A. 90. A stove.

X Q. 91. How large a stove?

A. 91. Well, it is a big cannel stove; weighs seven hundred and some odd pounds.

X Q. 92. How much coal will it hold?

A. 92. I guess it will hold two bushels or two bushels and a half.

X Q. 93. Is it filled during the night?

A. 93. No, sir.

X Q. 94. Do you know how long it takes that stove to burn out one charge?

A. 94. I have seen a fire in there in the morning—a few coals.

X Q. 95. Do you know how long it takes it to burn out one charge substantially?

125 A. 95. No, sir; I do not.

X Q. 96. Did you burn that stove during the day?

A. 96. No, sir.

X Q. 97. Do you use a stove like it during the day?

A. 97. Yes, sir; outside the sweat-room.

X Q. 98. That is for what purpose?

A. 98. Heating the factory.

X Q. 99. Then you don't run that to its full capacity; do you keep it going at full blast the whole time?

A. 99. The stove outside?

X Q. 100. Yes, sir.

A. 100. Well, when it was very cold.

X Q. 101. Is it the same kind of a stove?

A. 101. Yes; had them both made at the same time.

X Q. 102. When did you start a fire in that?

A. 102. In the morning when the men came to work.

X Q. 103. Fill it up during the day?

A. 103. Yes; whenever it goes down fill it up.

X Q. 104. How many times a day, on an average, did you have to fill it up?

A. 104. Depends on how cold the weather is. If it is cold I suppose filled it up more; if not, less.

X Q. 105. In a pretty cool day how many times did you have to fill it up?

A. 105. Well, two or three times a day.

X Q. 106. You keep your temperature about what in the factory?

A. 106. Outside the sweat-room?

X Q. 107. Yes.

A. 107. I can't tell; it is pretty cool in our place in the press-room.

X Q. 108. How large is your sweat-room?

A. 108. I guess about 10 by 10 or 8 by 10.

X Q. 109. What is it made of?

A. 109. Brick and a few stanchions between the brick.

126 X Q. 110. Is this stove right in the sweat-room?

A. 110. Yes.

X Q. 111. Sets on the floor of the sweat-room?

A. 111. Yes, sir.

X Q. 112. How do you leave your draught in that stove when you go away at night?

A. 112. The stove has always a tolerably fair draught.

X Q. 113. Do you know what temperature you kept that at?

A. 113. No, I can't state that; I should judge from about 120 to 130 or 140; may be sometimes as high as 150 degrees.

X Q. 114. From what do you form that judgment?

A. 114. I have a thermometer in there; went in just before I left the factory to see just how much I did have; on one occasion I saw it up to 140.

X Q. 115. Do you keep a thermometer there all the time?

A. 115. No, sir.

X Q. 116. Then only on one occasion you tested by the thermometer the amount of heat?

A. 116. No; several occasions; and on this occasion it was 140 and odd, another time 150.

X Q. 117. What time of the day was that?

A. 117. That was just after the factory was closed and we were going home.

X Q. 118. Ever test it in the morning?

A. 118. No, sir.

X Q. 119. You never tested it from the time you closed the factory at night?

A. 119. No.

X Q. 120. Do you know how long that heat is kept up?

A. 120. Well, that heat, I don't know how long we keep it up; generally it is warm when we get there in the morning.

X Q. 121. Not so warm but that you can stay there comfortably?

A. 121. You can go in there; oh, yes, you can go in there.
127 I should judge it was in weather like this about 85 or 90 or 100 degrees.

X Q. 122. What sort of wrappers do you use for your press?

A. 122. We use the Virginia wrappers and the Missouri wrappers. I suppose I have used most any kind of wrappers.

X Q. 123. What kind of wrappers did you use before you began this process?

A. 123. The same then. I can use a more flimsy wrapper on this way of working than I can the other way.

X Q. 124. Why?

A. 124. It puts a nice finish to the tobacco, keeps it solid and firm and nice. Use a wrapper that is thinner and it will make prettier looking work.

X Q. 125. You use a thinner wrapper than you can when you press it in the finisher between those plates?

A. 125. Unless we have very soft weather we can not; if the weather is a little dry and the factory is apt to be cool, or a draught through it, the minute a dry wind strikes the leaf, it gets brittle, hard, and presses rough.

X Q. 126. Then you mean in certain conditions of temperature you may be able to use a cheaper wrapper with this process than with the old one?

A. 126. I can always use a cheaper wrapper with this process.

X Q. 127. Do you, as a matter of fact, use a cheaper wrapper?

A. 127. Yes, I believe I do.

X Q. 128. How much cheaper?

A. 128. Well, just depends on the demand in the market; sometimes there is a demand for light wrappers and sometimes not.

X Q. 129. What do you mean? Why is there a demand for light wrappers at one time rather than at another?

A. 129. Well, sometimes people make what you call plug
128 smoking-tobacco; this is it (indicating); and they don't care what kind of wrapper you put on or how it looks; and so when tobacco

is to be used as smoking-tobacco it don't make any difference what wrapper is used or how it looks. Tobacco that is put up for smoking purposes they are not particular about, and they don't care so much about the looks; like to make it look tolerably well, but not so well as the regular brands. As a general thing we put no brand on plug smoking-tobacco at all.

X Q. 130. As a matter of fact, does your process enable you to use a wrapper not costing more than half as much as they were required to use in the old process?

A. 130. Yes; I have got a good many wrappers at half as much.

X Q. 131. Do you mean to say that a cheap wrapper was never used in the old process as a wrapper?

A. 131. Oh, yes, it was.

(Signature waived.)

And the said HENRY MCCABE, being about the age of 35 years, and having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Q. 1. What is your name, age, residence, and occupation?

A. 1. My name is Henry McCabe; I am engaged in the manufacture of plug-tobacco, and reside in St. Louis.

Q. 2. Are you the McCabe mentioned as assignee in the patent sued on?

A. 2. Yes, sir.

Q. 3. When did you first know of Worley's having any peculiar method of manufacturing tobacco other than the common method?

129 A. 3. Well, in 1870 I first knew it.

Q. 4. About what time in 1870?

A. 4. Some time in the spring.

Q. 5. What did you first know about it?

A. 5. Well, I called his attention to the necessity of being careful in putting up tobacco for the trade, so that it would not come back on us, being swelled or out of proper shape, and he then told me he was getting up an idea that he thought would obviate that, and about that time he showed me some plugs he had finished under his new idea, as he called it.

Q. 6. Did you notice anything peculiar about those plugs?

A. 6. Nothing except it was a smooth surface, and he said it would prevent the swelling and fermentation of the goods, and thereby enable us to put it earlier on the market. I moved the year before and had a very small stock on hand about the 1st of January, 5,000 or 6,000 lbs., so that it would necessitate us in going to work early in the spring, and we started some time in the early part of January to work.

Q. 7. Did you say you had a very large or small stock on hand?

A. 7. A very small; usually endeavored to have a stock of from 20,000 to 30,000 lbs. on hand; my trade demanded it that year, an average of 8,000 lbs., say; I didn't have more than two or three weeks' stock on hand at that time.

Q. 8. At the time Worley showed you this tobacco did he tell you how it was finished?

A. 8. No, sir; not at that time he did not; afterwards he did. I was not at the factory those times but very little. In the first place I was

only manufacturing at that time; I commenced about 1868, I think, and I hired Worley, as being a practical tobacco manufacturer. I knew nothing about the tobacco business, and left everything in his hands as regards manufacturing, having no knowledge of it.

Q. 9. Was anything said at or about that time between you
130 and Worley, or any of the employees about the place, as to how this tobacco should be finished, or as to other people seeing or knowing of the method by which you were finishing it?

(Objected to as leading.)

A. 9. Well, after we got to working it awhile I knew how he worked it. Then, of course, I made it an object not to allow any person to know how the work was done, how we got on that gloss; and then up to the time we got the patent on it there was an outside understanding that we were to keep it away from the public eye as much as possible.

Q. 10. Who, besides you and Worley, as far as you know, knew about the method of which you were manufacturing the tobacco?

A. 10. Mr. Rich knew of it; being my partner at the time of course he knew of it; and I suppose after Worley commenced using these boxes his pressmen knew it; of course they had to.

Q. 11. Any one else?

A. 11. Not to my knowledge.

Q. 12. Ever speak of it outside?

A. 12. No, sir; I don't think I ever did until after I got *one* patent, that I ever told any person the modus operandi of the idea.

Cross-examined by S. S. Boyd, Esq., counsel for respondents:

X Q. 1. You are a partner of Worley's now, are you?

A. 1. No, sir; I have never been a partner of Worley's.

X Q. 2. Are you using this process yourself?

A. 2. Yes, sir.

X Q. 3. How long have you been using it?

A. 3. Since 1870.

X Q. 4. When did Worley leave you?

A. 4. He left me, I think, about 18 months ago.

X Q. 5. You have been using it ever since?

A. 5. Yes, sir.

131 X Q. 6. Don't you know the exact time when he left you?

A. 6. He left me in March or April, I think, of 1875.

X Q. 7. You continued to use this process during 1875, didn't you?

A. 7. Yes, sir.

X Q. 8. Mr. Worley knew you were using it?

A. 8. Yes, he let me use it. 1875 or 1876 he left me; no, it was 1876 he left me, I think.

X Q. 9. Now which is it?

A. 9. He left me in 1876.

X Q. 10. You fix it in 1876 now, do you?

A. 10. Yes, I was thinking; after he left me I engaged Burlew. Yes, it is 1876; I am satisfied of that fact.

X Q. 11. Did he leave you before the patent was issued?

A. 11. He left me some time—yes, after we made application for a patent; may be three or four months. Yes, I made a mistake of a year there.

X Q. 12. Down to the time of his leaving you in 1876 you sold this regularly in the market, didn't you?

A. 12. Yes.

X Q. 13. He knew it all the time, that is, Worley?

A. 13. Oh, yes; I was paying him for his knowledge as a tobacco manufacturer a salary of $1,300 a year, which was above the usual salary of a small factory.

X Q. 14. Did he object to your making use of this process and selling the tobacco?

A. 14. He got it up, I suppose, for my benefit as much as anything else while he was with me.

X Q. 15. Did he ever object to your selling it?

A. 15. No, sir; never.

X Q. 16. How much of this do you suppose you sold in 1870?

A. 16. Really I can't tell you.

X Q. 17. One hundred pounds?

132 A. 17. Oh, yes, more than that.

X Q. 18. One thousand pounds.

A. 18. Yes, a few thousand pounds?

X Q. 19. As many as five thousand?

A. 19. I expect I did; I can't tell, though, the quantity, for the reason that I was on the road. During the life of Roach he attended to the city business, and I traveled on the road a great deal. In fact, the bulk of the time I was on the road in 1871 and 1872.

X Q. 20. Have you any doubt that you sold as much as five thousand pounds of it in 1870?

A. 20. Yes, I think I sold that much.

X Q. 21. How much in 1871?

A. 21. About the same quantity, possibly.

X Q. 22. How much in 1872?

A. 22. In the fall of 1872 I sold some of it.

X Q. 23. How much in 1873?

A. 23. The bulk of our production.

X Q. 24. About how much?

A. 24. Well, I might have sold 50,000, 60,000, or 70,000 pounds. I don't know what quantity of black goods we put up; I never used it on black goods.

X Q. 25. Now, did you sell so much as 40,000 pounds?

A. 25. I know I did.

X Q. 26. Where is Roa h now?

A. 26. He has been dead since the fall of 1871.

X Q. 27. He was your partner at the time he died?

A. 27. Yes.

X Q. 28. How many men did you have employed there in 1870?

A. 28. Well, I suppose I had five, six, or seven, may be.

X Q. 29. How many pressmen?

A. 29. One, to the best of my recollection.

X Q. 30. Did the pressman have any assistant?

A. 30. I really don't recollect; I don't remember.

133 X Q. 31. Do you remember how many rollers you had?

A. 31. As I said before, I guess about four or five rollers, which would make five or six men, including Worley.

X Q. 32. How many stemmers?

A. 32. Two or three to each man.

X Q. 33. To each roller?

A. 33. Yes, sometimes only one.

X Q. 34. Do you remember how many you had?

A. 34. I do not, because for this reason I could not begin to give you

the number: We paid so much a lump of putting up the tobacco in our factory, and the rollers paid the stemmers so. I don't know how many they had.

X Q. 35. In 1871 was your force increased or diminished?

A. 35. About the same as 1870.

X Q. 36. Have the same men employed in 1871 as in 1870?

A. 36. That is my recollection; I don't remember of any change.

X Q. 37. In 1872 did you have the same force?

A. 37. About the same, yes.

X Q. 38. Was it increased any?

A. 38. No; I have been putting up the same quantity of tobacco right along.

X Q. 39. Did you have the same men in 1873 that you did in 1871 and 1872?

A. 39. I don't remember whether I did or not. I had some of them, at least; but all of them I don't know, because that year, as I say, 1872 or 1873, I was—during the time I remained on the alley with my factory, after the death of Roach—I was seldom in the factory. Worley attended at the factory exclusively, even to the buying. He had exclusive control up to the time he left, and I might pass through in the morning or evening possibly.

134 X Q. 40. You took care of the financial part of the concern, didn't you?

A. 40. Yes, to the best of my ability.

X Q. 41. You knew how much was paid out to the hands?

A. 41. Yes.

X Q. 42. Then you are able to say about the extent of your force then, are you not?

A. 42. I say since 1869 to the present time my force has been about to average the same all the way through.

X Q. 43. How many changes were there in the stemmers during 1871, 1872, and 1873?

A. 43. I can't tell you, sir.

X Q. 44. Isn't it a fact that, as a general thing, your stemmers don't stay with you more than one season?

A. 44. Well, about that I can't tell you; I think I have noticed boys there until the second season.

X Q. 45. Did they usually stay longer than two seasons?

A. 45. Well, one young man at my place I guess he has been with me four or five years.

X Q. 46. But that is an exception, and that is the reason you remember it?

A. 46. Yes; we learned him the business; he is a roller now.

X Q. 47. Did you ever see this process carried on there in 1869 and 1870?

A. 47. I did, sir. I am satisfied I never saw it in 1869.

X Q. 48. Did you see it carried on in 1869?

A. 48. Well, he was experimenting a good while before he told me anything about it.

X Q. 49. How experimenting?

A. 49. Using those boxes.

X Q. 50. Experimenting to get boxes of sufficient strength?

A. 50. Something to enable him to put up tobacco so it would not swell.

135 X Q. 51. What was the nature of the experiment?

A. 51. He first used one kind of box and then another.

X Q. 52. Did he consult you about the mode of manufacturing?

A. 52. No, sir; he did not, until he thought he had the thing in pretty good shape. I knew about it for the reason that he claimed it as his all the time.

X Q. 53. How early in 1870 did he explain it to you?

A. 53. Some time in the spring of 1870.

X Q. 54. Were you not up there any time during the winter of 1869 and 1870?

A. 54. Yes, sir.

X Q. 55. Did you ever see any tobacco being finished during that time?

A. 55. I did not; not in 1869.

X Q. 56. Then, prior to the spring of 1870 you never saw any tobacco being finished in your factory in any way?

A. 56. Oh, I did; yes, certainly I did.

X Q. 57. Every time you went up there you saw it, didn't you?

A. 57. I did, of course; every time I went there I saw the work that was being taken out, of course.

X Q. 58. You don't mean to be understood that you took no interest in the matter as to how your factory was carried on, do you?

A. 58. Well, I did—always did; at that time, as I told you, I didn't take a great deal of interest, because I didn't understand how to manufacture tobacco.

X Q. 59. Would not the fact that you didn't understand how to manufacture tobacco induce you to learn?

A. 59. It did afterwards.

X Q. 60. Why didn't it at first?

A. 60. I hadn't the time.

X Q. 61. When did you begin to pay some attention to the mode of manufacturing?

136 A. 61. Well, the greater part of it has been since I moved down on Second street, because it was there under my eyes.

X Q. 62. When was that?

A. 62. That was 4 years ago this month.

X Q. 63. From that time you did pay attention to it?

A. 63. Yes.

X Q. 64. What was there in this process that required particular explanation?

A. 64. Well, Worley always intended to get a patent on it to begin with; now, do you mean of getting an explanation of it, or how?

X Q. 65. Yes.

A. 65. Well, I suppose he wanted to perfect the plan first; that was his first idea of putting up tobacco, and after he thought he had got it he told me, and after I came back from making a trip up the Missouri I remember he told me, and I told him, as I said before, that I had had some trouble with tobaccos that were sold that spring, and after making this trip, April or May, or along there; that was the first time I saw this box, after my return from that trip up the Missouri River, and I saw the mode then of finishing the tobacco in this way, and it was decided that would obviate any difficulty in the future.

X Q. 66. My question was, what necessity was there for any explanation? What was there in this process requiring particular explanation?

A. 66. I didn't see this process carried on; I saw the old process.

X Q. 67. When did you first see this process carried on?

A. 67. Some time in the spring of 1870.

X Q. 68. When you saw it carried on what necessity was there of any explanation?

A. 68. It was before I saw it carried on; he explained to me how it was done.

X Q. 69. If you had gone there without that explanation, and seen him carry it on, would you not have understood it?

137 A. 69. I would have known the tobacco manufactured under that process if I had seen it.

X Q. 70. So, really, there was no necessity of an explanation; anybody looking on could have understood it, couldn't they?

A. 70. Yes, at that time.

X Q. 71. Anybody passing through there at different times so as to see the tobacco pressed in the moulds, pressed in the finisher, and then removed from the finisher, could have understood that without any explanation, couldn't they?

A. 71. Provided they got in the press-room, yes; but to pass through the factory, without seeing or talking anything about it, they could not.

X Q. 72. Passing through the press-room, I say?

A. 72. The press-room was 70 feet long.

X Q. 73. Anybody engaged in tobacco manufacture, passing through that sweat-room and seeing the process going on, would have understood without explanation, wouldn't they?

A. 73. I don't believe they would.

X Q. 74. Why?

A. 74. In the first place it was a new plan of finishing; unless he was told that it was packed between these layers of tin and put in the sweat-house, and being kept there a certain time, I don't believe he would have known anything about it.

X Q. 75. Putting it between tins was nothing new, was it?

A. 75. Well, it was; because unless it was put between the tins preparatory to being put in the sweat-house you could not get this finish.

X Q. 76. You say prior to this time it was not pressed between tins?

A. 76. Not and sweat afterwards, from all I have seen; never was to my knowledge.

X Q. 77. My question is, whether, before this time, tin had been used in pressing tobacco?

138 A. 77. Except they had been in the old finishers.

X Q. 78. Where was the entrance to your factory?

A. 78. One from the alley and one from the yard, one opposite the other.

(Signature waived.)

(Complainants here offered in evidence exhibit marked Complainants' Exhibit E, defendants' admission.)

139 United States circuit court, eastern district of Missouri.

CHRISTIAN WORLEY ET AL.
vs.
THE LOKER TOBACCO COMPANY ET AL. } In equity. No. 1024

Be it remembered that on this 26th day of February, A. D. 1876, I, L. L. Walbridge, a notary public within and for the State and city aforesaid, and duly commissioned and qualified, under the laws of the United States, to take depositions for use in the circuit courts of the United States, did call and cause to be and personally appear before

me, at the office of S. S. Boyd, esq., No. 506 Olive street, in the city of St. Louis, in said eastern district, in the State aforesaid, Henry Burlew and Christian Worley, to testify and the truth to say on the part and behalf of the complainants in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the eastern district of Missouri, at St. Louis, in the district aforesaid, wherein Christian Worley et al. are complainants, and the Loker Tobacco Company et al. are respondents.

And the said HENRY BURLEY, being about the age of 50 years, and having been by me first carefully cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Question 1. Are you the person of the same name who has heretofore testified in this case?

A. 1. Yes, sir.

Q. 2. Look at the cakes of tobacco now shown you, and state what they are.

A. 2. This is some tobacco I manufactured for Mr. McCabe.

140 Q. 3. By what methods?

A. 3. This one, marked A, was by the Worley process; and the other, B, was the way I used to make it before.

Q. 4. What quality of tobacco is this?

A. 4. A very common quality—the meanest we make, sir. It is made low-priced goods—the lowest we make and the meanest.

Q. 5. How do these compare with the exhibits you produced when before on the stand?

A. 5. The other goods was finer than this—better goods—shone out better.

Q. 6. When were you notified to produce these cakes?

A. 6. Yesterday.

Q. 7. What quality of tobacco were you manufacturing at the time?

A. 7. This tobacco has been manufactured some time. I wasn't manufacturing any at that time.

Cross-examination by the counsel for the respondents, S. S. BOYD, Esq.:

X Q. 1. When did you manufacture these exhibits?

A. 1. I guess it is about two months as near as I can remember.

X Q. 2. What was the occasion of your making them?

A. 2. We were working on this kind of goods when we closed our factory.

X Q. 3. How happened you to make some in the old method then?

A. 3. I had this Exhibit B left over, and I had to manufacture it in the old way or let it lay over and dry up.

X Q. 4. How much did you manufacture in the old way?

A. 4. There was just about 100 pounds left over, and I pressed it in the old way under the press, and left it there.

X Q. 5. Why didn't you press it in the new way?

141 A. 5. I hadn't enough to fill up the finisher in the new way, and had to leave it over; couldn't put it out in the warm-house; the box was full.

X Q. 6. How much does your finisher hold?

A. 6. About 150 pounds of this kind of work.

X Q. 7. Did you have no finisher that held less than 100 pounds?

A. 7. No, sir; I think not; I don't know exactly, but that was the case this time. It wasn't full, and I didn't put it in the dry-house, but left it under the press.

X Q. 8. Have you no finisher down there that holds less than 100 pounds?

A. 8. I don't know that they hold les thans that; we had some old ones, all laid aside, that used to hold less. No, I don't think any of them hold less than 100 pounds.

X Q. 9. How long have you been working in that factory?

A. 9. This is the third year I have been engaged with McCabe.

X Q. 10. Do you have entire charge of the pressing and use of the finishers?

A. 10. I have control of the whole factory.

X Q. 11. It is your duty to determine how much goes into those finishers, and how much you take out?

A. 11. It is my duty to see the finishers are properly filled and pulled. We have a pressman, a very old hand at the business, who determines how much you shall press at one time there. I have the say-so, of course, of everything about the factory, and the pressman is told to fill it so full, and pull it so hard, and they fill it up before we take it out from under the press.

X Q. 12. Then you fill it to different degrees of fullness at different times?

A. 12. If we break the moulds and it don't fill up the finisher, we let it remain under the press until we made another set in the moulds. We then fill them up full; always fill them up full before we put them in the dry-house.

142 X Q. 13. Have you no finishers in your factory that hold less than 100 pounds?

A. 13. Not to my knowledge. I don't think there is. I never used any.

X Q. 14. Do you state, as a matter of fact, you can not press in that finisher unless you have the finisher full of tobacco?

A. 14. I suppose we could by getting extra blocks and blocking it down, by putting bars across the top of the blocks, so we could hold it to the three layers, if we chose; but we didn't do it. With our own blocks of that kind we could put any amount we pleased in the box, and put the blocks on top and hold it to its place; but it would dry up by putting it in the dry-house.

X Q. 15. That is, two blocks of wood?

A. 15. Two layers of wood; but putting it in full bulk, the heat that comes in contact with the tin, the pressure, makes the pressure, and gives it this gloss.

X Q. 16. How much did you press of this tobacco?

A. 16. Which?

X Q. 17. Of that old tobacco at that time?

A. 17. That is all that is left there.

X Q. 18. How much?

A. 18. About 100 pounds, or something like that. The finisher was nearly full.

X Q. 19. Why didn't you, if your finisher was nearly full, put the block in, and press in that way?

A. 19. Because we didn't want to. We could commence anew again, and then fill it up. That is the way we always do it. Sometimes we make 50 caddies of that kind of goods, and have the finisher half full, and let it remain until we commence again.

X Q. 20. I suppose the tobacco finished under the old method sells equally as well as that that is finished under the new?

A. 20. Well, we never offered any for sale. I don't know.

143 X Q. 21. What did you do with the 100 pounds that was pressed under the old method?

A. 21. Let it remain under the press.

X Q. 22. Is it all down there now?

A. 22. Yes; it is under the press. I got it out this morning.

X Q. 23. What is the purpose of pressing it, if you are not going to sell it?

Ans. 23. We don't pack it in the boxes.

X Q. 24. Was it pressed to keep on hand as a curiosity?

A. 24. To keep on hand until we got it full, to put it in the sweat-house to give it this process—the Worley process.

X Q. 25. Then this Exhibit B has been subjected to the same process that it would have been subjected to under the new process, with the exception that you have not put it in the sweat-house, hasn't it?

A. 25. Yes, sir.

X Q. 26. If you had taken Exhibit B and put it in the sweat-house, it would have been subjected to precisely the same process as that described by Worley's patent, would it?

A. 26. Yes, sir.

X Q. 27. So that up to the point where the tobacco is now it has been subjected to the same process as the Worley process, has it?

A. 27. Excepting the heating process.

X Q. 28. Up to the point where it is now it has been subjected to the same process that the Worley patent calls for—up to that point?

A. 28. Yes, sir.

X Q. 29. Now, is that the old process?

A. 29. That is the old process of manufacturing. That is the last we do to it. It is finished in the finisher. This is the finishing part of the old process, B, and this is the finishing part of the Worley process. (Indicating.)

144 X Q. 30. Then I understand you to say the Worley process, up to the time the tobacco is put in the sweat-house, is precisely the same as the old process?

A. 30. Just the same.

X Q. 31. The pressure applied is the same whether you use the old or the other process?

A. 31. The pressure on both is the same.

X Q. 32. Is the pressure applied under the new process the same as that applied under the old process?

A. 32. It is; certainly it is.

X Q. 33. The same degree of pressure is applied?

A. 33. Yes, sir; this here, "B," is.

X Q. 34. In carrying on the old process wouldn't you do something more to this tobacco than has been done to it?

A. 34. No; just pack it up. It is finished now. Take it out of the finisher for the market.

X Q. 35. This finisher you used for this was it a wooden or an iron finisher?

A. 35. Wooden. We have no iron.

X Q. 36. To carry out the old process successfully don't you use an iron finisher?

A. 36. Some people do. We haven't got any in our house.

X Q. 37. To carry out the old process successfully is it not necessary to have an iron finisher, or a finisher as strong as iron?

A. 37. It wants a finisher to stand the pressure and not break.

X Q. 38. Will the wooden finisher you used at your factory stand the pressure necessary to put the tobacco through under the old process?

A. 38. Well, I think so; I don't see why they wouldn't. The finishers we had before we changed them to stronger ones I didn't think they were quite strong enough, and we throwed them aside.

X Q. 39. These Exhibits A and B were subjected to precisely the same pressure?

145 A. 39. Pressed at the same time, in the same moulds.

X. Q. 40. In the same finisher?

A. 40. In the same moulds. This was finished and put away, A; put it in the heating process, and then the balance of it was all out of the same mould; was put in the finisher that it came out of this morning.

X Q. 41. Which was pressed harder in the finisher, Exhibit A or Exhibit B?

A. 41. Both pressed alike, as near as we can judge.

X Q. 42. What sort of a pressure did you use, hydraulic or hand?

A. 42. Used hydraulic at the start in the moulds.

X Q. 43. In the finisher?

A. 43. Hand-power. Some men use hydraulic, and some use hand-power. We use hydraulic in the moulds, but not for the finisher.

X Q. 44. Which produces the better result, the hand-power or the hydraulic power in the finisher?

A. 44. Well, I should think you could gauge it better by hand-power, put you can guage it also by hydraulic. So you get enough pressure it don't make any difference which.

X Q. 45. Suppose you had subjected Exhibit B to the same extreme pressure, how would its appearance have been?

A. 45. It would have made it more uneven in the edges. The same impression would have cut the edges. They would eat into one another, laying alongside each other. Put too much pressure on makes one lump if it is not even. After it has got a certain pressure the lump will be thrown out of shape the more pressure you put on it, because they will eat into one another. After a lump gets to a certain pressure the edges are smooth, and then a greater pressure will throw it out of shape one plug will go into the other, and will not look smooth.

X Q. 46. What would have been the appearance of the outside of the wrapper Exhibit B if it had been subjected to the same severe pressure?

146 A. 46. The more pressure it gets the more gloss or oil comes out of the surface.

X Q. 47. The more pressure you put on Exhibit B the smoother and glossier it would appear, wouldn't it?

A. 47. I suppose it would appear more glossy, yes.

X Q. 48. Have you manufactured tobacco under the old process?

A. 48. Always did all my life, before I came here.

X Q. 49. What power do you use in the finisher?

A. 49. We use the old-fashioned press. It is hydraulic too.

X Q. 50. When you want to produce the best result under the old process which power do you use?

A. 50. If the hand-power would not do it, we used the hydraulic pressure, but the great trouble about the hydraulic pressure is we could not get it regular for the finishers, so regular as we could by the hand-power.

X Q. 51. What is the purpose of using hydraulic power in preference to the hand-power?

A. 51. The greater pressure and easier used.

X Q. 52. As a matter of fact, under the old process, it is very desirable to get an extreme pressure in the finisher, isn't it?

A. 52. In the mould. The great pressure must be in the moulds; that shapes the lump. Then in the finisher we don't want such a pressure. We give it all the pressure pretty much in the mould. The finisher don't want one-half as much pressure as the mould.

X Q. 53. You said that you used the hydraulic pressure in the finisher?

A. 53. Yes, sir.

X Q. 54. What for? Why did you give it the preference over the hand-pressure?

147 A. 54. Because with the hydraulic pressure one man could do the work where it would take a half dozen to do it with the hand-power.

X Q. 55. Wasn't it because you could get more power by the hydraulic pressure than by hand?

A. 55. We don't want so much power in the finisher; not more than half what we do in the moulds.

X Q. 56. I am not talking about the moulds, nor about the comparison between the moulds and the finisher. I ask, as a matter of fact, in the manufacture of tobacco by the old process, if you do not desire to use the hydraulic power in preference to the hand-power because you get the more pressure by it?

A. 56. No; not for that reason, but because it is handier to use the hydraulic power; that is the reason we used it.

X Q. 57. About what pressure did you use in your finishers?

A. 57. Not over 100 tons I don't think, as near as I could tell; we could not exactly tell the gauge; but according to the way the lumps showed when they came out we found what pressure was necessary, and used the same pressure all the time.

X Q. 58. Wasn't it a matter of fact that according as you increased your pressure up to a certain amount the tobacco would have a better finish and a more glossy appearance?

A. 58. We always gauged our tobacco just this way: We gave it the pressure that made it look the best in shape and in gloss, and we always aimed to make it look the best, and when we found out that way we always gave it the same pressure; the pressure was put on any lump that would make the oil come to the surface, but we never gave it enough to put it out of shape; the prettier the lumps the better they always sell; when we obtained a certain amount of pressure, all that was necessary, we kept it and never gave it any more than that, because it might spoil the shape and mash it out of shape and everything.

X Q. 59. Would not Exhibit B have looked better if you had given it more pressure?

A. 59. I don't think it would have looked better than it does.

148 X Q. 60. Why?

A. 60. Because it would have been thrown out of shape; the edges would have been uneven and pulled out of shape. It don't make it look any better to pull it, and poor wrappers will all stick to the moulds, and make it look rough. There is just a certain amount of that the tobacco will bear, and it is owing to the kind of tobacco and the order it is in a good deal.

X Q. 61. Then you say that under the old process that tobacco could not have been improved in appearance?

A. 61. No; I don't see how it could with that grade of tobacco. If it had been fine tobacco it could.

X Q. 62. Is this the ordinary thickness of that plug of tobacco, Exhibit B?

A. 62. Yes; that grade of tobacco.

X Q. 63. Suppose Exhibit B had been made thicker, wouldn't it have made a better appearance on the outside?

A. 63. Well, I don't know as we could make it a better appearance. Probably if filled up it shapes better; but if you were to make it that size, that kind and quality of tobacco, where the tobacco is a thick lump like this, filled out a little better, it will make it shape a little better.

X Q. 64. Do you say that tobacco of this grade and quality you cannot put it in a thick plug?

A. 64. Oh, yes, we can; but we don't do it.

X Q. 65. Suppose that had been put into a thick plug, as you manufacture finer grades of tobacco, couldn't you have subjected it to a pressure which would have made the outside look more glossy and smooth than now?

A. 65. No; I don't think we could.

X Q. 66. Why was that?

A. 66. Because I don't think you can get it smoother than that.

X Q. 67. What is that owing to?

A. 67. Not in that same grade of tobacco.

149 X Q. 68. In this same grade of tobacco you could not have made it look smooth?

A. 68. No, sir; I don't think we could.

X Q. 69. Is this the lowest grade of tobacco?

A. 69. It is the lowest we make.

X Q. 70. Is it the lowest grade that is merchantable?

A. 70. I suppose it is, about. There may be some worse than that, but that is what we call the meanest tobacco; used for chewing and smoking both.

X Q. 71. Did you never happen to have any of your finer grades of tobacco left there?

A. 71. Oh, yes.

X Q. 72. Did you manufacture any of your finer grades under the old process as you have in Exhibit B?

A. 72. We haven't any of them left there. We manufacture some in the summer time every year, but not so much as the medium goods.

X Q. 73. Under the old method?

A. 73. If we have any left over we leave it in, as we did that, until we commence again, and if we don't commence again we put it in a box and head it.

X Q. 74. Did you have any left there this time?

A. 74. I don't think we did.

X Q. 75. Are you sure you did not?

A. 75. I don't know now that we did. I am not sure about it. There might have been, but I don't know. We make that in warm weather, that fine goods.

X Q. 76. Then, you state that, from your experience in the manufacture of plug-tobacco, it would be impossible to make tobacco under the old method of making tobacco that would look better than Exhibit B, when it is made of the grade of tobacco that is?

A. 76. Well, I should think so. There might be some plugs that would look a little better than that and some worse. That is a
150 fair average of tobacco, take it all through. I don't think you could of that grade of goods and class of tobacco, made out of scrappy tobacco. It is hard to roll that kind of tobacco, to make it roll of any shape and right, as you could with leaf-tobacco. That is made out of scraps and sweepings, and things that are left over, and odds and ends that we have, and it is not so easy and well made as the other.

X Q. 77. Please look at this piece of tobacco, and state how that was made.

(Defendants' plug, marked Exhibit F, was shown to the witness.)

A. 77. I didn't see that made. I should judge it was made by the machine.

X Q. 78. What do you mean by the machine?

A. 78. A machine to make plug-tobacco.

X Q. 79. Made by what is called the old or the new process?

A. 79. The pressing part of it I can't tell you. I didn't see it pressed. It looks like it had been made or pressed by the new process—I mean finished by the new process—to me.

X Q. 80. Then, from your experience in the manufacture of tobacco, you would think that the plug marked Exhibit F was manufactured under the Worley process?

A. 80. It looks that way.

X Q. 81. What is the quality of that tobacco?

A. 81. Well, it looks to be medium goods—medium tobacco.

X Q. 82. How does it compare with the quality of Exhibits A and B?

A. 82. It looks to be better tobacco. I can't tell what is inside of it.

X Q. 83. What would be your opinion, whether it was better or poorer tobacco?

A. 83. From its appearance, I should think it was better tobacco, sir.

X Q. 84. Have you any doubt about this?

151 A. 84. I can't tell, unless I look into it. Then I could tell you mighty quick.

X Q. 85. From an examination of the outside and its appearance, have you any doubt that it is better tobacco than Exhibits A and B?

A. 85. From the way it looks, I should think it was better tobacco.

X Q. 86. Do you say it would be impossible, under the old process, to have made tobacco of the grade of Exhibit B, and to have it as smooth as that, even if made as thick as that?

A. 86. This tobacco looks as though it was pressed in new tins, and if it has not been under the Worley process it has been with new tins, and the gloss of new tins will show up on new tobacco better than old. New tins will give the tobacco more gloss than after they get older, but that looks like it had been under the Worley process.

X Q. 87. Then that has either been made under the Worley process or it has been made with new tins?

A. 87. It looks that way to me.

X Q. 88. Can you tell how long that has been made?

A. 88. No; I can't tell. It has the appearance of having just been taken out of the finisher.

(Signature waived.)

And the said CHRISTAIN WORLEY, being about the age of years, and having been by me first cautioned and sworn to tell the truth, the

whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereon depose, testify, and say as follows:

Examined by R. H. PARKINSON, Esq.:

Question 1. You are the person of the same name who has heretofore testified in this case?

A. 1. Yes, sir.

152 Q. 2. Look at "Complainants' Exhibit Worley Tobacco No. 1 and No. 2," and state how they compare with the exhibits produced by you at the time of your former deposition.

A. 2. Well, they look almost as well, only they are darker colored.

Q. 3. How do they compare in the quality of the tobacco?

A. 3. The quality of the tobacco is pretty much the same.

Q. 4. How do they compare in the method in which they were finished?

A. 4. The same.

Cross-examined by S. S. BOYD, Esq., counsel for respondents:

X Q. 1. When did you last see those exhibits that were originally filed?

A. 1. The last time I saw them was right here.

X Q. 2. How long ago was that?

A. 2. About three months ago.

X Q. 3. Have you any particular recollection as to the quality of the tobacco in those exhibits?

A. 3. No; only I had a boy take them out of a box.

X Q. 4. Can you state now what was the grade of the tobacco in those exhibits originally produced here?

A. 4. It is tobacco that we call "Purity."

X Q. 5. You don't mean to say that "Purity" indicates the particular grade of tobacco, does it?

A. 5. It indicates our navy tobacco.

X Q. 6. Is your navy tobacco always the same grade?

A. 6. As near as we can make it.

X Q 7. You never put "Purity" on any except your navy?

A. 7. That is all.

X Q. 8. Are you sure the tobacco you originally produced was the same grade of tobacco you now present?

A. 8. No; they were not the same grade.

X Q. 9. Do you know whether they were subjected to the same pressure, precisely the same process as this you now present?

153 A. 9. The same process; yes, sir.

X Q. 10. The same pressure used?

A. 10. Well, I can't tell that, whether the same pressure.

X Q. 11. As a matter of fact, the only thing you know about it is the tobacco has passed through your process?

A. 11. Yes, sir.

X Q. 12. Whether it is the same grade of tobacco you can't tell?

A. 12. No.

(Complainants' counsel here states that the exhibits offered in evidence on the taking of former depositions have disappeared from his office, being, he supposes, stolen. He has been unable to trace them, and for that reason offers the new exhibits.)

(Signature waived.)

154 *Defendants' admission.*

United States circuit court, eastern district of Missouri.

CHRISTIAN WORLEY ET AL.
v.
LOKER TOBACCO CO. ET AL. } 1024.

The defendants in the above cause admit that they have been and are now manufacturing tobacco in the following manner:

The tobacco is first sufficiently pressed in the ordinary manner, then removed from the press and repacked in a wooden finisher substantially the same in construction as that shown in the drawings annexed to the letters patent granted the above-named complainant, No. 181512. The head of the finisher is 1½ to 2 inches thick, and when in place is flush with the edges of the finisher. The tobacco is packed, with interposed metal plate so as to be nearly level with the top of the finisher—never above it—when the head is placed on top of it and sufficient pressure applied to force it into position. The pressure is always applied by hand, using an ordinary retainer-wrench, and in no case is greater pressure used than is just sufficient to force the head into place. After the head is secured by the ordinary bar, the finisher is removed to the heating-room, where the tobacco is subjected, it still being in the finisher, to a dry heat, from 110 to 120 degrees Fahrenheit, for about five hours, the tobacco being all the time under the pressure above mentioned, and each layer thereof separated by metal plates in contact with the broadsides of the plugs. The tobacco is then allowed to cool in the finisher, after which it is removed and packed into the boxes in which it is shipped. The finishers used are about 16 inches deep and 12 inches square, inside measurement.

14 Sept., 1877.

SAMUEL S. BOYD,
Defendants' Solicitor.

155 TESTIMONY.

CHRISTIAN WORLEY ET AL., COMPLAINANTS,
versus
THE LOKER TOBACCO CO. ET AL., RESPONDENTS. } In equity.

Testimony taken on the part of respondents, under the sixty-seventh rule of practice, as amended, for the courts of equity of the United States, by Arthur E. Mooney, special examiner duly appointed by the said court to take depositions in said cause, Wednesday, October 10th, 1877, at the office of Samuel S. Boyd, esq., No. 506 Olive street, St. Louis, Mo.

Present, John E. Hatch, counsel for complainants, and Samuel S. Boyd, counsel for respondents.

GEORGE S. SHRYOCK, being produced and sworn as a witness on the part of the respondent, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

A. My name is George S. Shryock; residence St. Louis; age 42; I am now secretary of a manufacturing and bottling company.

Int. 2. Prior and down to the year 1874 what was your occupation?

A. A tobacco manufacturer.

Int. 3. Where?

A. In St. Louis; part of the time on Commercial street, between Pine and Olive, and part of the time on Chestnut street, corner of 15th.

156 Int. 4. How many years prior to 1874 were you engaged in the manufacture of tobacco?

A. Since the spring of the year 1868.

Int. 5. Were you alone, or was it a firm that you were connected with?

A. Part of the time I had a partner and part of the time I was by myself.

Int 6. What was the firm name?

A. George S. Shryock & Co.

Int. 7. Please state in what manner, during that time, you manufactured what you called your finest-grade tobacco; describe the process as particularly as you can.

A. After the tobacco was pressed into plugs it was placed in large wooden boxes, between plates of metal, one layer of tobacco in plugs and one sheet of metal, alternately. When the box was full the side was screwed on—the side that had been left off for the purpose of filling was screwed on. It was then pressed in the box under a screw and the head put in. The box was then placed in the sweat-room, where it was exposed to a degree of heat which was determined by circumstances. After the sweating process was finished the box was taken out and the tobacco packed in smaller boxes for sale.

Int. 8. For how long a time was the box kept in the sweat-room?

A. It was kept there for several days, owing to the order of the tobacco.

Int. 9. In what condition as to temperature was the tobacco when the box was taken from the sweat-room?

A. Well, some time was allowed for it to cool down before the tobacco was taken out; it was not as high a temperature as it was during the process of sweating.

Int. 10. After the tobacco was taken from the box, what, if anything, was done to it prior to its then being packed in the caddies ready for sale?

A. Nothing whatever that I remember. Of course when the tobacco was taken out of the large box or wooden finisher, as we call it, the metal plates were thrown aside, when it was packed in boxes for sale.

157 Int. 11. Please look at the drawing now shown you, and state how the finisher that you have spoken of corresponds with or differs from the finisher there shown. (Witness is here shown the drawing annexed to the patent of C. Worley upon which the present suit is based.)

A. The finisher we used differs from this one in this: That the box was like an ordinary tobacco-box, differing in hight and thickness, being strengthened for this purpose; but instead of the iron bands that (indicating) seems to have around it to strengthen it, we placed it inside of casing bands which enabled the box to be strong enough to resist the pressure of the screw. I can explain that, in order to afford this strengthening, there was a segment of wood placed on the side of this box, and when these four pieces were placed on the four sides of the box and the iron bands put around them, the keys being driven in these bands, then it afforded the support necessary. We had a large

number which we used for that purpose. They have been used in times gone by, but are not used so much now. In the boxes we used this moveable side was simply screwed on with long iron screws; they are called wood screws before the casing bands are put around, of course.

Int. 12. Do you remember about what degree of heat you employed in the sweat-room?

A. We employed from 65 to 135, according to circumstances. Sometimes it might have been a little more.

Int. 12. What sort of heat was that, dry or moist?

A. Dry heat.

Int. 14. When your tobacco was removed from the finisher to be placed in the caddies for sale what was the appearance of the surface of the plugs as to smoothness or roughness?

A. They were smooth. Our object in using the plates was to get a polish.

Int. 15. When, as near as you can remember, did you first manufacture tobacco in this way?

A. I think it was in the year 1870.

Int. 16. What enables you to fix that year?

A. Well, our first effort was to take the premium at the fair here
158 on tobacco, and the foreman, Mr. Lee, came to me one morning and told me he had got a plan to take that premium, and told me that this was the plan he hit upon. We talked the matter over, as we did all matters of business, often, and decided to try it. We made some experiments and decided that it would perform what we wanted it to do, and adopted it.

Int. 17. Can you give any idea of the amount of tobacco you manufactured in this way?

A. After we found this was a success we used it on all our finest tobacco.

Int. 18. How largely were you engaged in the manufacture of tobacco?

A. Not very largely, but we had a large proportion of our business in fine tobacco; it would be safe to say that we made not less than 5,000 pounds a year, perhaps twice that much.

Int. 19. By this process?

A. By that process. I would like to observe that in the detail of the manufacture I may not be strictly accurate, for I wasn't the foreman, but this is my recollection of the process.

Cross-examination by Mr. HATCH:

X-int. 1. Are you engaged at present in the manufacture of tobacco?

A. No, sir.

X-int. 2. When did you stop manufacturing?

A. In 1874.

X-int. 3. During how many seasons did you make tobacco in the manner in which you describe?

A. We continued this process every year until I quit business. During the latter part of the year 1873 we commenced to make different kinds of tobacco; I changed the nature of my business, and did not make so much of this kind of tobacco in that shape as I had formerly done. We commenced to make fancy shapes of tobacco, in which this process could not be employed.

X-int. 4. You say this method was suggested to you by your foreman?

A. Yes, sir.

159 X-int. 5. Robert Lee?

A. Yes, sir.

X-int. 6. How had you put up your best tobacco prior to that time?

A. We pressed it in the box without putting it—precisely the same way, except we didn't use this finisher; we didn't use the long box, and didn't use the tin plates between, for fine tobacco, in the sweating process; we used them in the finishing process, of course, but then the tobacco was taken out of the finisher and placed in the boxes. The process of sweating between tins we had never used before, or metal, as it is called. I had never heard of that before.

X-int. 7. What heat had you ordinarily used in the sweating-room prior to that time?

A. The heat ordinarily ranged from 65 to 120; sometimes a little more. In this process, if my recollection is correct, we got the highest heat we could, a little more than ordinary, but these details I am not so apt at, because it has been some time ago and I was not the manufacturer. My recollection is, though, that it required a high degree of heat to make the process obtain.

X-int. 8. You say the heat varied from 65 to 125 degrees; under what circumstances did you use as low a degree of heat as 65 degrees?

A. When the tobacco was pretty dry and all we wanted was to heat it a little and let it cool. We made a great deal of tobacco for damp climates.

X-int. 9. And under what circumstances did you use the higher degree?

A. When the tobacco was not put up so dry and we wanted to exert a greater power. My recollection is that the more you heat tobacco the more it would swell; the pressure would be greater.

X-int. 10. How much tobacco did you make in the season of 1870 by the process you have described?

A. I can't tell the number of pounds; I don't remember; but I know that we discovered that this process was a success not long before the fair, and the season for fine tobacco was pretty well over after
160 the fair, which takes place in October, so that we couldn't have made much that year, though we manufactured a great deal of tobacco in cool weather, much more than most manufacturers.

X-int. 11. Can you state some of the parties to whom that tobacco made by that process was sold by you?

A. No, sir; my books will show. I did a business with the merchants of the South particularly, and of course I couldn't tell without referring to the books of the establishment. I can give you the brand of the tobacco that we made, if you wish.

X-int. 12. What was the brand?

A. One brand was called "Standard," and the other "Premium."

X-int. 13. Who besides yourself can you name that saw that process used by you?

A. The foreman and the head pressman must have seen it.

X-int. 14. What is the name of the head pressman?

A. I had several head pressmen while in business. I think the pressman at that time was named Edward Geider.

X-int. 15. Can you name any others that saw the process used?

A. I don't remember who we had besides except one man, who met with a violent death afterwards, and that of course made an impression upon my mind.

X-int. 16. How is the pressure applied to the box after the tobacco and the metal plates were put into it?

A. It was by a screw; a lever.

X-int. 17. How operated?

A. The finisher was placed under the screw and the screw turned to bear upon the top of the finisher; but this process was applied at times as the box was filled, for it was a long box. It was applied at different stages.

X-int. 18. Was this pressure applied to the screw by hand or by machinery?

A. By a lever worked by hand.

X-int. 19. Who were the other members of your firm at the time you used this process that you speak of?

A. Mr. Lee was a partner a portion of the while, and a portion of the while he was not.

161 X-int. 20. Were you the only members of the firm of Shryock & Co., you and Mr. Lee?

A. Yes, sir.

X-int. 21. Mr. Lee had charge of the works?

A. Yes, sir; he was the foreman; had general charge of the manufactory.

X-int. 22. How often were you about the works?

A. All the time; that is to say, the office was connected with the factory, and I was in and out of the factory several times a day. We had consultations all the time about every step we took, so that I was pretty familiar with everything that took place.

(Signature waived.)

ROBERT E. LEE, being produced and sworn as a witness on the part of the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. What is your name, age, residence, and occupation?

A. Robert E. Lee; age, 35; residence, 707 Gate street; at present I am a street-railroad conductor.

Int. 2. Please state whether you were ever engaged in the manufacture of tobacco; and, if so, when you began that business and when you ceased to do that business.

A. I was in the tobacco business about 1856, and I quit it, as to manufacturing, in January, I think, 1873.

Int. 3. Please state whether you were ever connected with the firm of George S. Shryock & Co; and, if so, during what time.

A. I went to work for Mr. Shryock; went in as a partner the first of April, 1867. He stated 1868 this morning; my recollection is 1867; and I remained with him until January, 1873—no, January, 1874. I worked 1873 into 1874.

Int. 4. What part of the business did you attend to?

A. I was superintendent, foreman; attended to the factory.

Int. 5. Please state whether at any time there was a change made in the mode of manufacturing his finest grade of tobacco; and, if so, when that change was made, and in what it consisted.

162 A. During August or September, in 1870, I think it was, I got to experimenting with tobacco, finishing it to keep it from swelling; that is, new tobacco put into boxes will swell up. I put it in tins and put it in the sweat-house, and after cooling it off I found that it had a very high finish on it, slick, and I communicated that to Mr. Shryock,

and told him I thought I had hit upon a plan to make our tobacco look nice, and it wouldn't swell up when opened for sale to retailers, and then I showed what I had done, and I proposed then to get some boxes made, long boxes, that would hold 200 or 300 pounds, and use them, and he told me to go ahead.

Int. 6. Who made the boxes?

A. Mr. Oswald made the boxes for me; I don't know his first name. I went to work pressing tobacco, and packed it between tins in these boxes, filling the boxes with as much as I wanted in them, casing them up tight with iron bands, and putting them in the sweat-house. I let them remain there until I thought they got enough heat to expand the tobacco, and then repacked it off into boxes.

Int. 7. How was the tobacco put into this box?

A. There was a tin, then a layer of tobacco and a tin, and so on until the box was filled.

Int. 8. How was it pressed down?

A. With a screw.

Int. 9. In what condition was the tobacco when you packed it into this box?

A. Right out of the moulds; it had been round lumps before.

Int 10. About what degree of heat did you have in your sweat-room?

A. Generally manage to keep it as close to 130 as possible; sometimes run up to 150; sometimes it is 140. My heat was from a stove, and irregular; I generally tried to keep it at 130.

Int. 11. How long would the tobacco remain in the sweat-room?

A. That would depend upon the condition of the tobacco. If it was a high order I would sweat it harder, sometimes two, three, or four days. I have left it six days, but it was a very high order.

Int. 12. In what condition was it as to temperature when you took it out?

A. We would let it cool off.

163 Int. 13. After your took the tobacco from the finisher what was done to it?

A. It was packed away in boxes for sale. I used to keep one generally, one of these long boxes, to pack up into sliding boxes, little five-pound boxes.

Int. 14. You say you began to do this in 1870?

A. Yes, sir. How I know that is this: I looked at the diploma got at the fair.

Int. 15. What fair?

A. State fair, 1870.

Int. 16. In what month?

A. In October.

Int. 17. How much of this tobacco did you make in this way during 1870?

A. Well, I couldn't say.

Int. 18. Could you give any idea?

A. No, I cannot; I made all my fine tobacco that way.

Int. 19. Well, in 1871?

A. The same way.

Int. 19. How long did you continue to use it?

A. The balance of 1870, 1871, and 1872; I didn't commence on it in 1873, because we didn't start the factory until rather late, and we started on common goods, and about April I went out as partner and J. R. Harris came in as partner, and I acted as foreman. I don't recol-

lect of using it at all in 1873; I may have done it, but I don't recollect.

Int. 21. How much did you make of tobacco this way during those years?

A. I can't tell; I never kept any account.

Int. Did you make a large or small quantity?

A. We made a good deal of fine tobacco; I can't tell how much; it may have been 50,000 pounds, or it may have been 100,000 pounds. I can't tell as to the number of pounds.

Int. 23. Where was the factory situated?

A. 216 N. Commercial.

Int. 24. St. Louis?

164 A. Yes, sir; up to May, 1873. It was moved in May and a part of June upon 15th and Chestnut streets; that is my recollection; June it was we moved up there.

Int. 25. What sort of heat was it you used there?

A. Artificial heat, coal stove.

Int. 26. Dry or wet?

A. Dry.

Int. 27. What was the appearance of the tobacco?

A. Slick, firm, solid; what we call set—it was set.

Int. 28. How many men did you have employed in the factory there?

A. There were eight or ten tobacco-rollers, four or five pressmen, three or four hands on the leaf floor, forty or fifty stemmers, and all.

Cross-examination by Mr. HATCH;

X-int. 1. Give, as near as you can, the amount of tobacco that you finished.

A. I can't do it, sir; can't make any estimate.

X-int. 2. When did you finish the last lot, as near as you can tell?

A. Well, I don't recollect of doing any of it out there on 15th and Chestnut; I might say the summer during 1872.

X-int. 3. Then you used this the latter part of 1870, the season of 1871, and the summer of 1872?

A. Yes, sir.

X-int. 4. You continued in the tobacco business for a year or two after that?

A. It was January, 1874, when I left Mr. Shryock.

X-int. 5. Why did you stop using that process?

A. I didn't make tobacco any more; Mr. Harris was the boss; Mr. Harris came and made a different shape, what they called "Jubilee Twist," not plug.

X-int. 6. Mr. Harris, after he came in, didn't used the process?

A. No, sir.

X-int. 7. You had all the means there for its use, did you not?

A. Yes, sir; but, understand, the kind of tobacco he made wouldn't admit of this process—didn't want it.

165 X-int. 8. Did you think the process a good one?

A. Yes, sir.

X-int. 9. What process had you used to give a finish to tobacco before that time?

A. Nothing more than a common finisher. We pressed it in molds, then take it to the finisher, pack it between tins and press it, leave it stand so four or five hours, as long as you can, the longer the better, and pack it off into boxes.

X-int. 10. By that process you use no heat?

A. No heat.

X-int. 11. What is the advantage of pressing it between tins and using heat in connection with it?

A. Well, sir, it gives a higher finish, more gloss on it, and it makes tobacco so that when you take, for instance, new tobacco, tobacco really fresh, and press it and put it through that process it won't swell.

X-int. 17. Does it have a better market value?

A. Well, I couldn't say that; a man can guarantee it to be as good as it looks, and it won't swell.

X-int. 13. You say you used about 130 degrees of heat; did you consider that about the proper amount to use?

A. Yes, sir; I thought it was from 120 to 140; I tried to keep at 130 if I could.

X-int. 14. 130 produced good results?

A. Yes, sir.

X-int. 15. 130 would be as good as 140?

A. It would get that during that time; if I could keep it at that it always came out right.

X-int. 16. I suppose variations of 15 to 20 degrees wouldn't make much difference?

A. No, sir; but too much will burn it or make it too dry.

X-int. 17. How came you to think of this idea of finishing tobacco in this way?

A. Well, sir, I can't exactly tell you now, but I was always experimenting on tobacco. There was one thing that put me at it, and it is this: We were selling a great many five-pound boxes, sliding-top boxes. Tobacco in them you can't press; you have to take it out
166 of another box that has been pressed and put away, and pack it five pounds in the box. Whenever that box was opened for sale it would swell up, and that is how I tried the experiment of sweating between tins, for we had a good deal of fault found on that account.

X-int. 18. And until you began to experiment with this process you never heard of it being used by any one else?

A. No, sir.

X-int. 19. You consider it a valuable process?

A. Yes, sir; a very good way if a man don't carry a large stock.

X-int. 20. Won't you explain how it saves you from carrying stock?

A. Well, tobacco ought to have a certain age; it will swell up if you send it out too soon; this process keeps it from that, and you can send it out.

X-int. 21. May you not be mistaken as to the date when you began to use this; may not it have been 1871?

A. No, sir; I got the premium, and the diploma says 1870.

X-int. 22. May not the diploma have been on a different grade of tobacco?

A. No, sir.

X-int. 23. You are sure of that?

A. Yes, sir; and I also took one in 1871 or 1872, afterwards.

X-int. 24. What fair?

A. This one out here; the same process. The diplomas are hanging up in Mr. Shryock's office now.

X-int. 25. Can you give me the names of any parties who purchased that tobacco put up in that way by your firm?

A. I know nothing about the people who bought the tobacco; it was all sold in the South pretty much.

X-int. 26. You have no idea how much you made?

A. No, sir; I couldn't say.

X-int. 27. You can't tell whether you made over 5,000 pounds?

A. Yes, sir; ten fives I should judge, and more too, but I wouldn't like to say positive.

X-int. 28. Can't fix anything definite?

A. No, sir; I wouldn't do it.

167 Redirect examination by Mr. BOYD:

Int. 29. You say that Mr. Harris, when he assumed charge, manufactured another kind of tobacco. Look at these drawings, and see whether that resembles the tobacco he manufactured. (Showing witness the drawing attached to letters patent granted to J. K. Earickson and J. R. Harris.)

(Counsel for complainant objected.)

A. Yes, sir.

Int. 30. Describe that as near as you can.

A. His way of making tobacco?

Int. 31. Yes.

A. Well, he made it into twists; they were not plugs; and then the twists were pressed into one another, made them look rough.

Int. 32. Why wasn't this process applicable to the manufacture of tobacco in that form?

A. Well, it wouldn't give the tobacco the shape they wanted in this.

Recross-examination by Mr. HATCH:

X-int. 29. After Mr. Harris came there did you not also make some plug-tobacco?

A. Oh, yes.

X-int. 30. But you made this addition to it?

A. Mr. Harris ran the factory. I wasn't going to tell him what I knew, or anything else; tobacco men are always for themselves; Mr. Harris thought his way better than mine.

X-int. 31. But they continued to make plug-tobacco?

A. They made a little, nothing worth talking about; made 10 or 20,000 pounds, if they made that much.

(Signature waived.)

EDWARD GEIDER, being produced and sworn as a witness on behalf the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

168 A. My name is Edward Geider; my residence is on Columbus street, between Berry and Miller, St. Louis; my occupation is pressman.

Int. 2. In whose employ are you now?

A. F. H. Brinkmann.

Int. 3. Tobacconist?

A. Yes, sir.

Int. 4. Manufacturer?

A. Yes, sir.

Int. 5. State if you were ever in the employ of George S. Shryock & Co.; and, if so, how long.

A. I was employed there near five years.

Int. 6. When did you begin with him, and when did you cease working for him?

A. I believe somewhere in 1868 I begin with him, and quit in 1873.

Int. 7. What was your business?

A. Pressman.

Int. 8. What did you there at his factory?

A. Pressed tobacco.

Int. 9. Well, what pressman were you—head pressman?

A. Yes, sir.

Int. 10. Please state whether, while you were there, Mr. Shryock made any change in the mode of manufacturing his fine tobacco, and what that change was.

A. That change was packing tobacco between tins and high boxes—the boxes were thirty-six inches high—and cased up the box and put it in the sweat-house.

Int. 11. How long did it stay in the sweat-house?

A. Used to leave it two or three days; can't exactly tell how long they left it in.

Int. 12. How hot was the sweat-house?

A. Between 130 and 150; sometimes get to 120.

Int. 13. After the tobacco was taken from that sweat-house what did you do with it?

A. We took it out and left it to cool off, and packed it into boxes, packed it in these five-pound boxes.

169 Int. 14. What sort of a box was that that you packed it into to put it into the sweat-room?

A. A box 36 inches high.

Int. 15. How did you pack the tobacco in there?

A. Took one side off, screwed it off, and after it was filled up we would screw it on again.

Int. 16. You say you used metal plates?

A. Yes, sir.

Int. 17. How did you use the metal plates?

A. Plate and tobacco, and plate again and tobacco, until it was filled.

Int. 18. How did you press the tobacco in that finisher?

A. With a screw.

Int. 19. Worked it how?

A. By hand.

Int. 20. Working on the side or top of the case?

A. On the top of the case; screwed it down.

Int. 21. Can you tell when you first began to use that process?

A. Yes, sir; in October—somewhere in October. Before that we had been using it some.

Int. 23. What year?

A. 1870.

Int. 23. Can you tell how much you made in that year 1870?

A. No, sir; never kept track of it.

Int. 24. What proportion of your fine tobacco did you make by this process?

A. Well, we made—couldn't tell how many; used to make other tobacco between. I couldn't tell.

Int. 25. Did you use this process after 1870?

A. Yes, sir; kept working it on until Harris got in; then we quit it; had no use for it then.

Int. 26. Have you any idea how many pounds you made of tobacco in this way—a thousand pounds?

A. More than that, but I don't know how much more.

Int. 27. What had been done to the tobacco before you put it into this finisher?

A. Pressed it in molds, took it out of the molds, and finished it.

170 Int. 38. What was the appearance of the outside of the plugs when you took them from finishing between the metal plates?

A. They were slick.

X-int. 19. What do you mean by that—smooth?

A. Yes, sir; smooth.

Cross-examination by Mr. HATCH:

X-int. 1. What did you do there?

A. I was pressman there.

X-int. 2. Who worked with you?

A. A man named Pat Hannan, and Edward Carey, and a fellow named Klein.

X-int. 3. When did you last hear of Pat Hannan?

A. He was killed.

X-int. 4. When did you last hear of Edward Carey?

A. About two years ago.

X-int. 5. Where was he then?

A. I met him down here, down at the Six-mile House.

X-int. 6. Where was he at work?

A. Said he had been on a steamboat then.

X-int. 7. Know anything about Klein?

A. No, sir.

X-int. 8. Then you don't remember anybody else that worked there with you during the time you used this process?

A. No, sir.

X-int. 9. Can't you give the name of some other party who knew about the use of this process there at that time?

A. No, sir; they are the only three I know that worked with me in the press room.

X-int. 10. Can't you give me the name of any who knew about the use of the process there?

A. No, sir.

X-int. 11. How long did you work there, you say?

A. Near five years.

X-int. 12. Did you work upon tobacco before you went to work there?

A. Yes, sir.

171 X-int. 13. How long had you been at work in finishing tobacco?

A. In this factory?

X-int. 14. No; any factory.

A. Fifteen years, sir.

X-int. 15. Where did you work before you worked at this place?

A. I worked in Spear's factory.

X-int. 16. Where is that?

A. That is between Elm and Walnut, between Third and Fourth.

X-int. 17. How long did you work for Spear?

A. About 6 or 7 months.

X-int. 18. Where did you work before that?

A. Worked for Schroeder.

X-int. 19. Where is that?

A. Upon Christy ave. and Main.

X-int. 20. How long did you work for him?

A. I worked near four years; two years at the table and two years in the press-room.

X-int. 21. Did you ever see this process used by any one else until you saw it used here?

A. No, sir.

X-int. 22. Did you consider it a good process?
A. Yes, sir.
X-int. 23. In what did its value consist?
A. I don't know that.
X-int. 24. Why did you consider it a good process?
A. Because the tobacco was smooth, and did not swell.
X-int. 25. How did they make up their tobacco before that?
A. Used to take it out of the molds and put it in the iron finishers and let it stay there, and then put it in boxes.
X-int. 26. Without any heating?
A. Yes, sir; without any heating.
X-int. 27. How much pressure could you get with one of those hand-presses?
A. I couldn't tell that.
X-int. 28. How far could you press the tobacco down in the box?
172 A. Sometimes you could press it six inches, and sometimes two inches—that is, according to how the molds were.
X-int. 29. How long a lever did you have?
A. A big wooden stick.
X-int. 30. How long?
A. About six or seven feet long.
X-int. 31. How much tobacco was there made there, as near as you can tell?
A. I couldn't tell that.
X-int. 32. When did they stop making tobacco that way—what year?
A. They stopped making it down here before they moved to Chestnut.
X-int. 33. Did they commence making the twist at the same time you moved away?
A. Yes, sir; they were making twist down there while they were moving. They quit down there. When Jake Harris got in they quit making tobacco that way; didn't make any after Jake Harris got in. I am sure of that.
X-int. 34. Did they make any plug-tobacco there?
A. They made plug-tobacco, but mighty little.
X-int. 35. How long did Jake Harris stay there before they moved away from that place?
A. I don't know; I couldn't tell that either.
X-int. 36. A year or two years?
A. No; I didn't stop there no year.
X-int. 37. You remember dates accurately, don't you?
A. No, sir, I don't; so long ago I forgot the thing almost.
(Signature waived.)

JOHN G. HORMANN, being produced and sworn as a witness on behalf of the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.
173 A. My name is John G. Hormann; age, 46; my residence is 1605 Benton street, St. Louis; my occupation is tobacconist.
Int. 2. What is your present occupation?
A. Assistant foreman at Christian Peper's.
Int. 3. How long have you been engaged in the manufacture of tobacco?
A. About 25 years.

Int. 4. How long have you been engaged with Mr. Peper?

A. About nine or ten years foreman for him, and then I started my own and I failed, and went back to him last year.

Int. 5. Please state whether at any time Mr. Peper made a change in the way of manufacturing; whether he used some metal plates; when it was, and exactly how he manufactured it?

A. About from 1852 to 1858. I was head foreman then, and he used to try experiments on tobacco off and on, and we put tobacco between tin plates, in a kind of round drum, some of it, and pressed and put it in the sweat-house; had licorice-cased wrappings on it and it stuck to the tins.

Int. 6. How long did you let it stay in the sweat-house?

A. Two or three days.

Int. 7. How was it when it came out, hot or cold?

A. Hot when it came out; got cold before we opened it.

Int. 8. After you let it cool what did you do with it?

A. Packed it into another caddy, and it was ready for sale.

Int. 9. How long did you pack tobacco in that way? You say you began it in what year?

A. In 1852; we didn't pack it steadily; kept using and trying experiments every two or three weeks.

Int. 10. How much tobacco did you press in that way during those years?

A. Well, I couldn't say; might be two or three thousand weight during the year, more or less; I couldn't say.

Int. 11. Two or three thousand weight each year?

A. Yes, sir; might be.

Int. 12. When you put it in this box how did you pack it; what did you do?

174 A. Packed a roll of tobacco and put a metal in, and tobacco again, and so on, and put it in the sweat-house.

Int. 13. Did you use any pressure?

A. Yes, sir; a hand-screw.

Int. 14. To what part did you apply the pressure?

A. On top; pressed it to make it solid.

Int. 15. You say down to 1858 you used that?

(Counsel for complainant objected, as the witness did not say anything of the kind.)

A. Yes, sir.

Int. 16. Please state whether you used it after 1858.

A. Well, after 1858—it might be 1859 yet—but 1860 we didn't use it more, because the business was so rushed then we could do without it.

Int. 17. Just explain that.

A. Because it would take more trouble, more time to repack it—to save labor.

Int. 18. What was the occasion of that rush for tobacco?

A. Well, more demand for it than had been for several years before.

Int. 19. Did you ever resume the use of that process after that; and, if so, when?

A. Well, I don't think we did; not as long as I was there.

Int. 20. When did you leave Mr. Peper?

A. I think I left him about 1865; I think somewhere along 1855 or '56.

Int. 21. When did you go into his employ again?

A. October a year ago; October, 1876.

Cross-examination by Mr. HATCH:

X-int. 1. What year did you say you began to work for Mr. Peper?

A. When I first came there?

X-int. 2. Yes.

A. About 15 or 20 years ago.

X-int. 3. You couldn't tell the date exactly?

A. No, sir; so long ago I forget.

175 X-int. 4. But you are sure it was some fifteen or twenty years ago?

A. Yes, sir.

X-int. 5. Can you fix the time any more definitely than that?

A. That is about as close as I can get unless I look over a book.

X-int. 6. Isn't your memory for dates and matters that occurred a long time ago accurate?

A. Yes; but I have been bothered these last five or six years considerably, and my memory is not as well as it was fifteen or twenty years ago.

X-int. 7. Where tobacco was pressed, having been licorice-cased, you say it would stick to the tins?

A. Yes, sir.

X-int. 8. What harm does that do?

A. Tears the wrapper.

X-int. 9. Is it a salable article if the wrapping is torn off?

A. In certain times it is, when there is a rush.

X-int. 10. Who was working with you at the time that you were making these experiments at Mr. Peper's?

A. There were a lot of men.

X-int. 11. Give the names of any that you can recall.

A. There is one right next to him (pointing), Mr. Christian Worley.

X-int. 12. Can you give the names of any of the others?

A. His brother, Jacob Worley. There are so many I couldn't recollect half of them any more.

X-int. 13. Who was the head pressman there then?

A. The last part was Bertram Rudolph; had several before that, but I don't recollect them.

X-int. 14. Can you give the names of any one else that was working there?

A. Yes; a man named Johnson.

X-int. 15. Where is he now?

A. I don't know; he is in the city though; saw him a month or two ago.

176 X-int. 16. Any one else aside from these that you have already given?

A. No, not particular.

X-int. 17. Can you tell what year it was that you made these experiments as to this process that you have spoken of other than it was during the time while you were working at Peper's; can you give any more definite answer than that?

A. No, sir.

X-int. 18. Is Mr. Peper putting up tobacco in the city now?

A. Yes, sir.

X-int. 19. How does he put up his tobacco now?

A. Well, I couldn't say, because I command one floor, and I don't go to the factory to attend to any other part but that one floor.

X-int. 20. Don't you know how he puts up his tobacco? Does he use licorice in it now?

A. Yes, sir; don't use no licorice on the wrappers.

X-int. 21. He takes his tobacco now, does he, and presses it first in the iron molds?

A. Yes, sir.

X-int. 22. Then he packs it into the finisher between tins?

A. Yes, sir.

X-int. 23. Then he puts in the *tobacco* and presses it down there?

A. Yes, sir.

X-int. 24. Then he puts it in the heater and heats it to a high degree of heat?

A. I don't think he does; he might have done it before I come there, but it is all in an open room.

X-int. 25. What is the heat in the room?

A. Couldn't be over 30 or 40.

X-int. 26. What is the heat that is used, what does it come from?

A. From the heater.

X-int. 27. What kind of heaters?

A. From steam.

177 X-int. 28. When you say thirty or forty you mean 130 or 140?

A. No; people couldn't stand to work in it. We had it as high as 80 degrees last summer, and then it was so warm that a fellow had to get out.

X-int. 29. Don't he put his tobacco in the sweat-room after it is packed?

A. Yes.

X-int. 30. What heat does he have in the sweat-room?

A. I don't know what heat he carries in there.

(Signature waived.)

WILLIAM H. RYAN, being produced and sworn as a witness on behalf of the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

A. My name is William H. Ryan; am about 36 years old; residence, 301 South Seventh street, St. Louis; occupation, tobacco manufacturer.

Int. 2. You know the plaintiff, Christian Worley?

A. Yes, sir.

Int. 3. How long have you known him?

A. Something over 20 years, I guess.

Int. 4. Did you ever work in any tobacco factory with Mr. Worley?

A. I don't think I ever did.

Int. 5. Do you know what he was doing in 1872 and 1873?

A. Yes, sir; he was manufacturing tobacco.

Int. 6. For whom and where?

A. For Henry McCabe, on Second street, between Morgan and Cherry, I think, or Christy ave. and Morgan.

Int. 7. How did he manufacture his tobacco in 1872?

A. I don't know anything more than he used those finishers at that time.

Int. 8. What do you mean by finisher?

A. That wooden finisher.

178 Int. 9. Look at the drawing attached to letters patent 181512 and say whether the finisher you speak of resembles or differs from that.

A. Did you say in 1872 and '73?

Int. 10. Yes.

A. I couldn't say how he manufactured tobacco at that time.

Int. 11. In either year?

A. No, sir.

Int. 12. When did you first see him manufacture tobacco, using the finisher?

A. In the spring of 1875.

Int. 13. How did he manufacture it in 1872?

A. I don't know, sir.

Int. 14. Or 1873?

A. No, sir; don't think I was ever in his factory at that time; to my knowledge I don't remember of ever being there.

Int. 15. Then do I understand you to say that you have no knowledge whatever of the process employed by Mr. Worley until the spring of 1875?

A. Well, I have been hearing for a couple of years that he was using those finishers, but didn't know anything of my own knowledge until the spring of 1875.

Int. 16. Did you hear it from him?

(Counsel for complainant objected.)

A. Yes, sir; I heard it from Christian Worley previous to 1875, but how long previous I couldn't say.

Int. 17. How long did he say he had been using those finishers?

A. Never told me.

Int. 18. What was the earliest time that he said that he used them?

A. Might have been 1874.

Int. 19. What is the earliest date that you ever heard him say that he used those finishers?

A. That I couldn't answer; I couldn't tell you what was the earliest date.

Int. 20. From whom did you hear besides him that he had been using those finishers prior to 1875?

179 (Counsel for complainant objected.)

A. Well, it was the general talk among manufacturers; I can't tell any particular one that I heard it from; a great many were speaking about those finishers along in 1874 or 1875.

Int. 21. Haven't you stated that he used those finishers as early as October, 1873?

A. Haven't I stated so?

Int. 22. Yes.

A. Here?

Int. 23. No.

A. I may have said that I thought he had, yes.

Int. 24. Upon what did you base that statement?

(Counsel for complainant objected.)

A. I couldn't tell that exactly, what I based that statement on. It is my opinion that he used them as early as 1873, but I couldn't swear positively.

Int. 25. Were you intimately acquainted with Worley during 1873?

A. Yes, sir.

Int. 26. How often did you use to see him?

A. Nearly every morning.

Int. 27. How often were you at the factory during 1873?

A. I don't remember of ever being there at all in 1873.

Int. 28. In 1872?

A. No, sir.

Int. 29. From what did you derive your impression that he used this in October, 1873?

(Counsel for complainant objected.)

A. Well, I remember of him telling me, in the spring of 1875, that his success in taking premiums was owing to using those finishers. That was in the spring of 1875. I know that he had taken at least two premiums at the fair here, the St. Louis fair.

Int. 30. How often are those fairs held?

A. Every year.

Int. 31. What month?

A. October.

180 Int. 32. You speak of "those finishers;" what do you mean by that?

A. I mean such a finisher as you see there. (Referring to the finisher in the drawing attached to letters patent 181512.)

Int. 33. How did he use those? What did he do to the tobacco in order to use those finishers?

A. Pressed his tobacco in molds, then run them into his finishers, placed the finisher in the sweat-house, sweated it, took it out, and packed it into boxes. I suppose that is the way he worked them; that is my opinion about the matter.

Int. 34. Did he never describe to you how he manufactured the tobacco by the use of those finishers?

A. Yes, sir; I think he did.

Cross-examination by Mr. HATCH:

X-int. 1. How long have you been a tobacco manufacturer?

A. Eight or nine years.

X-int. 2. What was the common method of finishing tobacco in use before Mr. Worley's?

A. Press into a mold, run into a finisher, and from that to a box.

X-int. 3. Without heat?

A. Yes, sir.

X-int. 4. Have you ever seen tobacco made under Mr. Worley's patent?

A. Yes, sir.

X-int. 5. State whether or not you consider that that method of making tobacco has any advantages over the old method of finishing tobacco.

A. Yes, sir; it has the advantage of keeping the tobacco from swelling in the box.

X-int. 6. How is that an advantage? Please explain why that is an advantage.

A. Well, when tobacco is pressed in the ordinary way in the molds, taken out of the molds and run into a box, unless it remains in the finisher a very long time, it is liable to swell, and consequently there is not a smooth surface.

181 X-int. 7. It would be then apt to tear one from another, wouldn't it?

A. Might happen that way; yes, sir.

X-int. 8. Do you think tobacco finished by Mr. Worley's invention is more or less marketable than that finished by the old method?

A. I don't think there is a great deal of difference in it. That would depend a great deal upon the kind of machinery a man was using.

(Signature waived.)

At this point, by consent of parties to said cause, I adjourned the further taking of these depositions until the 11th day of October, then to be continued at No. 1425 N. 18th street, at 10 o'clock.

ARTHUR E. MOONEY,
Special Examiner.

Pursuant to adjournment, as before stated, on the 11th day of October, 1877, at No. 1425 N. 18th street, I continued the taking of said testimony, as follows:

Present, John E. Hatch, counsel for complainants, and Sam'l S. Boyd, counsel for respondents.

JOHN WICH, being produced and sworn as a witness on behalf of the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

A. My name is John Wich; my age is 37; residence, St. Louis; my business is box-maker.

Int. 2. Do you know Christian Worley?

A. Yes, sir; I know him for about fourteen years, I believe.

Int. 3. Do you know Henry McCabe?

A. Yes, sir; I have known him about eight years.

Int. 4. Do you know where Christian Worley was employed in 1872?

A. Yes, sir.

182 Int. 5. Where?

A. He was working for McCabe.

Int. 6. Whereabouts?

A. It was down on Second street; same place that McCabe keeps now.

Int. 7. What was McCabe's business?

A. Manufacturing tobacco.

Int. 8. Did you ever do any work for McCabe during 1872?

A. Yes, sir; I made some boxes for him.

Int. 9. What kind of boxes?

A. I made some boxes to put chewing tobacco in.

Int. 10. What were those boxes called?

A. Called some tobacco caddies, some paddocks, and so on.

Int. 11. Were you ever in the factory of McCabe during the year 1872?

A. Yes; I was in pretty near every time I took boxes there.

Int. 12. Did you ever see him manufacturing his plug-tobacco?

A. Well, I come by there and see the men working.

Int. 13. What sort of a box did they use in manufacturing it?

A. Well, they used the same as the other factories used; I don't know what they call their tools.

Int. 14. Did you ever see them pressing their tobacco?

A. I don't know if I did see them press it in the boxes; I couldn't tell.

Int. 15. Do you know what a finisher is?

A. Yes, sir.

Int. 16. Look at the drawing now shown you (being the drawing attached to letters patent 181512), and state whether the finishers used there at McCabe's in 1872 were like or different from that.

(Counsel for complainant objected.)

A. I make one myself for McCabe like this; I couldn't tell; I don't understand that particularly, for I don't know exactly how they work it.

183 Int. 17. Describe that finisher as well as you can, that you made for McCabe in 1872.

A. Well, it was made with four corners, some hoops on.

Int. 18. Did you ever see that finisher used at McCabe's?

A. Well, I just told you a while ago I see men at work when I just walk by there. I always had to pass the place where the men were working, and saw a little of it, but I never was there to see them work all the time.

Int. 19. What did you see them doing with it?

A. Saw them taking some tobacco out of this finisher.

Int. 20. What did they do with it?

A. Put it in boxes.

Int. 21. What kind of boxes?

A. Put it into boxes that they just put up for selling.

Int. 22. Well, when they took that tobacco out of this finisher what else was in the finisher besides the tobacco?

A. I believe there was some kind of tin, or whatever it was.

Int. 23. How many tins?

A. Most every course.

Int. 24. You say that you saw them taking the tobacco out of this finisher and packing it into their small boxes for sale; did you ever see them putting the tobacco into the finisher?

A. I can't tell; I don't recollect; that was a long time ago; I don't recollect if I did see them or not.

Int. 25. Do you know whether they had a sweat-room in McCabe's factory or not?

A. Yes, I believe there was one right near the bath-room.

Int. 26. Did you ever see anything in that sweat-room?

A. I don't know if I did look at it.

Int. 27. Were you ever in the sweat-room?

A. I just recollect the first time when it got fixed up.

Int. 28. Were you ever in it after it was used?

A. I can't tell; I don't know; I don't think I was.

Int. 29. Do you remember whether you ever saw them using the sweat-room in any way, for any purpose?

A. I don't recollect that I did see anything else.

184 Int. 30. When you saw this finisher being unpacked where was Worley?

A. May be he was in the factory; may be out of doors.

Int. 31. What was his position?

A. He was foreman there, attending to the business.

Int. 32. Who gave you the instructions in regard to making this finisher?

A. Mr. Worley.

Int. 33. Did he say anything about what he was going to do with it?

A. Well, he told me he was going to try something.

Int. 34. What did he say he was going to try?

A. He didn't say much; I don't know what he did say; I believe he didn't say anything else.

Int. 35. When you brought the finisher down there to McCabe's factory did you see Worley?

A. I don't know; I don't recollect that.

Int. 36. Did you ever have any conversation with Worley in 1872 about this finisher, after you carried it down there?

A. I can't tell; I don't know any more than I just made the boxes and brought them there and got home, and then after a while he tried

the boxes how they worked and that was the first boxes, and I make them over about two or three times.

Int. 37. What did you make them over for?

A. Because they were not strong enough.

Int. 38. For what?

A. For that use.

Int. 39. What was the use that he was going to put them to?

A. Going to use them for sweating tobacco.

Int. 40. And they were not strong enough?

A. They were not the first time; didn't make them strong enough; I got some other iron and hoops.

Int. 41. How many did you make that year?

A. In 1872 I made about nine.

Int. 42. Have you got any books to show when you made those?

A. I got a book here. (Indicating.)

185 Int. 43. Please look at your book and see if you can tell the date when you delivered the first ones.

A. (Referring to book.) I have got five boxes here, April 2d, 1872, and then I believe I fixed those five over again; then made four more; that made nine.

Int. 44. What date was that, the four more?

A. The 13th of April, 1872.

Int. 45. After you made those four on the 13th of April, 1872, did you make any changes in the boxes, or did those suit?

A. What boxes?

Int. 46. These finishers.

A. I don't know; I believe I had to fix them over once more, but I hav'n't got that in the book.

Int. 47. Well, what changes did you make in these boxes after you finished those nine?

A. I had to make them stronger; make them stronger all the time.

Int. 48. Did you examine this tobacco that was taken out from this finisher; did you look at it?

A. I looked at it.

Int. 49. How did it look, rough or smooth?

A. Well, it looked smooth.

Int. 50. How many times do you think it was during that year, after April, that you saw him taking the tobacco out of the finisher?

A. That is more than I can tell; may be a couple of times, may be a dozen times. I would go down there two or three times a week at that time, taking boxes there.

Int. 51. Can you tell whether you ever made any finishers of this kind for Mr. Worley prior to this date, April, 1872?

A. I think I did.

Int. 52. How long before?

A. I believe I made some may be in 1871.

Int. 53. Were you at McCabe's factory in 1873?

A. I believe so; I was making boxes for him since about—I quit making boxes there two years ago.

Int. 54. Was Worley employed with McCabe in 1873?

A. Yes, sir.

186 Int. 55. Do you know whether you made any finishers of this kind for Worley in 1873?

A. I don't know if I make any besides this; I make one box for a sample.

Int. 56. Did you ever see this finisher being used at McCabe's factory in 1873?

A. Yes, sir; I seen them all the time in use, till I didn't come down any more.

Int. 57. What did you see them doing with it in 1873?

A. Just what I told you a little while ago.

Int. 58. Do you remember whether you were in the sweat-room in 1873?

A. I don't recollect that I was in the sweat-room, only the first time—except the first time.

Int. 59. Did you ever see anything in the sweat-room during 1873?

A. I don't know if I saw anything or not, when I was in.

Cross-examination by Mr. HATCH:

X-int. 1. Do you remember how many boxes you made for Mr. Worley in 1871?

A. I told you one box.

X-int. 2. You said that before the time of April, 1872, when you made those for McCabe, you thought you made some for Worley; do you remember how many you made?

A. I guess one, may be two.

X-int. 3. Can you tell what year it was that you made that one or the two?

A. If I am not mistaken, it was 1871.

X-int. 4. Might it not have been 1870?

A. No, sir.

X-int. 5. Have you anything to rely on as to the time when you made the first box, except your memory?

A. I don't understand that question.

X-int. 6. You hav'n't any account in your book of the first box you made?

A. No, sir.

187 X-int. 7. You rely on your memory for the year when you made it?

A. Well, I am not sure.

X-int. 8. Did you say that Worley gave you directions how to make the box?

A. Yes, sir.

X-int. 9. Where did he give you those directions; at your place?

A. Yes, sir; he was at my place.

X-int. 10. When he gave you the directions about making them did he not tell you not to say anything about it to any one else?

A. Yes, he did.

X-int. 11. Do you know why he gave you that direction?

A. I don't know.

X-int. 12. Do you remember of making some boxes for Mr. Worley or Mr. McCabe prior to these that you have spoken of, and which were not bound with iron, but were square boxes about sixteen inches high?

A. Yes; the first box I made was made that way.

(Signature waived.)

At this point, by consent of parties to said cause, I adjourned the further taking of these depositions until 3 o'clock this day, the 11th of October, 1877, then to be continued at the office of Sam'l S. Boyd, No. 506 Olive street.

ARTHUR E. MOONEY,
Special Examiner.

Pursuant to adjournment, as before stated, at 3 p. m., I continued, at the office of Sam'l S. Boyd, the taking of said depositions, as follows:

AUGUST RUPPENTHAL, being produced and sworn as a witness on behalf of the respondents, deposes and says:

188 Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

A. My name is August Ruppenthal; my age is 34; residence, 1408 Madison street, St. Louis; occupation, tobacconist.

Int. 2. How long have you been engaged in the manufacture of tobacco?

A. Since 1864.

Int. 3. In St. Louis?

A. Yes, sir.

Int. 4. Are you acquainted with Christian Worley?

A. I am.

Int. 5. And Henry McCabe?

A. Yes, sir.

Int. 6. Do you know whether Christian Worley was ever employed with or engaged in the manufacture of tobacco with Henry McCabe?

A. Well, he was employed there; I think he was foreman.

Int. 7. What time? When?

A. Well, he was with McCabe since McCabe was in the business—in the manufacturing business.

Int. 8. About how long ago is that?

A. Well that is hard for me to tell; it must be somewhere around 1870, may be before that.

Int. 9. State whether you ever manufactured tobacco by using the process of sweating while the tobacco was in the finisher.

(Counsel for complainant objected to the examination of this witness, so far as it may be taken for the purpose of showing prior knowledge or use of the thing patented, for the reason that the name and residence of the witness are not set up in the answer of the defendants, as required by the statutes.)

A. I did not.

Int. 10. Please state how you manufacture your plug-tobacco.

A. Well, we press it in a mold; take it out of the mold and put it into what we call a wooden finisher; we put it in the sweat-house and sweat it, then take her out and pack it into boxes and then sell it.

189 Int. 11. What else do you put into this finisher with your tobacco?

A. Tins.

Int. 12. How many tins?

A. Well, we don't know how many, but we put tins between each layer.

Int. 13. When did you first begin to do that?

A. I think it was somewhere in 1875, if I am not mistaken.

Int. 14. Now, what caused you to do that?

A. I seen some of McCabe's tobacco and I thought it was a big improvement on it, on account of being nicely finished and smooth, and when I came to the factory we talked about the thing and got an idea to get these boxes made. I had been at McCabe's factory, and by going through I seen the box, and I thought that must be it, and so had a couple of them made, tried it, and had more made.

Int. 15. How did the tobacco you turned out then compare with the tobacco that you had seen before?

Int. 56. Did you ever see this finisher being used at McCabe's factory in 1873?

A. Yes, sir; I seen them all the time in use, till I didn't come down any more.

Int. 57. What did you see them doing with it in 1873?

A. Just what I told you a little while ago.

Int. 58. Do you remember whether you were in the sweat-room in 1873?

A. I don't recollect that I was in the sweat-room, only the first time—except the first time.

Int. 59. Did you ever see anything in the sweat-room during 1873?

A. I don't know if I saw anything or not, when I was in.

Cross-examination by Mr. HATCH:

X-int. 1. Do you remember how many boxes you made for Mr. Worley in 1871?

A. I told you one box.

X-int. 2. You said that before the time of April, 1872, when you made those for McCabe, you thought you made some for Worley; do you remember how many you made?

A. I guess one, may be two.

X-int. 3. Can you tell what year it was that you made that one or the two?

A. If I am not mistaken, it was 1871.

X-int. 4. Might it not have been 1870?

A. No, sir.

X-int. 5. Have you anything to rely on as to the time when you made the first box, except your memory?

A. I don't understand that question.

X-int. 6. You hav'n't any account in your book of the first box you made?

A. No, sir.

187 X-int. 7. You rely on your memory for the year when you made it?

A. Well, I am not sure.

X-int. 8. Did you say that Worley gave you directions how to make the box?

A. Yes, sir.

X-int. 9. Where did he give you those directions; at your place?

A. Yes, sir; he was at my place.

X-int. 10. When he gave you the directions about making them did he not tell you not to say anything about it to any one else?

A. Yes, he did.

X-int. 11. Do you know why he gave you that direction?

A. I don't know.

X-int. 12. Do you remember of making some boxes for Mr. Worley or Mr. McCabe prior to these that you have spoken of, and which were not bound with iron, but were square boxes about sixteen inches high?

A. Yes; the first box I made was made that way.

(Signature waived.)

At this point, by consent of parties to said cause, I adjourned the further taking of these depositions until 3 o'clock this day, the 11th of October, 1877, then to be continued at the office of Sam'l S. Boyd, No. 506 Olive street.

ARTHUR E. MOONEY,
Special Examiner.

Pursuant to adjournment, as before stated, at 3 p. m., I continued, at the office of Sam'l S. Boyd, the taking of said depositions, as follows:

AUGUST RUPPENTHAL, being produced and sworn as a witness on behalf of the respondents, deposes and says:

188 Direct examination by Mr. BOYD:

Int. 1. State your name, age, residence, and occupation.

A. My name is August Ruppenthal; my age is 34; residence, 1408 Madison street, St. Louis; occupation, tobacconist.

Int. 2. How long have you been engaged in the manufacture of tobacco?

A. Since 1864.

Int. 3. In St. Louis?

A. Yes, sir.

Int. 4. Are you acquainted with Christian Worley?

A. I am.

Int. 5. And Henry McCabe?

A. Yes, sir.

Int. 6. Do you know whether Christian Worley was ever employed with or engaged in the manufacture of tobacco with Henry McCabe?

A. Well, he was employed there; I think he was foreman.

Int. 7. What time? When?

A. Well, he was with McCabe since McCabe was in the business—in the manufacturing business.

Int. 8. About how long ago is that?

A. Well that is hard for me to tell; it must be somewhere around 1870, may be before that.

Int. 9. State whether you ever manufactured tobacco by using the process of sweating while the tobacco was in the finisher.

(Counsel for complainant objected to the examination of this witness, so far as it may be taken for the purpose of showing prior knowledge or use of the thing patented, for the reason that the name and residence of the witness are not set up in the answer of the defendants, as required by the statutes.)

A. I did not.

Int. 10. Please state how you manufacture your plug-tobacco.

A. Well, we press it in a mold; take it out of the mold and put it into what we call a wooden finisher; we put it in the sweat-house and sweat it, then take her out and pack it into boxes and then sell it.

189 Int. 11. What else do you put into this finisher with your tobacco?

A. Tins.

Int. 12. How many tins?

A. Well, we don't know how many, but we put tins between each layer.

Int. 13. When did you first begin to do that?

A. I think it was somewhere in 1875, if I am not mistaken.

Int. 14. Now, what caused you to do that?

A. I seen some of McCabe's tobacco and I thought it was a big improvement on it, on account of being nicely finished and smooth, and when I came to the factory we talked about the thing and got an idea to get these boxes made. I had been at McCabe's factory, and by going through I seen the box, and I thought that must be it, and so had a couple of them made, tried it, and had more made.

Int. 15. How did the tobacco you turned out then compare with the tobacco that you had seen before?

A. Well, when we turned it out it looked smooth, much better.

Int. 16. Had the finish and appearance that McCabe's had?

A. It did at that time.

Int. 17. Now, how long before—you began to do this you say in 1875—how long before that had you noticed the tobacco put up by McCabe had this appearance?

A. About two years, if not longer.

Int. 18. Where did you see that tobacco?

A. At some retailers.

Int. 19. How could you tell it was McCabe's?

A. Well, all the manufacturers have their names on it.

Int. 20. How much of it did you see?

A. Well, all I did see of his goods—I don't know how much—was that way.

Cross-examination by Mr. HATCH:

X-int. 1. Are you putting up tobacco now?

A. Yes, sir.

X-int. 2. And you use this finisher that you spoke of, this box with metal plates between each layer of tobacco?

190 A. Yes, sir.

X-int. 3. When you have filled the box with tobacco and plates what do you do; how do you put the lock in?

A. Enclose the box and put it into the sweat-room.

X-int. 4. How do you close it?

A. We have got screws on ours.

X-int. 5. What sort of screws?

A. Small screws; we have two little iron bars to run across the box, and on each end we have a screw—fastened with a screw.

X-int. 6. How long do you keep it in the sweat-room?

A. We used to keep it in sometimes two days, sometimes a day; now we keep it in eight hours.

X-int. 7. How much heat do you have in the sweat-room?

A. I suppose about 150—130.

X-int. 8. About what degree of heat does it require to give the tobacco a nice finish?

A. That I can't tell, because I never attend to that part myself, never have anything in that to tell how much heat.

X-int. 9. Do you find that tobacco finished in this way has a better market value than the rough tobacco?

A. Well, I should think it ought to; for me, I think it is a big improvement; in fact, if we hadn't those boxes we couldn't go along at all, because we are doing our own work, haven't much capital, and we had to have something. We could put tobacco up in the morning and often take it out in the evening, which we could not have done the other way. It would swell too much; well this would swell some, but not so much.

(Signature waived.)

CHRISTIAN PEPER, being produced and sworn as a witness on behalf of the respondents, deposes and says:

Direct examination by Mr. BOYD:

Int. 1. What is your name, age, residence, and occupation?

A. My name is Christian Peper; my age is fifty-one; residence, 1522 Morgan; occupation, tobacconist.

191 Int. 2. Please state how long you have been engaged in the manufacture of tobacco.

A. Twenty-six years—over 25 anyhow.

Int. 3. Have you manufactured plug-tobacco all that time?

A. I have.

Int. 4. How did you use to manufacture plug-tobacco when you first commenced?

A. In a similar way as manufactured now, although there may be some improvements. We had wooden molds then, and now we use iron molds and finishers.

Int. 5. Did you use finishers as early as that time?

A. Yes, sir.

Int. 6. How were they constructed?

A. The ones I speak of are the same as we have now. Some manufacturers would finish in a common box having iron bands in those days.

Int. 7. In those days how did you pack the tobacco in the finishers?

A. Between tins, Russia iron tins.

Int. 8. How many tins?

A. Well, a tin on each side, a plug between each tin, tins at the bottom and top.

Int. 9. How did you put the tobacco in the finisher; any pressure required?

A. Well, yes; always put pressure on.

Int. 10. How?

A. Well, by hydraulic or hand power.

Int. 11. How did you apply the pressure, to the side or top?

A. The finisher has a pressure on the side and top; merely screw it up; screw it together so the tobacco don't run—make edges, as we call it.

Int. 12. How did you apply the hydraulic pressure?

A. Generally on lumps in the mold.

Int. 13. After it was put into the finisher did you apply any pressure to the tobacco?

A. Yes, sir; by hand-power.

192 Int. 14. By a screw and platen running down?

A. Yes, sir.

Int. 15. In those times, after you had put it into the finisher, what else did you do?

A. After it come out of the finisher we usually put it into boxes.

Int. 16. Into caddies?

A. Caddies and boxes.

Int. 17. For sale?

A. Yes, sir.

Int. 18. Well, now, when did you first begin to sweat tobacco?

A. Well, I have been sweating tobacco—that was an old thing when I commenced sweating tobacco; nearly everybody sweat it as general thing. However, there were some grades I didn't sweat, because we would keep it long on hand and it wouldn't swell. The object of sweating is to keep it from swelling and make it keep better.

Int. 19. When you began to sweat it what was it in?

A. In boxes.

Int. 20. How; packed in boxes?

A. Yes; one over the other. I am now speaking of the olden time, and general run of manufacturing as a rule.

Int. 21. In those boxes in which you sweated it, were they the boxes in which it was sold?

A. Yes, sir.

Int. 22. When did you make any change in your process of sweating?

A. I have made a good many changes from time to time; that is, I have been experimenting off and on; in fact, continually. I am experimenting now.

Int. 23. What change did you make?

A. I recollect at one time we run for some time a certain grade, sweated it between tins—lay it in—packed it boxes or kegs, and sweated it in them.

Int. 24. Put the tins between?

A. Yes, sir.

Int. 25. After you sweated it in those boxes between the tins
193 what was necessary to be done to the tobacco before it was ready for sale?

A. Nothing at all.

Int. 26. When was it you began to do this?

A. That was between 1853, 1854, and 1860, along there somewhere.

Int. 27. When it was packed in this way in the boxes between tins, please state whether or not there was any pressure put on the tobacco in order to pack it into those boxes.

A. I don't understand you; you mean after it came out?

Int. 28. You say you packed it between plates in a box and then put that in the sweat-house. Was there any pressure applied to that before?

A. Yes, sir; certainly.

Int. 29. About what degree of pressure did you use; can you tell?

A. I can't tell that.

Int. 30. What instrument did you use?

A. A press.

Int. 31. Hand-power?

A. Yes, sir; hand-power.

Int. 32. When did you cease, if ever, to prepare your tobacco that way, by sweating it in your box between the plates?

A. That is a little more than I can tell you, because I had almost forgotten the routine of it. I can hardly tell that, for the reason that I stated that improvements have been made so rapidly and so many, and then all manufacturers don't manufacture alike; there is a little difference in the way of manufacturing.

Int. 33. What change did you make in the process of manufacturing, after you manufactured by sweating it between tins in these boxes, in regard to the sweating or in regard to the packing of it?

A. I don't know as there is any difference much made, only dipping, when I first started, wasn't so extensive; we used to dip a little by hand.

Int. 34. What do you mean by dipping?

A. Tobacco dipped in the sweetening and then run out.

194 Int. 35. You call that licorice-casing?

A. Yes, sir.

Int. 36. When did you begin to use hand-casing?

A. Old as I can recollect.

Int. 37. Is that the same as water-casing?

A. That is only used on wrappers.

Int. 38. When did you first use water-cased wrappings?

A. We have used them as long as I can recollect to some extent, but not as a rule.

Int. 39. How often, from the time that you first commenced to pack your tobacco in boxes between tins and sweat it in those boxes, have you done that up to the present time?

A. That is more than I can tell.

Int. 40. Are you doing it now?

A. Not in boxes.

Int. 41. What do you put it in now?

A. Sweat it in finishers.

Int. 42. What is the difference between the finisher and the box you used in old times?

A. I don't know as you can call it sweating either. There is a certain way about tobacco; there is a certain summer heat which tobacco ought to be kept at, and if you can keep that up continually on plugs it makes it better. In winter it isn't so easy to keep the heat just right; therefore we generally make a difference between summer work and winter work. It has been always the aim of manufacturers to have a summer season in the shop in winter, if possible. If you keep a summer heat you can make tobacco always uniform, but winter breaks up that heat and you must make it up by artificial heat.

Int. 43. And this artificial heat is what is generally called sweating?

A. Yes, or a certain heat into a room.

Int. 44. How does this finisher that you use now differ from the old boxes that you used to use?

A. This finisher that I use now is used by everybody; that is the iron finisher I speak of.

195 Int. 45. Just describe that, please.

A. These finishers that I have got are twelve by twelve and a half; some that I can put into sections, six inch, nine inch, and eleven inch. We put in an iron tin, and then tobacco and a tin, and so forth.

Int. 46. Do you prize it?

A. Yes, sir.

Int. 47. Then do you put it in the sweat-room?

A. No; don't put it in the sweat-room until after it comes out of the finishers; it is put in boxes.

Int. 48. What boxes do you put it in?

A. The boxes in which it is sold.

Int. 49. When did you cease to put it in the sweat-room in the box with the metal plates?

A. I can't tell that; I don't know exactly the time; I couldn't say that; couldn't give no exact time.

Int. 50. Well, about?

A. I can't say that.

Int. 51. How long is it since you have used that process, a year or two years, or three or four years?

A. Well, it might be two or three years, it might be five years, and it may not be six months, for the reason that I would shift from one thing to another; run it two or three weeks and then stop it. If an iron finisher is taken and kept in a summer heat, that tobacco will get into a sweat in that finisher, and if continued in that finisher the usual time of the sweating process the process will be the same as if sweated in boxes.

Int. 52. How much, in round numbers, of tobacco do you suppose you have made by putting it through finishers with metal plates and putting those finishers into the sweating-room?

A. I have never put the finisher in the sweat-room, excepting boxes or casks, one of the two.

Int. 53. How much tobacco have you made having the tobacco packed in these boxes or drums with metal plates in the casing, and then putting the box or drum into the sweat-room; give it in rough numbers?

196 A. That is an utter impossibility for me to do. I think I run one brand that went pretty much all through that process; this was a thick tobacco that I speak of; I speak of the round tobacco.

Int. 54. What was the appearance of this tobacco when you took it from the plates, as to the surface?

A. Well, the appearance—or rather I should say that my experiments with it have been this: as a rule it would first assume a more substantial gloss, but this would leave it eventually, would't stay there. After a month or two months you couldn't tell the difference between that and tobacco done the other way.

Int. 55. But when it first came out you say it had the glossy appearance?

A. Yes, sir; the way I account for that is this: that it is done by a plate that has never been used. If there are new tins taken there is a gloss; it is not glossed when the tins are old.

Int. 56. How extensively have you manufactured tobacco?

A. Well, I have put up a good deal; I couldn't say how much.

Int. 57. You have been one of the largest manufacturers here?

A. I believe so; one of the largest.

Int. 58. Well, do you think you ever manufactured by this process a thousand pounds of tobacco?

A. More than that, I reckon.

Int. 59. How much more?

A. I couldn't give any idea; things like that come in every day's work, and a person loses sight of it; I couldn't say.

Int. 60. What is the smallest amount you would be willing to swear you made by this process that would be entirely within bounds?

A. Several thousands pounds.

Cross-examination by Mr. HATCH:

X-int. 1. Please explain what you mean by sweating, as it is used in the trade.

A. Simply putting the tobacco into a certain heat, a certain warmth, and keeping it there until it sweats, and continue that heat by the same process, and not vary.

X-int. 2. How long do you keep it there in order to make it sweat and carry it through the sweating process?

197 A. That varies; for instance, if you have a fine tobacco, light pressed, and lacks a little substance, not a very heavy tobacco, being pressed, if it is to be sweated, and you could have a sweating of twenty-four or forty-eight hours, that would sweat it enough, and you could take it right out and it wouldn't swell. In former years we used to sweat it longer. There was a time when it was thought necessary to make it sweat three or four weeks,

X-int. 3. Where tobacoo is put into a finisher between meta' plates, and then the finisher and plates put into a heated room and heated in that condition, how long is it usually kept under heat, if you know?

A. That I can't say; that varies. Just as I stated a while ago, it is according to the tobacco you have got. Some will be injured by sweating by keeping it over time; other tobacco will be benefited; and the manufacturer has to be the judge of that.

X-int. 4. Where did you use those boxes that you described in which you finished the tobacco between metal plates; where were you doing business at the time?

A. On Main street; not where I am now, but right opposite, on the other side.

X-int. 5. What is the number?

A. 914, 916, and 918 were the numbers, I think.

X-int. 6. Who was your foreman at the time you used that?

A. When I used that I think John Hormann was foreman there.

X-int. 7. Who were some of your workmen that worked there?

A. Well, I don't hardly recollect any; I suppose you have reference to the pressman; other workmen wouldn't know anything about it. I am not sure but you were there at one time. (Addressing Mr. Worley.)

X-int. 8. Was Mr. Christian Worley working there?

A. I am not sure of that; I couldn't say positively; it is a good while ago.

X-int. 9. Do you remember any one else?

A. Well, I don't hardly recollect any just now by name.

X-int. 10. How many of these boxes did you have in which you packed tobacco this way?

198 A. That is more than I can tell you. I was going to say there might be some of that old machinery around there yet.

X-int. 11. You can't tell how many boxes?

A. No, sir.

X-int. 12. Did you have any trouble in making tobacco this way; did the wrappings ever stick to the plates?

A. Well, yes; I made the remark one day that I must have quit because the wrapper stuck to the tin. In those days we generally cased the wrappers with the leaf and then took it out. In those days we didn't sweeten tobacco so much, but in the course of time they got to sweetening it more and more, and we had to water-case the wrappers.

X-int. 13. Where the wrapper was licorice-cased and then pressed between the plates, taking up the plate would be apt to tear the wrapper, would it not?

A. Unless the plate is very clean it is very apt to do it; the licorice is apt to stick on the dirty portion.

X-int. 14. Do you finish any of your tobacco now in a finisher between metal plates, and then put the tobacco in the finisher under heat?

A. I don't understand you exactly.

X-int. 15. Do you still finish tobacco by taking it, after it has been pressed by the hydraulic press, and placing it in a finisher between metal plates, and then subjecting the mass to more or less pressure, so that you can put the head on above the tobacco plates, then placing the finisher, with the tobacco in it, under heat for a certain length of time, and after that taking the finisher out and taking the tobacco out and packing it into caddies?

A. I put the tobacco in the finisher as usual—that has never been changed—between the metal; I try to keep my finishers at a summer heat, that is, certain grades, not all; I don't move my finishers—never. I have my heaters all over the press-room, at different places, and have my finishers placed in rotation, and so arranged that I can apply a certain heat whenever I want to.

X-int. 16. What heat do you apply to them?

A. I don't know; I couldn't say that; that varies, as the sweating always has done.

199 X-int. 17. Give the extremes, between what degrees.

A. Well, I suppose it might average from seventy to one hundred and one hundred and ten; might, at times, go to one hundred and twenty before it was noticed by the parties in charge.

Redirect examination by Mr. BOYD:

Int. 61. Explain, as near as you can, the construction of this stationary finisher; what enables you to heat that finisher by itself?

A. I don't heat any finisher by itself. I aim to keep a summer heat throughout the whole shop. I have a row of finishers and have the heaters between the finishers. I try to keep the finishers warm. If we can't keep the shop warm I try to keep the finishers warm. The other process I don't believe in, and have discontinued it.

Int. 62. After the tobacco is pressed in this finisher between metal plates, and the heat is applied to it as you have described, what do you do to the tobacco before it is ready for market?

A. Put it into boxes, and then it is ready for market.

Cross-examination by Mr. HATCH:

X-int. 18. How long have you used this last process?

A. I don't know; suppose it is over a year; that is, keeping the finishers at a summer heat, steady.

(Signature waived.)

I, Arthur E. Mooney, special examiner, do certify that the foregoing witnesses came before me, at the office of Samuel S. Boyd, esq., 506 Olive street, and were by me sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing in short-hand by me.

I further certify that it was then and there agreed, in my presence, by counsel for complainants and respondents, that my transcript of said short-hand notes so taken might be read in evidence at the trial of said cause with the same force and effect as if said transcript had been signed by said deponents in my presence.

I further certify that the foregoing is a true and faithful transcript of said short-hand notes so taken.

Witness my hand this 15th day of October, A. D. 1877.

ARTHUR E. MOONEY,
Special Examiner.

200, 201 GEORGE S. MYERS, being about the age of years, and having been by me first carefully cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say, as follows:

Examination by S. S. BOYD for respondent:

Int. 1. What is your residence and occupation?

A. I am a resident of St. Louis; my occupation is tobacco manufacturing.

Int. 2. How long have you been engaged in manufacturing tobacco?

A. Since 1858; I believe twenty years.

Int. 3. Are you alone or with a partner now?

A. Well, I am in a company, formerly Leggett and I, but turned it in a joint-stock company. I am secretary and cashier of the Leggett & Myers Tobacco Company.

Int. 4. What personal experience have you had practically with manufacturing plug-tobacco?

A. Well, I have always been a tobacco manufacturer, a practical

manufacturer, in every factory I have been in up to the change in our company. In the change in our company I have been trying to throw that off.

Int. 5. What process of manufacture do you follow?

A. Well, sir, the old process; that is, the process we have followed the last twenty years.

Int. 6. Describe it briefly.

A. We make our tobacco in lumps; then subject it to a hydraulic pressure in molds; afterwards take it out and put it between tins in an iron finisher and resubject it to a hydraulic pressure, and let it stand as long as we can conveniently; then take out, pack it into boxes, and repress it into boxes.

Int. 7. What pressure do you subject it to in the finisher, a high or low degree?

A. Moderately high, that is, not as high as in the mold, but a moderate degree; I think a pressure of 2,500 lbs. to the square
202 inch what we pull it at in the finisher; that is our gauge; I think we pull one thing all the time, as near as we can; we have got a gauge of about 2,500 lbs. to the square inch.

Int. 8. What effect on the smoothness or glossy appearance of the plug does the pressure you apply in the finisher have?

A. It undoubtedly makes it smoother to a certain degree. You can give it a degree of pressure, though, you would mash the tobacco up. To as much as the tobacco will stand you will improve the looks of it, but you can go to a degree you would entirely spoil it.

Int. 9. Suppose you fail to come to that proper degree of pressing in the finisher, what effect would it have on the glossy appearance and smoothness of the plug?

A. Well, in our case if it does not correspond with the balance of the tobacco we generally repull it; that has been my habit all the time; if I don't get pressure enough in the finisher I put it back and repull it and get uniformity in appearance.

Int. 10. Please look at plugs Exhibit G and H and state what those are.

A. Well, these are tobaccos manufactured by Leggett & Meyers. They are manufactured in the ordinary way, under the old process.

Int. 11. Where did you get these from?

A. I knocked a box open and picked them out of a box this morning.

Int. 12. That is, the box that is ready for sale?

A. A box ready for sale. I told the shipping-clerk to bring me a box of navy tobacco, and he brought that and he knocked it open, and I took those two plugs out of it.

Int. 13. How does this correspond in appearance to your tobacco generally, better or worse looking?

A. Well, I don't know; I suppose we have a good many worse plugs than that, and better I suppose; take it on an average it is fully up to the average. We have a great many worse plugs than that, and we have a great many better plugs, but this is fully an average. If I could always make it that well I would be perfectly satisfied.

Int. 15. Did you ever employ what is called the new process, the Worley process?

203 A. Never have, sir.

Int. 15. Please look at Complainants' Exhibit A and B and state whether the quality of tobacco in both is the same.

A. Well, now that is a very hard matter for me to do.

Int. 16. What is your best impression in regard to it?

A. Well, there is a wrapper right there on B that is undoubtedly worse than any wrapper on A, but that wrapper up there on B is about like the other; but this lower one down here is undoubtedly a worse wrapper.

Int. 17. That is, the wrapper on the lower part of Exhibit B is poorer than that on Exhibit A?

A. Yes; that is the lower part; but from there up it seems to be a similar wrapper.

Int. 18. Looking at Exhibit B, can you state whether or not, if that plug had been manufactured as thick as the plug you have shown of your manufacture, its appearance could have been improved by increasing the pressure to which it had been subjected in the finisher?

A. I don't think the thickness of the plug makes any difference in regard to the finish.

Int. 19. Well, then, could that plug of tobacco have been improved in appearance by increasing the pressure to which it was subjected—Exhibit B?

A. Well, I don't know whether it could or not; that plug there, the lower part of Exhibit B, has not had enough pressure on it, but the upper part seems to be well finished. I don't know that the upper part could be improved any. The lower part if filled out more even would have been better. I speak of Exhibit B.

Int. 20. What is the quality of that tobacco?

A. Well, I can't say.

Int. 21. Good, bad, or indifferent?

A. Well, that is a very hard matter for me to say what quality it is, sir; I should not judge it to be, from its appearance, a very high grade of tobacco; I should think it to be rather a low grade.

204 Cross-examination by complainant's counsel, R. H. PARKINSON, Esq.:

(Complainant's counsel objects to the foregoing deposition as incompetent at this stage of the case, and, without waiving his right to objection, proceeds to cross-examine.)

X-int. 2. It is a very common thing, isn't it, in finishing this quality of tobacco, to have some leaves in the wrapper poorer than others?

A. Oh, certainly, sir; no mistake about that, certainly.

X-int. 3. So, then, so far as you can see, taken right through the two, Exhibits A and B are from the same quality, are they not?

A. Well, I should judge so, yes; I don't see any particular difference.

X-int. 4. Can you state how long Exhibits H and G were between the tins?

A. No, sir; I have no idea in the world. We let them stand just as long as we can; as long as we have molds to hold them.

(Signature waived.)

CHARLES F. LOKER, being about the age of years, and having been by me first carefully cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Examination by counsel for respondent, by S. S. BOYD, Esq.:

Int. 1. What practical experience have you had in the manufacture of plug-tobacco?

A. I have been in it nine years, and done most everything in it.

Int. 2. Please look at Defendants' Exhibit F and state how that was manufactured.

A. It was first in the molds, in the first place put under a 3,500 lbs.

pressure to the square inch; it was left there about twenty-four hours, and then it was put into an iron finisher and put under a pressure there, and laid for about thirty-six hours..

205 Int. 3. How did that differ from what is called the old process?

A. Well, that is the old process.

Int. 4. What is the quality of that tobacco as compared with Complainants' Exhibits A and B?

A. Well, they are classed about the same grade. I believe this F is about the lowest grade we make of this.

Int. 5. How long has that been made?

A. That was pressed in the molds about the 21st of December, I think it was 1877, and taken out on the 27th and put in the finisher; then on the 29th taken out of the finisher and into boxes.

Cross-examination by counsel for complainant, R. H. PARKINSON, Esq.:

(Counsel renews the same objection as heretofore.)

X-int. 1. What is the usual time that you leave tobacco under pressure in the mold?

A. Well, that will depend altogether on the quantity of molds you have, the number of sets you have. The longer you leave it of course the better it is generally. I suppose leave it to run about four or five sets, and average a day, will make it about two hours or two hours and a half.

X-int. 2. You leave it in about two hours usually?

A. About two hours usually.

X-int. 3. How do you get your pressure of 3,500 lbs.?

A. Hydraulic.

X-int. 4. How do you get your pressure in the finisher?

A. Hydraulic.

X-int. 5. Is that the usual pressure that you apply?

A. The pressure we use all the time.

X-int. 6. In all your manufacture?

A. Yes; have a gauge on the hydraulic to gauge it. This went through the same process as the other, as stated by two witnesses—the process of filling the mold till the time it was taken out of the finisher. I was notified when the finisher was to be opened, or rather when the molds were to opened, and I saw them put in the finisher, and was notified when the finisher was to be opened, and saw the whole process.

(Signature waived.)

206, 207 UNITED STATES OF AMERICA,

Eastern District of Missouri, set:

I, M. M. Price, clerk of the circuit court of the United States in and for said district, hereby certify that the above and foregoing is a full, true, and complete copy of the record and proceedings had in the case of Christian Worley et al., complainants, vs. The Loker Tobacco Co. et al., defendants, as fully as the same appears of record and on file in said case in my office.

In witness whereof I have hereunto signed my name and affixed the seal of said circuit court, at office, in the city of St. Louis, this 23d day of December, 1878.

[SEAL.]

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

(Indorsement on cover:) No. 196. Christian Worley and Henry McCabe, appellants, vs. Loker Tobacco Company, George T. Loker, and Charles F. Loker. E. Missouri C. C. U. S. Filed 7th June, 1879.

SUPREME COURT U.S.
FILED
DEC 12 1881

Robert Clarke & Co., Printers, Cincinnati, O.]

Supreme Court of the United States.

OCTOBER TERM, 1881.

Christian Worley and Henry McCabe,

Appellants,

No. 196.] *vs.*

Loker Tobacco Company, George F. Loker and Charles F. Loker,

Appellees.

BRIEF FOR APPELLANTS.

ROBT. H. PARKINSON,
Counsel for Appellants.

Robert Clarke & Co., Printers, Cincinnati, O.]

Supreme Court of the United States.

OCTOBER TERM, 1881.

Christian Worley and Henry McCabe,

Appellants,

No. 196.] *vs.*

Loker Tobacco Company, George F. Loker and Charles F. Loker,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from the Circuit Court of the United States for the Eastern District of Missouri.

The suit is for infringement of letters patent No. 181,512, granted complainants as inventor and assignee of an undivided half interest, respectively, August 22, 1876, for "improvement in manufacturing plug tobacco."

The case was heard below on bill, answer, replication, and proofs, and a decree entered dismissing the bill.

From this decree the complainants appealed.

The validity of the patent and infringement are in issue.

ASSIGNMENT OF ERROR.

The Court erred:

First. In finding the equities for the defendants.

Second. In dismissing the bill.

Third. In that it did not find the patent sued upon in all respects good and valid, the property of complainants,

and infringed by defendants, and grant the injunction and account prayed in the bill.

THE INVENTION.

The nature of the invention is thus recited in the patent:

"My improved mode consists in finishing tobacco by placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat for several hours while they are tightly compressed between the plates, which are in contact with the broad sides of the plugs, and finally removing the box, and leaving the contents therein until cold, the whole process being adapted to give a fine and smooth finish to the wrapper, and, by putting the plug in proper condition doing away with its tendency to bulge out at the sides, as plugs are apt to do when they have not been thus treated.

"The plugs are taken from the finisher, and packed directly in the boxes in which they are shipped."

The specification then proceeds to describe the process in detail, and the instrumentalities employed.

It disclaims the simple finishing of tobacco by placing it in a heated room, and also the simple pressing of tobacco between metallic plates.

The peculiarity of the process is, that while the plugs of tobacco are still confined between the plates, and subjected to pressure, they are introduced into the sweat-room and there exposed to a heat of such intensity as to melt the oil of the tobacco, cause the plug to expand, and, by the additional pressure produced by their expansion against the compresing sheets of tin, squeeze this oil to the surface where it forms a glossy coating, serving both to preserve the tobacco and to give it a more highly finished appearance. The evidence shows that tobacco finished in this way may be put on the market at once without the danger of after sweating and losing its shape to which tobacco finished in the ordinary way is exposed; that the plugs retain their form more perfectly; that the application of artificial oils to form the coating is dispensed with; that the natural oil

of the tobacco thus obtained for the surface coating is not liable to become rancid or moldy like applied oils; that the tobacco is better preserved, and that it receives a higher polish and better finish. See, in this connection, *Dep. Burlew, p.* 46, *ans.* 11–17, *p.* 48, *Cross-Q.* 1–8.

The claim is as follows:

"The mode of finishing tobacco, substantially as described, consisting of placing the plugs in a box in alternate layers with thin metal plates, applying extreme pressure thereto, and subjecting the plugs to dry heat of about 140 degrees Fahrenheit for several hours, while they are tightly compressed between the plates, which are in contact with the broad sides of the plugs, and finally removing the box, and leaving the contents therein until cold."

UTILITY.

On utility of invention, see, in addition to testimony of Burlew, already referred to, *Dep. Rudolph, p.* 18, *ans.* 20; *p.* 21, *ans. cross-qu.* 33, 34; *Dep. Hobner, p.* 26, *ans.* 6, and *cross-qu.* 5; *Dep. Oppermann, p.* 31, *ans.* 11–15; *Dep. Worley, p.* 53, *ans.* 15; *p.* 54, *ans.* 24; *p.* 55, *ans.* 36, 37; *Dep. McCabe, p.* 64, *ans.* 5, 6.

See, also, on same point, in defendants' testimony, *Dep. Shryock, p.* 80, *ans.* 14–17; *Dep. Lee, p.* 82, *ans.* 5; *p.* 85, *ans. cross-qu.* 11, 12, 19–21; *Dep. Geider, p.* 88, *ans.* 28, 29; *p.* 89, *ans. cross-qu.* 22–26; *Dep. Ryan, p.* 94, *ans. cross-qu.* 4–7; *Dep. Wich, p.* 97, *ans.* 48, 49; *Dep. Ruppenthal, p.* 99, *ans.* 13–15; *p.* 100, *ans. cross-qu.* 9,

INFRINGEMENT.

The admission of defendants, page 78, concedes that they take the plugs of tobacco from the molds, place them in a wooden finisher, substantially the same in construction as that shown in the complainants' patent, in alternate layers, with metal plates between the plugs; then apply pressure to the head of the finisher, forcing it down; fasten it in the position to which it is forced, thus confining it under pressure; then move it to the heating-room, where it is subjected to dry heat, from 110 to 120 degrees, for about five hours, the tobacco being all the time under the pressure

above mentioned, and each layer separated by metallic plates in contact with the broad sides of the plugs; and that they then allow the tobacco to cool in the finisher, after which it is removed and packed in the boxes in which it is shipped.

The first deposition of the defendant, Loker, shows that a high degree of pressure is applied by the screw-press, operated by levers (see *Dep. Loker, p.* 11, *ans.* 6–14); also, that the heat applied is much more than that mentioned in the admission, being 130 degrees and upward. (See *Dep. Loker, p.* 11, *ans.* 16–18.

The same deposition shows that the defendant, Loker, went to Worley, the complainant, to find out about his mode of finishing tobacco. (See *p.* 12, *ans.* 19–27.)

In his second deposition, this witness testifies that they apply hydraulic pressure to the presses. (See *Loker's Dep., p.* 109, *ans.* 4, 5, *cross-examination.*)

The evidence shows that the substantial results of this process may be secured with the heat ranging a considerable number of degrees either side of that suggested in the patent, and even the minimum limit mentioned in defendants' admission answers the purpose, though less satisfactorily than the higher degree which the patentee names as his standard. The essential point is that it be sufficient to melt the oil and expand the tobacco, thus squeezing the oil to its surface. (See *Dep. Lee, p.* 83, *ans.* 10; *p.* 85, *ans. cross-qu.* 13–16; *Dep. Ruppenthal, p.* 100, *ans. cross-qu.* 7; *Dep. Burlew, p.* 52, *ans. cross-qu.* 63; *Dep. Worley, p.* 62, *ans. cross-qu.* 113–116.)

The invention does not purport to be dependent on the exact degree of heat used. The patentee has specified a degree of heat which will answer the purpose, and which he considered to be, and the evidence shows to be, the best standard to aim at. The deposition of the defendant, Loker, shows that their standard is within a few degrees of that named in the patent as "about" what is to be used, and that they rise above it or fall below it according as their supply of heat varies. (See *Dep. Loker, p.* 11, *ans.* 16.)

In order to infringe, it is not necessary that the defend-

ants use the invention to as good advantage or to the same degree described in the patent. It is enough that they use it in sufficient degree to obtain substantially the same mode of operation and the same kind of effect.

Winans v. *Denmead*, 15 How. 330.

PEPER ANTICIPATION.

Two witnesses, Hormann and Peper, testify to what they both call "experiments."

Their testimony is confused, and does not distinguish between experiments made in the remote past, and those subsequent to the date of complainants' patent. It is evident that when being asked about one they are often answering about the other.

But in any construction of their testimony neither of them describes complainants' process or any approach to it. Their own testimony shows that it was never used, seen, or understood by either of them prior to the issue of complainants' patent.

Five witnesses, who were employed in Peper's pressroom during the time, one as head pressman, one as foreman, one as partner, all understanding what was done there better than either Peper or Hormann, testify in the most positive terms that no such process was used.

Hormann (Defendants' Witness) p. 89.

Testifies that he was head foreman for Peper from 1852 to 1858. That he "used to try experiments on tobacco off and on, and we put tobacco between tin plates, in a kind of round drum, some of it; and pressed and put it in the sweat-house; had licorice-cased wrappings on it and it stuck to the tins." (*Ans.* 5.)

"Did'nt pack it steadily; kept using and trying experiments every two or three weeks." (*Ans.* 9.)

"Never used it after 1860." (*Ans.* 16–17.)

The tobacco would stick to the tins and thus tore the wrapper. (*Ans. cross-qu.* 7–9.)

Peper (Defendants' Witness) p. 100.

Is the only other witness to this use offered by defendants. It is in his establishment the use is alleged to have occurred.

He testifies that he generally applied the pressure upon the lumps in the mold. He then put it into the finisher; pressed it, took it out, and put it into boxes for sale. When he sweat tobacco it was in boxes in which it was sold. He is asked (*ques.* 22):

"When did you make any change in the process of sweating?

A. 22. I have made a good many changes from time to time, that is, I have been experimenting off and on; in fact, continually. I am experimenting now.

Q. 23. What change did you make?

A. 23. I recollect at one time we run for some time on a certain grade, sweated it between tins, laid it in, packing it in boxes and kegs, and sweated it then.

Q. 24. Put the tins between?

A. 24. Yes, sir.

Q. 25. If you sweated it in those boxes between tins, what was necessary to be done to the tobacco before it was ready for sale?

A. 25. Nothing at all.

Q. 26. When was it you began to do this?

A. 26. That was between 1853–54 and 1860; along there somewhere.

Q. 27. When so packed in this way, in boxes between tins, please state whether or not there was any pressure put on the tobacco, in order to pack it into these boxes?

A. 27. I don't understand you; you mean after it came out?

Q. 28. You say you packed it between plates in a box, and then put that in the sweat-house, was there any pressure applied to that before?

A. 28. Yes, sir, certainly.

Q. 29. About what degree of pressure did you use, can you tell?

A. 29. I can not tell that.

* * * * * * * * *

Q. 32. When did you cease, if ever, to prepare your tobacco that way in your boxes between plates?

A. 32. That is a little more than I can tell you, because I had almost forgotten the routine of it. I can hardly tell that, for the reason that I stated that improvements have been made perpetually, and so many, and then all manufacturers do not manufacture alike—there is a little difference in the way of manufacturing.

Q. 33. What change did you make in the process of manufacture after you manufactured by sweating it between tins or these boxes, in regard to the sweating or in regard to packing of it?

A. 33. I don't know as there is any difference much made, only dipping when I first started was not so extensive, we used to dip a little by hand.

* * * * * * * * *

Q. 52. How much in round nnmbers of tobacco do you suppose to have made by putting it through finishers with metal plates and putting these finishers in the sweat-room?

A. 52. I have never put the finishers in the sweat-room except in boxes or casks, one of the two."

This last answer, taken in connection with those that precede it, shows very plainly that the witness remembers nothing of such a process as is described in the patent and knew nothing of such a process. The pressure about which he is testifying is that applied to the tobacco before being put into the finisher. The sweating is the sweating done in the boxes or casks. He does uot pretend to recollect the routine of the process with any distinctness, and only knows tbat metallic plates were used at times somewhere in the process. This was common in the old methods of finishing, as is expressly admitted in the patent.

Neither this witness nor Hormann pretends that the tobacco was ever subjected to heat while confined under pressure in the finisher. Neither pretends that it was ever under any circumstances, subjected to a sufficient degree of heat to melt the oil or expand the tobacco, or that they ever formed, or thought of forming, a coating to the to-

bacco from its own oil forced out in this way. On the contrary, after being pressed in the finisher, it was placed in drums or boxes, which were not, in their nature, capable of either sustaining or applying any substantial pressure. It does not appear that there was any means of confining the tops of these drums or boxes, or that they ever were confined.

The only degree of heat used in sweating is spoken of by Peper as "summer heat." (See *Ans.* 42.)

As there was neither the confinement under pressure, nor the application of heat sufficient to melt the oil and swell the tobacco, Peper never got the coating which it obtained by complainant's process, and never discovered that it could be so obtained. He, instead, always applied licorice to the wrappers. He then got only a temporary gloss, which disappeared within a month or two, instead of the substantial and permanent finish obtained by complainant's process. (See *Dep. Peper*, *p.* 104, *ans.* 54, 55.)

Whatever these witnesses did, were, according to their own statement, mere unsuccessful and abandoned experiments. They gave them no satisfaction, and they did not think it worth while to continue them. Even these experiments do not appear to have been public. No exhibit or tangible evidence of any kind, in support of these witnesses, is produced, and their confused testimony would not be sufficient to establish a prior use of any sort.

It is easy to persuade a witness, or for a witness to persuade himself, that certain steps which he remembers to have been taken in the past, and which are very indistinct in his recollection, are the same as those with which he has been made familiar by representations of those talking with him, or by his own experience in the present, especially so when some of the instrumentalities used are the same.

That no approach to complainant's process was ever used in Peper's establishment is affirmatively shown by the following five witnesses:

Baxmeyer (*Complainants' Witness*), *p.* 13.

This witness commenced to work for Peper in 1856 or

'57; is sure he was working there in 1857; worked in the press-room; continued there until he enlisted in the militia to fight guerrillas in Missouri in 1863 or '64; describes the method of finishing tobacco used there; was finished in finishers and then packed into boxes, afterwards seasoned in the sweat-house; was never placed in the sweat-house while in the press between the metallic plates; the finishers were not so constructed that it could be; there was no means of securing the tobacco in place when removed from the press—the press itself formed the top; Hormann was foreman up-stairs while he worked there; Hormann's work was up-stairs, running the rollers and picking leaf; the pressing and finishing was done down-stairs.

Rudolph (*Complainants' Witness*), *p.* 17.

This is the person alluded to by Hormann as head pressman while the process described by him was being carried on; commenced to work in Peper's press-room in 1857, and continued there eleven years. He describes the process same as preceding witness. He first knew of tobacco being pressed between metallic sheets and kept under pressure in a sweat-room when he went into the employ of Worley, and found it a great improvement; nothing of the kind was ever done in Peper's establishment while he was there.

Miller (*Complainants' Witness*), *p.* 24.

Went into Peper's employ in 1862, and in 1868 became a partner in the firm; was through the factory every day, often a dozen times; after the tobacco was rolled it was pressed in the molds; used wooden finishers with iron plate inside; no tobacco was ever finished while he was there by being placed between metallic plates in the finisher subjected to pressure, and while under pressure put into the sweat-house and kept under pressure there; nothing was ever said about any such method; the first he knew of tobacco being finished in that way was from Worley or McCabe in 1876; he noticed the difference in appearance, it being smoother and more glossy; never saw any like it finished or sold at Peper's.

Reagan (*Complainants' Witness*), *p.* 37.

This witness commenced to work for Peper in 1867 or '68, and continued to work there until 1873 or '74. Was foreman in the press-room. Describes the method of finishing tobacco, which was the old method. Never knew of Worley's method being used anywhere until he went into the employ of Worley.

Worley (*Complainants' Witness*), *p.* 52.

Has worked for Peper several times. Began working for him, he thinks, in 1855 or '56, possibly 1857. Thinks he worked there four or five years at that time. Was in the press-room every day, usually many times a day, and assisted in pressing tobacco. Never knew of tobacco being finished there by the process described in his patent.

SHRYOCK ANTICIPATION.

Shryock (*Defendants' Witness*), *p.* 78.

Claims to have used complainants' process, he thinks, commencing in 1870, and continuing until 1874. He admits that his description of the process may not be strictly accurate, as he was not the foreman. (See *p.* 80, *ans.* 19.)

Lee (*Defendants' Witness*), *p.* 82.

Testifies in support of Shryock. He admits that he told his partner, Mr. Harris, with whom he entered into partnership about the first of 1874, nothing about this process, and never used it after the summer of 1872. Says he was not going to tell what he knew. (See *ans. cross-qu.* 2 and 30.)

Geider (*Defendants' Witness*), *p.* 86.

This witness also testifies in support of Shryock. Can not give the names of any one who knew about the use of the process there. (See *ans. cross-qu.* 10.) They stopped making by this process after Harris came into the firm.

Harris (*Complainants' Witness*), *p* 34.

Testifies to having gone into partnership with Shryock, he thinks, in 1873, in the manufacture of tobacco. Manu-

factured at the same place where Shryock had been manufacturing before. Never heard of this process. The finishers there, when he went there, were very old style, rather out of date. Saw nothing peculiar about it.

Reagan (*Complainants' Witness*), *p.* 37.

Testifies to having been told by defendants' witness, Lee, that nobody ever thought of this process until Worley got it out. That it was the prettiest finished tobacco he ever saw—that none could beat it. (See *ans.* 18.)

McNamee (*Complainants' Witness*), *p.* 41.

Worked for Shryock and Lee in 1871 and 1872. Was in the press-room several times a day. Knew their method of finishing, and describes it. Was nothing like the complainants' method; never knew of their using any such method.

Kinney (*Complainants' Witness*), *p.* 42.

Worked for Shryock in 1871 and 1872. Was in the press-rooms several times a day. Knew how they finished tobacco; describes the method same as preceding witness. Never knew of their finishing tobacco according to Worley's method. First saw that method in Worley's establishment, and describes it. Defendants' witness, Lee, told this witness there was a question that he looked for complainants to ask him when on the stand that would have done them some good; also, that their method of finishing tobacco at Shryock's was kept a secret, and that he told his pressman if he told anybody he would discharge him. (*Ans.* 21 *and* 23.)

No person who ever saw or heard of this use, other than Shryock and Lee and their pressman, is produced. No one else ever even saw their finishers or noticed the polish of their tobacco, as they did that of the patentee's. Lee's subsequent partners in the tobacco business neither heard of it nor found any traces of the machinery alleged to have been used. The existence of the alleged use is highly improbable.

It is clear that if there was any such use as that claimed

by defendants' witnesses, it was a secret use carefully withheld from the public, and not within the statute relating to anticipation, and was speedily abandoned.

But it is further shown in the case that complainants' invention antedated the alleged use of Shryock's, and it becomes immaterial whether defendants' evidence as to that use, is, or is not correct.

DATE OF INVENTION.

Complainants carry back Worley's invention to the early part of 1870, and show that from that time until the date of the application for their patent there was no public use of it, it being carefully withheld until, by their experiments both in the manufacture and in the sale of tobacco finished by this process, they had satisfied themselves of the permanent character of the results obtained by it, and the best methods of applying it, and the instrumentalities necessary for its most advantageous application.

Worley (*Complainants' Witness*), p. 52.

Testifies to McCabe's shop having been moved in the fall of 1869, and, by reason of their having a small stock of tobacco on hand, it becoming especially important they should have some method of finishing the tobacco that would dispense with the necessity for retaining it on hand as long as required when finished by the old methods; that about that time he commenced his experiments, and about the first of 1870, finished some tobacco by the process described in this patent; that for some time he was experimenting upon different kinds of finishers, constructing among others, iron finishers in the winter of 1873–4, first trying these iron finishers in the spring of 1874; that the experiments with them were not satisfactory, and he finally settled upon the wooden finishers with iron bands and metallic top constructed as described in this patent. This was in the spring of 1874.

McCabe (*Complainants' Witness*), p. 65.

Testifies that he first knew of Worley's having some

peculiar method of finishing tobacco in the spring of 1870. He called his attention, at that time, to the necessity of being careful to put up tobacco for the trade so that it would not come back on them swelled out of proper shape, and Worley told him he was getting up an idea that he thought would obviate that. About that time he showed him some plugs he had finished under his new idea, as he called it. The plugs had a smooth surface, and he said it would prevent the swelling and fermentation of the goods, and enable him to put them early on the market. They had a very small stock on hand at the time, owing to having recently moved. Worley did not tell him at the time how he finished this tobacco, but soon after he learned how it was done. Then they made it an object not to allow any person in to know how the work was done—how the gloss was got on. From that time till they got the patent, there was an understanding that they were to keep it from the public eye as much as possible. No one besides himself and Worley and his partner knew the process, so far as his knowledge goes.

Rudolph (*Complainants' Witness*), p. 17.

Was pressman for Roach & McCabe when they moved, in 1869, and continued with them during that winter and next spring. After they got the machinery up, Worley began to work on a new method of finishing tobacco. Did not let any body see it—kept it to themselves; Worley told him not to say any thing about it, and they would see how it would work—they would make an improvement on tobacco. It made a great change in appearance. Tobacco looked more smooth and solid and was kept better. Some of the hands saw the finishers, but did not see how the work was done. They saw the tobacco after it came out. Never told any one at that time how the work was done.

Hobner (*Complainants' Witness*), p. 25.

Was employed at McCabe's factory in 1869–70–71, rolling tobacco. Noticed the tobacco in 1870–71. Some of it had a smoother, slicker appearance—did not know how it

was finished. Used to look around to see how it was finished, but "could not get to make out how it was." Didn't know how they got the gloss—thought they put some stuff on it. (See *ans. and cross-qu.* 74–77.) Does not know as anybody but Mr. Worley knew how it was done. Knew they tried not to have it known. (See *ans.* 7, *cross-qu.* 75.)

Opperman, (*Complainants' Witness*) p. 31.

Bought tobacco of McCabe in 1871, which he noticed was smoother than he had bought there before. Heard, in 1870 or 1871, that McCabe was getting up a new finisher. Worley showed him some tobacco with the gloss on it. Told him it was made in some new finisher. Don't know how this tobacco was finished.

Wich (*defendant's witness*), *p.* 95.

Made finishers for McCabe, under Worley's direction, in 1871 and 1872; can't tell whether like that shown in patent. Had hoops on. Were not satisfactory, and had to make others; made them over several times; were not strong enough at first. Saw tobacco taken from these finishers, but knows nothing of how it was treated in them.

DEFENSE OF PRIOR PUBLIC USE.

There is no evidence which even tends to show any public use of the invention prior to the application for the patent.

The evidence, on the contrary, shows clearly and without contradiction that the only use of it prior to this time was so carefully guarded that not even the workmen in the establishment knew what the process was. Not a single witness other than the patentees themselves, and their foreman, who was cautioned to secrecy, ever knew how the tobacco was treated.

The sale of the product of the process did not carry to the public any intimation as to the process by which it was finished.

The statute, in express terms, makes a public use or sale of the invention necessary to invalidate the patent.

This is the language alike of the clause authorizing the defense of public use, and the clause providing who shall be entitled to obtain a patent.

In no case has a secret use, however extensive, been held to invalidate a patent. It has frequently been held that an experimental use, even though public, is not sufficient, and care must be observed, in reading the decisions, to distinguish between the cases which have turned on the publicity of the use, and those which have turned on its experimental character, the use being admitted to have been, so far as it went, public.

When the use is not public it does not fall within the statute, and it matters not whether it is experimental or otherwise.

The object of the statute is to enable the public, after it has seen the invention in open use for a certain length of time, to assume with safety that it is abandoned.

The publicity must be such as to give the public full knowledge of the invention with the consent of the inventor. It is not sufficient that this knowledge be obtained by stealth.

The question in this case is not whether tobacco, which, in some of its stages of preparation, had been put through the patented process, was publicly sold or used, but whether the process itself was in public use with the consent and allowance of the inventor. There is no evidence offered tending to show that it was publicly used or in any way exposed to the public, either with or without his consent or knowledge, prior to the two years allowed by the statute.

The case of *Goodyear* v. *Day*, is analogous to that here in issue, and holds distinctly that when the invention relates to the process, the sale of the product of this process, when that product does not show the process, is not within the statute.

The decision was by Justice Grier. See *printed Supreme Court record in Providence Rubber Co.* v. *Goodyear, filed November* 6, 1867, *p.* 26.

On necessity of public use or sale of invention as distinguished from private, see—

Shaw v. *Cooper*, 7 Pet. 292 (319).
Ryan v. *Goodwin*, 3 Sum. 514 (518).
Wyeth v. *Stone*, 1 Story, 273 (281).
Allen v. *Blunt*, 2 Wood Min. 121 (143).
Kindall v. *Winsor*, 21 How. 322.

On point that use, even when public, if experimented, not sufficient, see—

Wyeth v. *Stone*, 1 Story, 273 (281).
Pitts v. *Hall*, 2 Blatch. 229 (235).
Am. Nicholson Pavement Co. v. *City of Elizabeth*, 6 Fish. 424.
Elizabeth v. *Pavement Co.*, 7 Otto, 126.

The language of the statute is the same as that providing for the defense of prior use by others than the inventor.

The authorities which construe this language are equally applicable to the defense of prior public use by the inventor. The courts would not hesitate to declare a secret manufacture, such as that carried on by complainants, insufficient to invalidate a subsequent patent to another inventor.

The inventor not only kept himself strictly within his legal rights, he availed himself of the protection of the statute for a purpose thoroughly legitimate and commendable from an equitable standpoint.

The nature of the invention required extensive experiments to determine both whether the process would be permanently beneficial to the tobacco under the various exposures and changes of circumstances through which it was likely to pass, and what, if any, change in the instrumentality used would enable it to be carried out more economically and effectually.

The success of the process could only be determined by putting the product for some time upon the market and ascertaining whether the effect of the process was durable, how the tobacco treated by it stood the various usages to which it is liable in handling, shipping, storing, and exposure

for sale—the changes of season and atmospheric action. The gloss produced by this process might, under changes incident to the trade, speedily mold or yield to swelling of the tobacco, or the process might prove otherwise deleterious. Material changes in the process, or in the instrumentalities for applying it, might be necessary to meet these contingencies. So long as he could do so without transgressing the terms of the statute it was more than excusable, it was becoming, in the inventor to fully satisfy himself as to all these particulars before applying for a patent.

It was also becoming in him to ascertain not merely by what mechanism the process could be worked, but by what it could be best worked, whether or not improvements could be made in this mechanism.

The evidence shows that the inventor was all the time experimenting upon instrumentalities through which to apply the process—that finding his first wooden finishers unsatisfactory he had others made, and again others, making changes each time; that he then had some iron ones got up and tried, but found them less satisfactory than the former, and returned to wood well braced with iron. (See *Dep. Worley, ans.* 16-19; *Dep. Wich, ans.* 36.)

It was within less than two years of the time when the iron finishers were tried and rejected that the application for a patent was made. It was not until after this that he was satisfied that he had provided the best instrumentalities for carrying out his invention or was prepared to describe them in his patent.

Worley was not a mechanic but merely a tobacco worker, and the adaptation of mechanical appliances to the purposes of his invention naturally perplexed and delayed him to an extent that to a ready mechanic seems unnecessary. But he is not to be judged by what more intelligent or readier minds would have done, or even by what it seems to us, as we look back at it, that he might have done. The law fixes no limit to the time a man may work or plod over his invention, or even dream over it, provided he does nothing that amounts to an actual publication of it within the terms of the statute; and statutes relating to forfeiture

are never to be strained in their construction against those they affect—certainly not against inventors.

Inventors feel their way slowly, even in what afterwards seem simple inventions. They must try many methods before they are satisfied they have found the best. These experiments often relate to the mechanical means of carrying out their inventions quite as much as to what is of the essence of the invention. It is the policy of the law to encourage them in making abundant experiment, and in elaborating all the details appertaining to the most complete and advantageous application of their invention.

It is not necessary that these experiments should go to the essence of the invention. It is sufficient that they aim at better means of applying it.

The question here is not whether the use of the process by the inventor was sufficiently extensive to work a forfeiture if it had been a public use.

If it be conceded that a single public use of the invention would be fatal, no such use is shown.

In *Fruit Jar Co.* v. *Wright*, 4 Otto, 92; *McClurg* v. *Kingsland*, 1 How. 202; *Coffin* v. *Ogden*, 18 Wal. 120; *McMillin* v. *Barclay*, 5 Fish. 189, and other cases to the same effect, the publicity of the use was beyond controversy. The only question was whether being public, and hence within the terms of the statute, it could escape these terms by reason of its limited extent or experimental nature.

The publicity of the use was recognized by the Court in each case as an essential element, and the language used in discussing the extent or nature of a use necessary to bring it within the statute, applies only to a use conceded to be public. This language implies that, notwithstanding its publicity, the use would be insufficient if in any sense experimental, but in each case the use was without any restriction or any accompanying circumstances that could suggest an intention to withhold it from the public. No changes or experiments looking to a change were made or attempted; no thought of a change as a result of the use appears to have been entertained. There was not a cir-

cumstance to indicate that the use was either secret or experimental, or was so intended at the time.

In *Elizabeth* v. *Pavement Co.*, 7 Otto, 126, the inventor had continued his invention in use on a public turnpike for six years before his application. The entire invention was fully exposed to the public without anything to indicate an intention to withhold it. The Company in which he was interested was receiving tolls for the use of the pike. Notwithstanding its unquestioned publicity, this Court, in a very comprehensive opinion, sustained the patent on the ground that it was but a reasonable experiment to ascertain the sufficiency and permanence of the invention, and that this relieved even a public use from the terms of the statute. It does not appear that Nicholson, during that six years, made or attempted any change in his invention. In its opinion, the Court, speaking of a use in public more than two years before the application, says:

" * * * That the use of the pavement in question was public in one sense, can not be disputed. But can it be said that the invention was in public use? The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use. (Curtis Patents, sec. 381; *Shaw* v. *Cooper*, 7 Pet. 292.)

* * * * * *

"When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case, such use is not a public use within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether auy and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experi-

ment; and no one would say that such a use, pursued with a *bona fide* intent of testing the qualities of the machine, would be a public use within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use he keeps the invention under his own control, and does not lose his title to a patent.

"It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute.

"While the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist-mill, or a carding-machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law.

"But, if the inventor allows his machine to be used by other persons generally, either with or without compensation; or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law."

This case clearly excludes the idea that the public sale or use of flour ground in the patented mill, or wool carded in the patented carding-machine, would work a forfeiture.

The case would be much stronger if, as with the present invention, the mill or the carding-machine was so used as never to exhibit the invention itself to any one other than the patentees and the single foreman employed by them in working it.

The publicity with which the invention must be used

to bring it within the statute, aside from any question of its experimental character, is thus stated by Justice Woodbury in *Adams* v. *Edwards*, 1 Fish. 1:

"It need not be a general use by the community; but it must be an open use, however, so that the structure and *modus operandi* are apparent.

. . . . . .

"A man is not to lie by and let the public—several persons—use his invention without objection. He is not to lie by and let persons manufacture the article for sale, as if not to be patented; because he thus misleads them."

This case was argued by Mr. S. P. Staples and B. R. Curtis for complainants, and Mr. Rufus Choate and Mr. Dana and Mr. Jewell for defendants.

To same effect, see—
Gayler v. *Wilder*, 10 How., 477.
Cahoon v. *Ring*, 1 Cliff., 592.
Judson v. *Bradford*, 16 O. G., 171.

In *Kendall* v. *Winsor*, 21 How., 322. The patent was upon a machine for making harness. There was evidence to show one of the machines to have been in use by the patentee eight years, and several for five or more years; that harnesses made on them had been sold generally; that the inventor had said that he did not intend to patent the machines; that only the hands employed in the shop were allowed to see the machines; and that one of these hands had, some two years before application for the patent, without permission of the patentee, helped the defendants to build a machine like the patentee's.

Justice Curtis, presiding in the court below, refused, among others, the following instructions, viz.:

"1. That it is the duty of an inventor, if he would secure the protection of the patent laws, to apply for a patent as soon as his machine (if he has invented a machine) is in practical working order, so as to work regularly every day

in the business for which it was designed; and if he does not so apply, he has no remedy against any persons who possess themselves of the invention, with his knowledge and without his notification to desist, or of his claims as an inventor, before he applies for his patent.

"2. That a machine can no longer be considered as an experiment, or the subject of experiment, when it is worked regularly in the course of business, and produces a satisfactory fabric in quantities sufficient to supply the entire demand for the article.

"3. That in order to justify the delay of the plaintiff in applying for a patent after his machine was in practical working order, on the ground of the desire to improve and perfect it, the plaintiff must show some defect in construction, or difficulty in the operation or mode of operation, which he desired and expected to remove by further thought and study; and if no such thing is shown, then the machine must be held to have been completed and finished, in the sense of the patent law, at the time it was put in regular working use and operation."

The Court gave in lieu of these instructions the following, viz.: " . . . . That to constitute such an abandonment to the public as would destroy the plaintiff's right to take a patent in a case where it did not appear any sale of the thing patented had been made, and there was no open public exhibition of the machine, the jury must find that he intended to give up and relinquish his right to take letters patent."

The jury found for the patentee. The Supreme Court unanimously sustained all the rulings below.

Every distinction that can be made between that case and the one now before the Court is in favor of the latter.

Unlike that case, there were here continued experiments looking to a change in the process, and changes in the instrumentalities were repeatedly made.

It was here necessary to put tobacco treated by the process on the market for a considerable time to ascertain whether the effect was permanently beneficial.

There was here no general knowledge of the invention

among workmen employed in the shop. It was withheld even from them.

There is here no pretense that the inventor had, by word or act, intimated to anybody that he did not intend to apply for a patent.

There have been no intervening equities here. Nobody else has either applied for a patent or introduced the invention to the public in advance of these patentees, and the questions which, it was suggested in *Kendall* v. *Winsor*, might in such a case arise, are not presented.

These patentees are beyond question the first to introduce the invention to the public, and did so by their patent. They have done nothing tending to mislead the public, nothing that has misled, or could mislead, any individual. They have been exceptionally careful in this respect. They have not rendered themselves obnoxious to either the letter or the spirit of the law.

They may have acted with more caution, more deliberation, more hesitation, than to men of more decision or more active temperament would seem necessary; but, in view of the certainty that, the moment their invention was laid before the public, other manufacturers, adopting their suggestions, would tax their ingenuity to find other modes of appropriating them, it is not easy to even criticize the wisdom of their course in taking abundant time to ascertain whether or not anything could be added to their invention, or any better means of applying it contrived, before exposing it in a patent. But their legal rights do not depend upon whether their course seems to brighter minds, judging them from a subsequent standpoint, the wisest or most diligent that was open to them. No such hard conditions as these are laid upon inventors.

It is enough that they invented the improvement, never used it publicly, never even impliedly authorized its use by others, never abandoned it, and first presented it to the public in their patent.

SUFFICIENCY OF SPECIFICATION.

The answer denies that the specification describes the invention with sufficient clearness.

No witness has undertaken to say that any person skilled in the art would find any difficulty in understanding the invention from the patent, or in putting it in practice.

Strong evidence of this kind, from persons skilled in the art, would be necessary to overcome the presumption of sufficiency arising from the judgment of the Patent Office upon that point, embodied in the grant of the patent. It is a point upon which that office is especially well qualified to pass, and upon which its judgment is entitled to great weight, and should not be lightly disregarded. But an examination of the patent shows affirmatively that there is nothing that could mislead anybody as to the nature of the invention, and that the description is clear enough to enable a novice to practice it.

Stress has been laid on the fact that the amount of pressure applied to the finisher is not specified.

The evidence shows, and the patent admits, that pressing in the finishers was old, and the amount of pressure well understood, and varied with the quality of the tobacco —it always being limited by the pressure it would bear without mashing the cake.

See *Dep. Myers* (*Defendants' witness*) p. 107; *Ans.* 5–8. *Burley* (*Complainants' witness*) p. 50, *Cross-qu.* 34–45; p. 72, *Cross-qu.* 28–33; p. 74, *Cross-qu.* 58–60.

In complainants process no variation was required from the pressure that was commonly applied to the finisher before, and which was perfectly familiar to every man acquainted with the art, that is a pressure approaching as nearly as practicable to, but short of, that which would mash the plugs, varying somewhat with the quality and condition of the tobacco.

No elaboration of the specification on this point was needed for the guidance of any one that had the most elementary knowledge of the art, and none could, from the

nature of the case furnish a more definite rule than that already understood.

The word "*extreme*," used in the patent, most aptly distinguishes this pressure, which compressed the plugs themselves to the verge of their endurance, from the comparatively gentle pressure used to crowd the plugs closely together in packing in caddies for shipment.

That word was intelligible to those to whom it was addressed, and conveyed exactly the distinction material to the operation of the invention.

Respectfully submitted,

ROBERT H. PARKINSON,

For Appellants.

14-345

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 167.

JOSIAH H. GAUTIER AND CHARLES E. GREGORY, AS J. H. GAUTIER & CO., PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 12, 1879.

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In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

3 Supreme court, city & county of New York.

J. *Gautier*, H. GAUTIER & , comprising the firm of Gautier & Co., plaintiffs, *against* CHESTER A. ARTHUR, AS COLLECTOR OF THE port of New York, defendant.	Summons for relief, (com. not ser.)

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the city & county of New York, in the county court-house, in said city, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 93 Nassau street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated New York, December 1873.

WAKEMAN & LATTING,
Plaintiffs' Attorney, 93 *Nassau St., N. Y. City.*

4 (Endorsed:) Supreme court. J. Gautier & others ag't Chester A. Arthur, as collector, &c. Summons. Wakeman & Latting, pl'ffs' att'ys, 93 Nassau st., N. Y. To Chester A. Arthur. Received Jan. 16, 1874. U. S. attorney's office. Rec'd Jan'y 10, '74.

5 The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of [L. S.] the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Chester A. Arthur, defendant, by J. Gautier & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 13th day of April, 1874, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 4th day of April, in the year one thousand eight hundred and seventy-four.

KENNETH G. WHITE,
Clerk.

GEORGE BLISS,
Defendant's Attorney.

6 (Endorsed:) U. S. circuit court. Chester A. Arthur ads. J. Gautier & al. Certiorari. George Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Ap'l 4th, 1874.

Yours, &c.

GEORGE BLISS,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Ap' 4th, 1874.

WAKEMAN & LATTING,
Plaintiffs' Attorney'.

7 *Declaration.*

U. S. circuit court for the southern district of New York.

J. GAUTIER & H. GAUTIER
agt.
CHESTER A. ARTHUR, AS COLLECTOR OF THE port of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. Gautier & H. Gautier, plaintiffs, by Wakeman and Latting, their attorneys, complain of Chester A. Arthur, as collector of the port of New York, the defendant in this suit.

1. For that whereas heretofore, to wit, on or about the 3d day of July, the plaintiffs imported into the United States and entered at the port of New York 265 barrels of plumbago and 559 barrels of plumbago; that the said merchandise was imported in the French vessel or bark named the "Francis," from Galle and Columbo, in the island of Ceylon.

2. That at the time the said merchandise was entered at the said port of New York, to wit, on or about the 3d day of July, 1873, the same was not subject to any duty by virtue of any law or statute of the
8 United States, but that the same were free of duty, and that the plaintiffs were entitled to have and receive said merchandise from the said bark without being compelled to pay any duty, customs, or taxes thereon by any law of the United States.

3. That notwithstanding the facts and the law, as aforesaid, the defendant being then, during all the times herein referred to, the collector of the port of New York, as such collector did seize upon and detained the said merchandise, and did refuse to permit the same to be delivered to the plaintiffs, who were the lawful owners thereof, and demanded that the plaintiffs should pay a duty of ten per cent. ad valorem upon the same, amounting to $2,025.80.

4. That the plaintiffs were by said retention of said merchandise and by the said demand compelled to pay, and they did pay, on or about the 3d day of July, 1873, the said duty of ten per cent., being the sum aforesaid, in gold, to the defendant, who had and received the same.

5. That previous to and also at the time of said payment, and also within the time allowed by law thereafter, the plaintiffs, in due
9 form, did protest to the defendant against the said retention, demand, exaction and payment, which the defendant, nevertheless, and wrongfully, and without authority of law or right, did exact and compel to be paid, as aforesaid, by these plaintiffs.

6. That thereafter, and on or about the 3d day of July, 1873, the plaintiffs, being aggrieved by the action of the defendant and the payment of said duty as aforesaid, did appeal to the Secretary of the Treasury of the United States. That thereafter, and in the month of October, 1873, the said Secretary declined to direct the repayment of the said sum exacted by defendant as aforesaid, and left the plaintiffs without remedy, except before this honorable court.

Wherefore the plaintiffs pray this honorable court that they may have judgment against the defendant for the value in currency of said sum of $2,025.80 in gold on the said 3d day of July, 1873, being the sum of $2,339.78, with interest thereon from that date, together with all the costs and expenses of this action.

WAKEMAN & LATTING,
Att'ys for Pl'ffs, &c., 93 Nassau St., N. Y.

(Endorsed:) 2821. U. S. circuit court. Southern district of
10 N. Y. J. Gautier & others ag't Chester A. Arthur, as collector, &c. Declaration. Wakeman & Latting, att'ys for pl'ffs, 93 Nassau st., N. Y.

To GEORGE BLISS, Esq., def't's att'y:

Please take notice, rule for def't to plead within 20 days, or judg't for pl'ffs, was entered this 11th day of Sept'r, 1874.

WAKEMAN & LATTING,
Att'ys for Pl'ffs.

Received Sep. 11, 1874. U. S. attorney's office.

11 *Bill of particulars, pursuant to § 36 of act of Congress of July 18, 1866, entitled "An act further to prevent smuggling, and for other purposes."*

N. Y. supreme court.

J. H. GAUTIER & OTHERS
agt.
CHESTER A. ARTHUR, AS COLLECTOR, &c., &c.

1. The names of the importers in this matter were the firm of J. H. Gautier & Company, composed of J. H. Gautier, C. E. Gregory, & T. B. Gautier.

2. That the merchandise upon which it is claimed duty was wrongfully exacted was and is described as 265 barrels of plumbago and 559 barrels of plumbago, entered at the port of New York on the third day of July, 1873, and that the same was imported from the ports of Galle and Colombo, in the island of Ceylon.

3. That the vessel in which said good were imported was the "Francis," a bark sailing from said ports.

12 4. That the dates of the invoices of said merchandise were February 6th & March 5th, 1873, respectively.

5. That the date of the entry of the same at the custom-house of the port of New York was July 3, 1873.

6. That the precise amount of duty claimed to have been exacted in excess of the amount due is $2,025.80 in gold.

7. That the date of the payment of said duties was the 3rd of July, 1873.

8. That the day and year on which protest was filed against the exaction of said duties was the 3rd day of July, 1873.

9. The date of the appeal thereon to the Secretary of the Treasury was the 3rd day of July, 1873.

10. That the date of the decision of the Secretary of the Treasury thereon was the 16th day of October, 1873.

Yours, &c.,

WAKEMAN & LATTING,
Pl'ffs' Att'ys, 93 Nassau St., N. Y.

To GEORGE BLISS, Esq.,
Def't's Att'y.

13 (Endorsed:) 2821. Gautier v. Arthur. Bill of particulars. To Geo. Bliss, esq., def't's att'y. Received Feb. 21, 1874. U. S. attorney's office.

14 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR
ads.
J. GAUTIER ET AL.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury when, &c., and says that he does not owe the said sum of $2,339.78, as above demanded, or any part thereof, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEORGE BLISS,
Defendant's Attorney.

To WAKEMAN & LATTING, Esqrs.,
Plaintiffs' Attorneys.

(Endorsed:) 2821. U. S. circuit court. Chester A. Arthur ads. J. Gautier et al. Plea. George Bliss, attorney for defendant.

Due service of a copy of within is hereby admitted.
New York, Sept'r 17, 1874.

WAKEMAN & LATTING,
Pl'ffs' Att'ys.

You will please take notice that the plea of the defendant in
15 the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, Sept. 17th, 1874.

Yours, &c.,

GEORGE BLISS,
Defendant's Attorney.

To WAKEMAN & LATTING, Esqrs.,
Plaintiffs' Attorneys.

16 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on Wednesday, the ninth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable William J. Wallace, circuit judge.

JAMES GAUTIER ET AL
vs.
CHESTER A. ARTHUR. } No. 264.

Counsel for the respective parties file a written stipulation waiving a jury, and to try this cause before the court.

Mr. Wakeman is heard on the part of the plaintiff.

George Bliss, United States district attorney, is heard on the part of the defendant.

Mr. Wakeman is heard in reply.

C. A. V.

17 *Statement of facts, February* 8, 1876.

U. S. circuit court.

GAUTIER, &C.
v.
ARTHUR. } No. 264.

PICKERING
v.
ARTHUR. } No. 265.

BAKER
v.
ARTHUR. } No. 266.

ARNSON
v.
ARTHUR. } 267.

FOWLER
v.
SAME. } 268.

The merchandise referred to in these cases consisted of sixteen hundred and twenty-nine barrels of plumbago & ten cases of citronella oil. These importations were made in bark the Francis, a French vessel from Colombo, British possessions in the island of Ceylon, east of the Cape of Good Hope. That the Francis arrived in the port of New York
18 in July, 1873, and made an entry of her cargo; that the plaintiffs above named were the consignees of the merchandise herein described, & claimed to enter the same as exempt from duty; that the said defendant, as collector of the port, claimed the right to and did impose and levy a duty of ten per cent. ad valorem thereon; that against such impositions & levy of duty the said several plaintiffs duly protested, & to enable them respectively to obtain the possession of their said merchandise did, under such protest, pay a sum of money in gold to said defendant as such collector as equalled the amount of the said duty thus levied in each of said cases.

That an appeal was duly taken by the plaintiffs, Gautier & Co., from the said collector's decisions and action to the Secretary of the Treasury, who thereupon affirmed the decision and action of said collector; and thereupon these actions were duly brought to recover back the said several sums of money thus paid, with interest, as claimed in each case re-

spectively; that as to the appeals in the other cases the p
if the court decides that they are entitled to recove
19 pealed in accordance with law, be at liberty to ent
such appeals to the court, whose decision therein
such proof to be submitted during the present term.

GEORGE BLISS,

WAKEMAN & LAT

(Endorsed:) 2821. U. S. circuit court. Gautier against
four other cases against same. Statement of facts. Judg
for def't. Wm. J. Wallace, Apr. 3, 1876. Wakeman & I
for plaintiffs, 93 Nassau st., N. Y. Filed Jun. 22, 1876.

20 *Judgment.*

United States circuit court, southern district of New

J. GAUTIER & ANO.
vs.
C. A. ARTHUR.

The issues in this action having been brought on for tri
Judge Wallace, at a circuit court of the October term,
issues having been tried on an agreed statements of fact
ment for the defendant having been duly ordered on the
April, 1876, and his costs having been adjusted at $24.57.
Now, on motion of Stewart L. Woodford, United States
defendant,
It is adjudged that the defendant have judgment agains
upon the issues in this action, and that he recover the sum
taxed costs, and have execution therefor.
Judgment signed this 19' day of Feb'y, 1878.

J. M. D

21 (Indorsed:) 2821. United States circuit court.
ano. vs. C. A. Arthur. Judgment roll. Stewart
United States attorney for defendant. Costs, $24.57. U. S.
Filed Feb. 19, 1878. John I. Davenport, clerk.

22 *Bond for costs.*

Circuit court of the United States of America for the sou
of New York, in the second circuit.

JOSIAH H. GAUTIER AND CHARLES E. GREGory, comprising the firm of J. H. Gautier & Co.,
vs.
CHESTER A. ARTHUR, AS COLLECTOR OF THE port of New York.

Know all men by these presents that we, Lloyd Aspin
quis C. Gaspar, are held and firmly bound unto the abov
ter A. Arthur, as collector, in the sum of two hundred & fifty dolla

be paid to the said defendant, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said suit to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LLOYD ASPINWALL. [L. S.]
MARQUIS C. GASPAR. [L. S.]

Sealed and delivered and taken and acknowledged this 30th day of March, 1878, before me.

[L. S.] JOS. M. BULGER,
Notary Public, N. Y. Co.

23 STATE OF NEW YORK,
City & County of New York, ss:

Lloyd Aspinwall, being duly sworn, doth depose and say that he is a freeholder and resides in the city of New York, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

LLOYD ASPINWALL.

Sworn to this thirtieth day of March, A. D. 1878, before me.

[L. S.] JOS. M. BULGER,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City & County of New York, ss:

Marquis C. Gaspar, being duly sworn, doth depose & say that he is a householder and resides in the State of New Jersey; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

MARQUIS C. GASPAR.

18

Sworn to this thirtieth day March, A. D. 1878, before me.

[L. S.] JOS. M. BULGER,
Notary Public, N. Y. Co.

(Indorsed:) Vol. , page . U. S. circuit court. Josiah H. Gautier et al. vs. Chester A. Arthur, as collector, &c. Bond for costs on writ of error to Supreme Court. Wakeman & Latting, 93 Nassau st., N. Y., proctor.

The within bond is approved.

SAM'L BLATCHFORD.

U. S. circuit court. Filed May 8, 1878. John I. Davenport, clerk.

24 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-eight.

JOSIAH H. GAUTIER AND CHARLES E. GREGORY, composing the firm of J. H. Gautier & Co., plaintiffs in error,
agt.
CHESTER A. ARTHUR, AS COLLECTOR OF THE port of New York, defendant in error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Josiah H. Gautier and Charles E. Gregory, by Wakeman & Latting, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that as appears by the plaintiffs' complaint and the statement of facts, dated February 8, 1876, the rendition of the judgment should have been in favor of the plaintiffs and against the defendant, and the grounds of the plaintiffs' objection to said judgment are that at the time the merchandize referred to in this case was imported
25 and entered at the port of New York the same was not subject to any duty by virtue of any law or statute of the United States, but the same was free of duty and should have been so entered.

And the said Josiah H. Gautier and Charles E. Gregory pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

Dated May 13th, 1878.

WAKEMAN & LATTING,
Att'ys for Pl'ffs in error.

To STEWART L. WOODFORD, Esq.,
U. S. Att'y.

(Endorsed:) 2821. U. S. Supreme Court. Josiah H. Gautier et al. agt. Chester A. Arthur, as collector, &c. Assignment in error. Wakeman & Latting, att'ys for pl'ffs, 93 Nassau st. U. S. circuit court. Filed May 13, 1878.

26 Supreme Court of the United States.

JOSIAH H. GAUTIER & CHARLES E. GREGORY, composing the firm of J. H. Gautier & Co., plaintiffs in error,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, 1878, the said Chester A. Arthur, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

STEWART L. WOODFORD,
Attorney for Defendant in error.

(Endorsed:) 2821. Josiah H. Gautier & Charles E. Gregory, composing the firm of J. H. Gautier & Co., plaintiffs in error, vs. Chester A. Arthur, defendant in error. Joinder in error. Stewart L. Woodford, attorney for def't in error.

27 Service of a copy of the within joinder in error is hereby admitted.

New York, June 10, 1878.

WAKEMAN & LATTING,
Att'y for Pl'ffs in error.

U. S. circuit court. Filed Jun. 10, 1878. John I. Davenport, clerk.

28 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, collector of the port of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1878, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Josiah H. Gautier and Charles E. Gregory, composing the firm of J. H. Gautier & Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of April, 1878.

SAM. BLATCHFORD,
Judge of the Circuit Court for the Southern District of New York.

29 (Indorsed:) 2821. A, 125. U. S. circuit court, south'n dist. N. Y. Josiah H. Gautier et al. ag't Chester A. Arthur, as collector, &c. Citation. X'd. Wakeman & Latting, pl'ffs' att'ys, 93 Nassau st., N. Y. U. S. circuit court. Filed May 9, 1878, John I. Davenport, clerk.

I admit due service of within citation, dated May 9, 1878.

S. L. WOODFORD,
U. S. A'ty.

(Indorsement on cover:) No. 167. Josiah H. Gautier and Charles E. Gregory, as J. H. Gautier & Co., plaintiffs in error, vs. Chester A. Arthur, collector of port of New York. S. New York. C. C. U. S. Filed 12th March, 1879.

O

SUPREME COURT U.S.
FILED
DEC 5 1883
JAMES H. McKENNEY, CLERK

U. S. Supreme Court.

JOSIAH H. GAUTIER and others, agt. Appellants CHESTER A. ARTHUR, as Collector, etc. Respondents	**POINTS** *For Appellants*

This action was brought to recover back a sum of money equal to a duty of ten per cent. *ad valorem* on certain merchandise, to wit.: 1,629 lbs. of plumbago, and 10 cases citronella belonging to the above named plaintiffs, all of which were imported in the French vessel known as the "Francis" from Columbo, in the Island of Ceylon, a British East India possession, in July, 1873.

The moneys thus paid and retained under the claim of duties, were paid under protest and duly appealed to the Secretary, who affirmed the action of the Collector. Thereupon this action was brought to recover back the sum of money thus paid.

The above facts were admitted by stipulation and the right to recover back the duties thus paid is the only question in the case.

First Point.

The Appellants claim that the merchandise in question was absolutely exempt from duty. The Act of June 6th, 1872, § 5, provides, "That on and after the first day of August next, the importations of the articles enumerated and described in this section " shall be exempt from duty," that is to say, Oil, Citronella, Plumbago, etc., 17 Statutes at Large, p. 230, p. 236.

It is understood that power to impose this tax was claimed upon the argument below under § 17 of the Act of June 30, 1864. Statutes at Large. Vol. 13, p. 202.

In reply to this claim we submit :

1. That the words " Shall be exempt from duty," are to be taken in their ordinary sense, and in that view they necessarily operate as a repeal of all authority, in whatever form it may have previously existed, for the imposition of any duty. These words admit of, and can have no other construction.

2. But it is claimed that this is a discriminating duty imposed, because the merchandise was imported in a French bottom. To this we say,

(1). The duty is levied on the goods, and not on the vessel. The entry and assessment of this duty on these goods is in exactly the same form as that of any other.

(2). But the reason assigned for the levy does not change the fact. It is an attempt to levy a duty on goods which the Statute

expressly declares shall be exempt from duty. It is no less a "duty," because it is claimed to be a discriminating duty.

(3). As to these goods, can the words "shall be exempt from duty," have there ordinary full force and yet leave a duty legally imposed? Obviously not. To cover the defendant's acts, the Statute should read "exempt from duty, except when imported in French bottoms."

Second Point.

Upon the argument below, it was claimed that § 17 of the Act of June 30, 1864, conferred the power in question, notwithstanding that by the subsequent Act of 1872, the articles described were absolutely declared "exempt from duty."

To this, it may be said:

1. That the facts agreed to and specially found in themselves, do not authorize the conclusion, that because the importations were in a French vessel, that therefore a discriminating duty of ten per cent. could be levied. Facts excluding the conditions of the proviso should have been shown and found as facts.

2. The language of this 17th Section expressly provides "That a discriminating duty of ten per cent. *ad valorem*, in addition to the duties imposed by law, shall be levied," etc.

It will instantly be observed that there was no duty "imposed by law" upon the im-

portation of the goods in question. They were in the language of the Statute, "exempt from duty." There were, therefore, no duties thereon "imposed by law" to which this ten per cent. could be imposed "in addition."

The learned judge below, in his opinion, substantially admits the correctness of this construction. He says, "If the duty were one," in addition to the duties now imposed by law, "there would be room for fair argument, that it was intended to be applicable only to articles otherwise dutiable."

The case of Echeverria vs. Barney, 5 Blatchford, p. 193, is nearly in point. The words of the Statute there under consideration were "in addition to the duties imposed by this Act." Here the words are, "in addition to the duties imposed by law," Mr. Justice Nelson held that the goods then in question being free by that Act, no additional duties could be imposed.

It may be claimed that this construction is inconsistant with the decisions of this Court in the cases of Hadden vs. the Collector, 5 Wallace, 112 and Sturges vs. the Collector, 12 Wallace, 19. It is sufficient to say in this regard, that the sections of the Statutes which received construction in these cases were other and vitally different from the one here under consideration, and are therefore not applicable.

It is plain therefore, that this section 17 read in connection with § 5 of the Act of June 6, 1872, as of the date of these impor-

tations affords no authority for the imposition of this duty.

Third Point.

But the learned judge below in his opinion, differed from the views of the counsel for the Government, and held that section 18 of the same Act, (Heyl, p. 554) confered the power to impose this duty notwithstanding the Act of 1872.

1. The learned judge seems to have overlooked the fact that this section, down to the proviso, was superceded and rendered in operative by section six of the Act of March 3d, 1865, (Heyl, 555-557).

And that this section is also superceded by section three of the Act of June, 1872, the Act under which this importation was made, and which is as follows:—"Section 3. That on and after the first day of October next there shall be collected and paid on all the goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except wool, raw cotton and raw silk, etc.), when imported from places west of the Cape of Good Hope, a duty of ten per centum *ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

Section five of the same Act is as follows: "§ 5. That on and after the first day of August next the importation of the articles enumerated and described in this section shall be exempt from duty—that is to say, (page 233 Id.) " Plumbago, Citronella, or

lemon grass" (page 236 Id.)

In construing these two sections of the same statute we invoke the well settled rule—that an article exempt from duty by specific designation will not be affected by the general words of the same statute which would otherwise embrace it.

Arthur vs. Lahey, 6 Otto, 112.
Arthur vs. Rheims, id., 143.

The designation of an article by a specific name in a statute as exempt from duty, excludes it from the operation of general words imposing duties in the same Act which would otherwise include it and make it subject to duty.

Tong Duck Chung vs. Kelly.
25 Int. Rev. Rec., 149.
7 Reporter 741, and cases cited.

A designation *eo nomine* must prevail over general words. Even if there were an ambiguity in the construction of these sections (which there is not), the construction should be in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretation. So said Mr. Justice Nelson, in Powers vs. Barney. 5 Blatchford, 202.

2. As was done by Mr. Justice Davis in delivering the opinion of this Court in the canary-bird case, 13 Wall, p. 162, these two sections should be read together in their order. The third section by its general

language may cover the articles in question, but the fifth section is a subsequent expression of the Legislative will, and in effect as a proviso to the former section, declares that these articles shall be exempt from duty.

Powers vs. Barney, Supra.

3. It will at once be observed that under this section, a duty of ten per cent. can only be imposed upon "goods, wares and merchandise of the growth or produce of countries east of the Cape of Good Hope"

In the findings of fact there is nothing to show that the articles in question were "of the growth or produce" of the countries indicated. Obviously this Court in the absence of any proof upon the point, will not assume that Plumbago or black lead is the product of any particular country; or because it was imported from any particular country, that therefore it was the product of that country.

The judgment should be reversed, and the case remitted with direction that judgment be entered for the Appellants.

WAKEMAN & LATTING,

Attorneys for Plaintiff and App't.

ABRAM WAKEMAN,

of Counsel.

SUPREME COURT U.
FILED
NOV 28 1881
JAMES R. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

GAUTIER & CO.
vs.
ARTHUR, COLLECTOR, &c. } No. 167.

BRIEF FOR THE DEFENDANT IN ERROR.

This was an action to recover money exacted by the collector on duties, upon the following statement of facts:

"The merchandise referred to in this case consisted of plumbago. This importation was made in the bark Francis, a French vessel from Columbo, British possessions in the island of Ceylon, east of the Cape of Good Hope. The Francis arrived in the port of New York in July, 1873, and made an entry of her cargo. The plaintiffs above named were the consignees of the merchandise herein described, and claimed to enter the same as exempt from duty; the said defendant, as collector of the port, claimed the right to and did impose and levy a duty of ten per cent. ad valorem thereon. Against such impositions and levy of duty the said several plaintiffs duly protested; and to enable them respectively to obtain the possession of their said merchandise did, under

such protest, pay a sum of money in gold to said defendant as such collector as equaled the amount of said duty thus levied in each of said cases." P. 6.

An appeal was duly taken by the plaintiffs, &c.

Ordinarily, *plumbago* is exempt from duty (Rev. Stat., sec. 2505, p. 487).

By section 2502 (p. 459) it is, however, provided as follows:

A discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which shall be imported in vessels not of the United States; but this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported in vessels not of the United States, entitled, by treaty or any act of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in vessels of the United States.

A proclamation by President Grant, dated September 22, 1873 (18 Stats., 844), shows that it was *only*—

On and after the first day of October next [1873] that merchandise imported into France in vessels of the United States, from whatever country, will be subject to no other duties or imposts than those which shall be collected upon merchandise imported into France from countries of its origin, or from any other country in French vessels.

The merchandise in question, of course, came within the provisions of section 2502, as above.

Sturges *vs.* The Collector (12 Wall., 19) and Hadden *vs.* The Collector (5 Wall., 107) exclude every *scruple* against applying the section to articles otherwise *free.*

S. F. PHILLIPS,
Solicitor-General.

SUPREME COURT U. S.
FILED
DEC 5 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GAUTIER, *vs.* ARTHUR.	OPINION.

WALLACE, *J.*

The plaintiffs imported Plumbago and Citronella, the produce of a country east of the Cape of Good Hope, in a French Vessel from the British possessions, west of the Cape of Good Hope. By Section 18 of the Act of June 30, 1864, (13 U. S. Statute at Large, p. 216) these products thus imported were subject to a discriminating "duty of ten per centum *ad valorem* in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

By Section 5 of the Act of June 6, 1872, (17 Id. 233) certain enumerated articles, among which are Plumbago and Citronella were declared to be "exempt from duty."

The plaintiffs importation having been made after the last Act took effect, and the defendant as collector of

the Port of New York, having exacted the discriminating duty of ten per centum, the plaintiffs bring this action to recover the sum thus exacted.

The case presents the question whether the Act of 1872 repeals by implication as to articles placed on the free list, the Act of 1864.

A repeal by implication is not favored, and the earlier Act remains in force unless the later is manifestly repugnant to and inconsistant with it.

Both Acts must stand, if both can be given effect as to the particular application involved.

This may be done by exempting the articles placed on the free list, except when imported under the special circumstances which subject all importations to a discriminating duty.

Viewing the question as though the earlier and later Acts had been passed at the same time, and made separate sections of a comprehensive tariff code, would there be any reasonable doubt that articles not otherwise dutiable would be subject to the discriminating duty?

It would seem evident that it was the legislative intent to lay a duty on all products of the growth of countries east of the Cape of Good Hope, without regard to the consideration whether or not such products were otherwise dutiable, because it is imposed on such as are otherwise subject to a very low duty, as well as upon those subject to the highest duty.

The discrimination regards solely the commerce which is the subject of the provisions:—Acts imposing discriminating duties are retaliatory measures designed to countervail the unfriendly or illiberal policy of foreign powers towards our own commerce, and to coerce the re-

moval of obnoxious restrictions which have been placed upon it, and to this end the interests of our own consumers are subordinated or ignored.

Upon the argument it was urged that the discriminating duty is imposed only on articles otherwise dutiable, and does not apply where no other duty is imposed, and that the language used is so clear as to leave no room for deductions based upon general principles of construction or predicated upon the general theory of such statutes.

If the duty were one "in addition to the duties now imposed by law," there would be room for fair argument that it was intended to be applicable only to articles otherwise dutiable.

But such is not the language. The duty imposed is in addition to the duties imposed upon the products "when imported directly from the place or places of their growth or production."

There are no duties imposed specifically on any products "when imported directly from the place of their growth or production," and if the argument is sound, it would result that no products are subject to the discriminating duty.

There is nothing therefore in the language used to indicate that any distinction between products dutiable and not dutiable was present in the mind of the law-makers when they imposed the discriminating duty.

Judgment is ordered for the defendant.

12534

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~309~~ 65

NATHAN C. DRAPER, APPELLANT,

vs.

HENRY S. DAVIS ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 21, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 309.

NATHAN C. DRAPER, APPELLANT,

vs.

HENRY S. DAVIS ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 In the supreme court of the District of Columbia, the day of M'ch, 1877.

NATHAN C. DRAPER
vs.
ANTHONY HYDE, CATHARINE S. FORREST, Johnson P. Thomas, Sarah J. Thomas, Henry S. Davis, Charles Winder, and Edward Champlier. } Eq. No. .

To the supreme court of the District of Columbia, holding an equity court for said District.

The plaintiff above named complaining shows to the court as follows, to wit:

1. The plaintiff is a resident of the District of Columbia.

2. The defendants Anthony Hyde, Johnson P. Thomas, Sarah J. Thomas, Henry S. Davis, and Edward Champlin are also residents of said District, but the defendant, Catharine S. Forrest, is a resident of the State of Virginia, and the defendant Charles Winder is a resident of Maryland, having removed some years since from D. C.

2 3. The defendant Anthony Hyde, professing to act as trustee for the defendant Catharine S. Forrest under and by virtue of a certain deed of trust of record among the land records of the District of Columbia, in liber 698, at folio 87 et seq., to which record and a copy thereof, which will be filed in this cause as Exhibit A, reference is here prayed, is now advertising for sale, on the 8th and 9th inst., certain real estate and personal property of great value, to wit, of the value of $50,000 and upwards, as complainant verily believes, all of which is the property of said complainant exclusively, or with the defendant Johnson P. Thomas as his business partner, and the said Hyde declares his intention to so sell all the said property as mentioned and advertized in the published advertisement herewith filed as Exhibit B, and which it is prayed may be taken and read as a part thereof.

4. This complainant did execute the deed of trust recorded as herein-before mentioned at or about the date thereof, to secure the payment of a loan of ten thousand dollars of about the date of such deed, made by the defendant Catharine S. Forrest to the complainant and the defendant Johnson P. Thomas, doing business under the firm name of N.

3 C. Draper & Co., every dollar of it for the use and benefit of said firm, although the complainant's individual note was given therefor, but the complainant says that such deed did not convey to the said Hyde as trustee any part of lot four in square numbered 294 or any part of lot three in said square, nor any right, title, estate or interest therein or in any part of either of said lots, nor has the complainant by any deed at any time made such conveyance to said Hyde, nor has he authorized him to make any sale thereof as set forth in the advertisement aforesaid, and yet before the execution of the deed aforesaid this complainant was vested with and still until now continues vested with title and interest in said property of a value not less than $16,000, all of which the said defendant, Anthony Hyde, wrongfully claims the power to sell and convey by virtue of the deed aforesaid and for the benefit of the said Catharine S. Forrest.

5. This complainant further shows that subsequent to the execution of the deed of trust aforesaid the mill and factory mentioned in said advertisement was almost entirely destroyed by fire, together with a

large part of the machinery, saws, implements, fixtures and fur-
4 niture of every kind on, in or belonging therein, and that after
such fire the complainant rebuilt the mill and factory at great expense and placed therein new and other machinery, saws, implements, fixtures, and furniture, at an expense and of a value not less than $3,000, none whereof were included in the deed of trust aforesaid, nor ever made subject to the payment of the debt aforesaid or any part thereof, and yet the said defendant Hyde wrongfully claims the power and is proceeding to sell the same by virtue of the deed aforesaid and to the great and irreparable loss and damage of the complainant.

6. The complainant further says that by reason of political and financial uncertainties and possibilities the business of the country at large, and especially of the city of Washington, has for some months past been prostrated almost to annihilation, capital has disappeared, real estate finds no one willing to invest, no one desires to buy, property put up for sale under deed of trust is uniformly transferred to the in-
cumbrancer at whatever price he chooses to place upon it in the
5 utter absence of competition. No fair or reasonably equitable
sale of the property aforesaid can be made until business revives at least in some measure. Indeed the said defendant Hyde admits that he does not expect to effect a sale of said property, but does expect he will be obliged to bide bid it in for the benefit of the aforesaid Catharine. Yet the said property, even with but a moderate demand for real estate, with the beginning of a restoration of public confidence, will be worth in the market not less than $20,000 over and above the incumbrance aforesaid and of all prior incumbrances. Furthermore, no part of the principal of the indebtedness mentioned in said deed of trust is yet due and less than one year's interest is due and unpaid.

7. And the complainant further says even if a sale of any portion of the property aforesaid could lawfully and ought in justice to the parties in interest to be presently made, nevertheless such sale ought to be made under a decree of the court, sitting, adjusting, and providing
for all of the entangled interests of the parties, and by a trustee
6 selected by the court, and impartial towards all having interests
in the property as security or in any other manner.

8. The firm of N. C. Draper & Co. is indebted to the defendant Henry S. Davis upon certain notes now held by him to the amount of about eleven thousand dollars, secured upon a portion of the property above mentioned, by deed of trust to the defendant Charles Winder, who has since removed from the District of Columbia to some place to complainant unknown, and William Y. Fendall, since deceased, and this incumbrance antedates that of the deed of trust to said def'nt Hyde.

9. The defendant Johnson P. Thomas owns a third interest in the mill property hereinbefore mentioned, to wit, the property at the intersection of C street and Ohio avenue with 13th street west, described as lot 4 and part of lot 3, in square 294, by virtue of a deed thereof from the said Henry S. Davis, grantor, to complainant, one Jno. W. Bodine (who still later sold his undivided third to complainant) and the said
Johnson P. Thomas, dated about the first of May, 1867, being
7 made owner and indebted to complainant in the sum of $2,600,
evidenced by his note of that amount payable to the order of complainant, executed and dated June 7, 1870, maturing in twelve months from date; the said Thomas and Sarah J. Thomas, his wife, to secure said note, duly executed, acknowledged, and delivered their certain deed of trust of that date, whereby they conveyed all their right, title, and interest and estate in and to the said real and personal estate

to one Edward Champlin, as trustee, with power, on default in the payment of said $2,600, and interest accruing thereon, to sell and convey all the property so granted and apply the proceeds of such sale to the payment of such indebtedness, &c., &c., as is commonly provided in such deeds. No part of such indebtedness has been paid, satisfied, or discharged, neither has any portion of such property been released from the lien of such deed of trust, but said deed was, after its due and full execution and delivery, entitling it to be placed upon record by this complainant, accidentally lost before record made, and has not yet been found.

8 10. Finally, the complainant says the sole surviving trustee in the deed to secure the def'd't Davis has abandoned his trusteeship, and the trustee, Edward Champlin, cannot exercise his office because of the loss of the deed to him before record thereof.

And the complainant prays—

1st. That the writ of subpœna may be issued to each of the defendants named in the title to this bill of complainant, commanding them and each of them to appear and answer, &c.

2. That the defendant Anthony Hyde may be restrained from proceeding under the deed of trust to him during the pendency of this suit.

3d. That the said defendant Hyde may be forever enjoined from offering for sale complainant's interest in any part of lots 3 and 4, in sq. 294, and from offering for sale the engines, machinery, saws, implements, fixtures, furniture, or any of them, placed in the mill aforesaid since said deed of trust to him; that the priorities of the several incumbrances hereinbefore mentioned may be ascertained and de-

9 termined as well as the amount of each.

4. That the right of the complainant to security upon a portion of said property, or of the interest of the defendant Johnson P. Thomas in the same, may be ascertained and declared, together with the description of the property on which such lien rests, and from what time, and that the defendant' Johnson P. Thomas and Sarah J. Thomas be required to duly execute and deliver to complainant a new deed of trust in lieu of and equivalent to the instrument lost, of like date nunc pro tunc.

5. And finally, for such other and further relief in the premises as may be just and equitable.

NATHAN C. DRAPER.

WM. A. MELOY, *Sol'r.*

DISTRICT OF COLUMBIA, *ss:*

Nathan C. Draper, being duly sworn, deposes and says:

I do solemnly swear that I have read the foregoing bill by me subscribed, & know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated on information & belief I believe to be true.

N. C. DRAPER.

10 Subscribed & sworn to this 8th of M'ch, 1877, before me.

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

(Endorsement:) 5425. Eq. Doc. 16. Nathan C. Draper vs. Anthony Hyde et al. Bill.

The clerk will please file and issue, &c.

WM. A. MELOY, *Sol'r.*

Filed March 8th, 1877.

R. J. MEIGS, *Clerk.*

11 *Subpœna to answer.*

In the supreme court of the District of Columbia, the 8th day of March, 1874.

NATHAN C. DRAPER, COMPLAINANT, *against* ANTHONY HYDE ET AL., DEFENDANT'. } No. 5425. Eq'y Dock. 16.

The President of the United States to Anthony Hyde, Catharine S. Forrest, Johnson P. and Sarah J. Thomas, Henry S. Davis, Charles Winder, and Edward Champlin, defendants:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness, D. K. Cartter, Chief Justice.

[SEAL.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendan therewith served is to enter appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

12 *Restraining order.*

The defendant is hereby restrained, as prayed in the within mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 4th day of April, 1877, of which take notice.

By the court.

D. C. HUMPHRYS, *Justice.*

(Endorsement:) No. 5425. Equity Docket 16. Original. Nathan C. Draper vs. Anthony Hyde et al. Issued March 8th, 1877. Returned 17, 1877.

Not to be found, Forrest & Windsor. Sum'd all the others, & served notice for injuction on Hyde, March 18th, '77.

ALEX. SHARP, *Marshal.*

MELOY, *Edwards.*

In the supreme court of the District of Columbia.

N. C. DRAPER, COMPLAINANT, *vs.* A. HYDE ET AL., DEFENDANT'. } Equity. No. 5425.

Henry S. Davis, one of the defendants in the above entitled
13 cause, answering the bill of complaint filed therein, says:

1st. That the statement in said bill as to the amount of money due him from the complainant is erroneous and false, the amount due to him being much larger than therein stated.

2d. That the statement in said bill of complaint as to his having abandoned his trustee is also erronious and false.

3d. That of the three thousand dollars that the complainant states he paid for rebuilding & furnishing the mill after the fire, this defendant furnished & paid the sum of twenty-nine hundred & seven & $\frac{6}{100}$ dollars ($2,907.06), and further this defendant says that he has paid the sum of nine hundred and ninety-five & $\frac{18}{100}$ ($995.18) for ground rent and insurance on the mill property, which he was obliged to pay to protect his own interests, but all of which the complainant was obliged and in duty bound to pay, but neglected and refused to do so. And while the amount due to this defendant from the compla'nant is payable in semi-
14 annual payments, he, the complainant, has neglected for more than nine years past to pay any portion of the principal, although frequently requested to do so. Neither has he paid any interest on the principal since the second day of November, A. D. eighteen hundred and seventy-five, though frequently urged to do so, with the exception of thirty-five & $\frac{22}{100}$ dollars ($35.22). The complainant has also neglected and refused to pay the general or special or water taxes on the mill property, which this defendant is informed are now in arrears to the amount of over thirty-five hundred dollars ($3,500.00), and all of which the complainant was obliged and in duty bound to pay.

As to the other matters and things alleged in said bill of complaint, this defendant has no information.

This defendant having answered, prays to be dismissed hence with his reasonable costs.

H. S. DAVIS.

JOHN E. NORRIS, *Sol'r.*

I do solemnly swear that I have read the answer by me sub-
15 scribed, and know the contents thereof, and that the facts therein stated as of my own knowledge are true, and the facts therein stated on the information of others I believe to be true.

H. S. DAVIS.

Subscribed and sworn to before me on this 13th day of March, 1877.

R. J. MEIGS,
Clk S. C., D. C.,
By R. J. MEIGS, JR., *Ass't.*

(Endorsement:) 5425. Equity. N. C. Draper vs. A. Hyde et al. Answer of H. S. Davis.

The clerk will file this answer & enter my app'r'ce for H. S. Davis.

JOHN E. NORRIS, *Sol'r.*

Filed March 13th, 1877.

R. J. MEIGS.

In the supreme court of the District of Columbia. In equity.

N. C. DRAPER
vs.
A. HYDE ET AL. } No. 5425. Docket 16.

16 The answer of Johnson P. Thomas, defendant, to the bill of com-
plaint in this cause.

In answer to said bill of complaint I would say as follows:

1. I admit the execution and delivery of the deed of trust in said bill

recited to defendant Hyde, & that interest has been for a long time due and unpaid.

2nd. I admit the execution and delivery of the deed of trust recited in paragraph 9 of said bill, but deny that the same hath been lost, unless said loss hath occurred since the 14th February, 1877, and allege that the same was in the possession of plaintiff between said date and the time of the filing of this bill, and that the same hath been for many years withheld from record by said plaintiff.

3. I allege that the firm of N. C. Draper & Co., of which I am a member, is in such an embarrassed condition that it cannot pay its indebtedness; that this condition is admitted by said plaintiff, and I am therefore willing that said sale as advertised shall take place for the
17 payment of the principal, debt and interest, due to defendant Forest.

JOHNSON P. THOMAS.

C. M. MATHEWS,
Solic'tor for J. P. Thomas.

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, *and that the facts therein stated upon my personal knowledge are true*, and the facts therein stated upon information and belief I believe to be true.

JOHNSON P. THOMAS.

Sworn to and subscribed before me this 24th day of March, 1877.
[SEAL.] JOHN T. C. CLARK,
Notary Public.

(Endorsement:) 5425, docket 16. N. C. Draper vs. A. Hyde et al. In equity. Answer of defendant Johnson P. Thomas. C. M. Mathews, sol'r for def't J. P. Thomas. Filed April 5th, 1877. R. J. Megs, clerk.

18 *Statement of taxes, and interest, to March 8th, 1877, on property of N. C. Draper.*

Taxes & in'st to March 8th, 1877:

Mill property, pt. 30, lot 4, & imp's, sq. 294, sold June 13, 1876		$174 59
Do. do. do. do. " June 29, 1875		652 29
Do. 1872–'3, Jan'y 3, 1876, sold to H. M. Baker		236 71
Do. tax due 30 June, 1877 (part of bill ($254\frac{89}{100}$)	145 55	
Penalty on 1st ½ same 6%	4 36	$149 91
		$1,213 50

Special tax on mill property:

On 13th street, Dec. 9, 1872	$303 48	
15 % in'st to M'ch 8, '77, 430	193 47	
		$496 95
On C street, Nov. 29, '73	$764 40	
10 % int. to M'ch 8, '77, 338	250 13	
		1,014 53
On Ohio avenue	273 68	$1,785 16

Dwelling:

Lot 8, sq. 296, carriage way		$338 22	
" of 7, do. do.		188 25	
" 8, do. 1873		53 40	
N ½ 7 & all 8 & imp's, sold 29 June, 1875		340 51	
Do. do. 13 " 1876		86 45	
Do. do., tax 1876–'77	$71 57		
Penalty on 1st ½ same, 6 %	2 15		
		73 52	
N ½ 7, sq. 296, sold to Baker Jan. 3, '76, (1872–'3)		66 50	
			$1,147

House on 5th street, lot S 24, sq. 510:

Sold 29 June, 1875		$166 11	
" 13 " 1876		45 60	
Part of bill $254.81 tax, June 30, '77	$37 69		
Penalty on 1st ½ same, 6 %	1 13		
		38 82	
Tax 1872-'73, sold to Baker		67 82	
			$318 35
Total			$4,464 06

19 In the supreme court of the District of Columbia, the day of March, 1877. In equity.

BETWEEN N. C. DRAPER, PLAINTIFF, *and* ANTHONY HYDE ET AL., DEFENDANT. } No. 5425. Docket 16.

The answer of the above-named defendant Anthony Hyde, to the bill of complaint of the above-named plaintiff.

In answer to said bill of complaint, I say as follows:

1. I admit paragraphs one (1 & two) 2, in said bill of complaint.

2. I admit the statements of paragraph three (3) of said bill, except as to the value of the property, real and personal, advertised to be sold by me, but deny that said real and personal estate is worth the sum of fifty thousand (50,000) dollars.

3. I admit that plaintiff did execute said deed mentioned in paragraph four (4) of said bill, but do not know, and cannot admit, that said execution was in all respects for the use and benefit of the firm of
20 N. C. Draper & Co., and I deny that said deed fails to convey any part of lots four (4) and three (3) in square numbered two hundred ninety-four (294) in the city of Washington, in said District, and charge that I became, by virtue of said deed of trust, duly authorized to make sale of said real estate in said square numbered two hundred and ninety-four (294), in the manner in which said sale hath been by me attempted to be made, according to the advertisement in public notice in said bill mentioned; and I deny that I am wrongfully claiming the right to sell the same.

4. I admit that, since the execution and delivery of said deed of trust, there has been a partial destruction of the real & personal estate mentioned in paragraph five (5) of said bill, and that there has been a rebuilding and addition of new machinery to an amount of cost unknown to me; and I charge & allege that at the time of said destruction, and in aid of the said rebuilding of said premises, and the addition of said new machinery, I did as trustee under said deed of trust, and with
21 the consent of defendant Catharine S. Forrest, secured thereby, surrender and give up my right to certain amounts of money which became due and payable under the policies of insurance upon said estate thus destroyed, and that said amounts were received by the said plaintiff, and were applied to said rebuilding and addition. By reason of which premises I am advised that said added or substituted machinery became liable for the payment of said debt secured by said deed of trust, and was made subject to the provisions of the same.

5. I am not advised of the effect had upon the value of real and personal estate and manufacturing property by the political and financial uncertainties alleged in paragraph six (6) to now prevail, but claim and charge that I am proceeding to make sale of the property advertised by

me in accordance with the terms of the deed of trust, after more than one (1) year's interest was due and unpaid, and amounting, on the 8th March, 1877, to the sum of $1,119.30; and I further allege that
22 said plaintiff hath utterly failed to pay either the general or special taxes which have been for the past four (4) years levied and assessed upon said real and personal estate, and that said taxes due and unpaid on the 8th March, 1877, amounted to the sum of $4,464.06, a particular account & statement of which I annex hereto as a part of my answer to said bill of complaint. And I am further informed and believe, & so believing charge, that of ground rent there is due by plaintiff to said defendant Davis *there is due* the sum of $276.18, and also the sum of $720 due said Davis by said plaintiff for insurance upon said mill property, and payable by said plaintiff, said ground rent being also due on said mill property; all said items aggregating the sum of $6,559.54.

6. In denial of the statements of paragraphs seven (7) and ten (10) I allege that I am impartial, and have acted fairly in the execution of this trust; that I have only proceeded to offer said estate for sale
23 after a large amount of interest and taxes and other charges had accrued; that my proceedings in the premises have the consent and approval of defendant Thomas, the partner of plaintiff, who is desirous of closing said business; that said charges have materially affected the security of said debt covered by said deed of trust; and that the utter neglect of said plaintiff to provide therefore has made it necessary that a settlement should be had.

7. I do not know and cannot admit the indebtedness to said defendant Davis, but state that it is a first lien upon the mill property in said bill mentioned.

8. I know nothing of the statements in paragraph nine (9) of said bill, and that if the allegations therein contained be true, neither my rights nor those of defendant Forrest can be affected thereby, as neither she nor I were affected with notice of said deed of trust therein mentioned.

9. That during my endeavors to collect the interest due and in arrears he did request me to make sale of said premises in case he did
24 not make payment of the interest as promised; and since the advertisement of sale he has expressed his entire acquiescence in said proposed sale, except in a suggestion that sale be made of the different parcels of real estate in an order different from that proposed to be followed by me.

ANTH. HYDE.

C. M. MATHEWS,
Sol'r for Def't Hyde.

I do solemnly swear that I have read the answer by me subscribed; that I know the facts thereof; and that the facts therein stated upon my personal knowledge are true; and that the facts therein stated upon information and belief I believe to be true.

ANTH. HYDE.

Sworn to and subscribed before me this twenty-second day of March 1877.

D. RITTENHOUSE,
Not'y Public.

(Endorsement:) Filed Apr. 5, 1877. R. J. Meigs, clerk.

25 In supreme court D. C.

NATHAN C. DRAPER *vs.* ANTHONY HYDE, HENRY S. DAVIS, AND JOHNSON P. THOMAS et al.	Eq. 5425.

And the plaintiff joins issue with the above named defendants severally answering herein.

WM. A. MELOY,
Sol'r for Pl'ff.

(Endorsement:) Filed April 11th, 1877. R. J. Meigs, clerk.

26 In supreme court D. C.

NATHAN C. DRAPER *vs.* ANTHONY HYDE, CATHARINE S. FORREST, Johnson P. Thomas, Sarah J. Thomas, Henry S. Davis, Charles Winder, and Edward Champlin.	Eq. No. 5425.

To the supreme court of the District of Columbia, holding an equity court for said District:

And having first obtained leave of the court, the said complainant again comes and for amended and supplemental bill represents as follows, viz:

1. Heretofore, and on or about the 8th day of M'ch, 1877, this complainant filed his certain bill of complaint in this court, wherein he was sole plaintiff and the defendants above named were the defendants, to which bill remaining on the files of this court he prays that reference may be had, and that the same may be taken and read as forming a part hereof, in and by which complainant sought to have the amount and priorities of several incumbrances upon the property mentioned in said bill, and also upon what real estate and chattels the same
27 were respectively a lien, ascertained and judicially determined.

In the 8th paragraph, especially, of said bill complainant set forth the fact that the defendant, Henry S. Davis, held certain notes of the firm of N. C. Draper and Co., secured by a certain deed of trust upon a portion of the property described in said bill, which deed was theretofore executed to Charles Winder and Wm. Y. Fendall, as joint trustees, and to their heirs and assigns, and upon which indebtedness so secured several thousand dollars have been paid, and by the defendant Davis duly applied, while other large sums in equity ought to be thereto applied which he disputes.

Upon this bill issues were joined by answer of the defendants Hyde, Thomas and Davis, and the replication of complainant, and evidence taken on behalf of each of said persons so joining in issue, which evidence has been returned into court.

Yet so it is that notwithstanding the pendency of said cause involving the determination of questions of fact and of law gravely material to the interests of all the parties before any sale can justly and equitably be made of any of the property mentioned in said bill; neverthe-
28 less, since the taking of the evidence as aforesaid, on behalf of the said defendant Davis, he has caused the said Charles H.

Winder, one of the two joint trustees aforesaid, in his individual name solely, to advertise under the said deed of trust, and the said Winder is now so advertising and offering for sale, on Thursday, the 14th day of June, 1877, at public auction, a large portion of the real and personal property mentioned in these proceedings, viz: Lot four, and the west three feet of lot three, in sq. 294, with all the buildings, improvements, and appurtenances thereon and thereto belonging, and also all the goods, chattels and furniture upon said premises.

3. And complainant further represents that such advertisement and attempt to sell is wanton and useless, and calculated merely to imbar'ass the interests of the parties, plaintiff and defendant, in this cause, and to seriously injure the plaintiff and the other defendants by impairing the securities now held by them respectively, and finally by depriving this suit of its proper object, and of the results sought in the determi-
29 nation and satisfaction of all the rights of all the parties, both plaintiff and defendant.

4. That the deed of trust aforesaid to the said Winder and Fendall, as will fully appear from inspection of the record thereof, at folio 282, in liber E. C. E. 4 of the land records of the District of Columbia, to which reference is prayed, as a part hereof, and copy whereof will be filed by complainant, was a conveyance of title to both such trustees, and to their respective heirs, and not to one or to either of them in any contingency, and the said Winder has no power to convey the title of said property, or of any part thereof, as pretended by him.

5. Moreover, the said trust-deed reposed a confidence, duty, and trust in and was executed by this plaintiff expressly upon condition and for the consideration that such confidence, duty and trust should be exercised by the said Winder and Fendall jointly and not severally, or by the said Winder alone; wherefore, as complainant is advised and verily believes, the said Winder is acting without and beyond his authority in the premises.

30 6. The deed of trust aforesaid does not authorize the said Winder to make conveyance of any portion of the property therein mentioned.

7. The said deed of trust enumerated and made subject to the incumbrance of the debt therein specified one thirty-horse power engine and sundry other goods and chattels in and on said premises at the time of the execution of said deed, but subsequent to that time and prior to as well as after the date of the deed of trust to the def'd't Hyde, other machinery and articles now in and on said premises were purchased by the firm of N. C. Draper & Co. and placed upon said premises, which non-enumerated and subsequently purchased machines and articles of personal property of the value of $4,000.00, as complainant is informed and verily believes, were not nor could they have been made subject to lien by the said deed of trust to Winder and Fendall; and complainant is further informed, as matter of law, and verily believes, that any valid deed of trust or mortgage subsequent to that last mentioned and
31 prior to the acquisition of such additional property, placing a lien thereon, would have hold on the same and an equity therein superior to and exclusive of any pretended lien under the deed of trust aforesaid to Winder and Fendall; nevertheless, in and by his advertisement aforesaid, the said Winder offers and proposes to sell all the machinery, goods, chattels, &c., now on said premises in one mass, to the great damage not only of the complainant, but also of his the said Davis co-defendants and of the general creditors of the firm of N. C. Draper and Co. (said firm now being insolvent).

8. The said Charles H. Winder some time since ceased to be and is not now a resident within the jurisdiction of this court, nor has he, to the best of plaintiff's knowledge, information, and belief, any property within the reach of the process of this court, nor can he be made to account with or respond to the creditors of the firm of N. C. Draper & Co. for his conduct of the trust afor'said, or for any moneys which may come to his hands as proceeds of any sale made by him.

9. And, finally, this complainant says that suit has been brought in this court on the equity side thereof, to wit, cause No. 5374, and is
32 now therein pending, for the purpose of a general winding up and settlement of the affairs of N. C. Draper & Co. as an insolvent or greatly embar'assed firm, in which cause proof has been made and submitted to the auditor touching all the assits and all the liabilities of said firm, including indebtedness to the said Henry S. Davis, on which payments have been made to an amount of more than ten thousand dollars, and said cause is now waiting the action of the auditor in making up his report to enable this court to direct the time, manner, and terms of disposing of the entire assits of said firm, and the proper, legal, and equitable distribution of such assets among all the creditors, unsecured as well as secured, and complainant desires that such assets may be realized upon with the least possible expense and litigation, the cost of which must fall upon the creditors of said firm.

Wherefore, fileing this amended and supplemental bill, he prays—

That, during the pendency of this action and until final decree therein the said Henry S. Davis and Charles H. Winder may be restrained from selling the property, or any part of the property, refer'ed to
33 in the advertisement aforesaid, and from directly or indirectly causing the same to be sold, and from in any manner proceeding under the deed of trust aforesaid to said Winder.

That the defendant Henry S. Davis may be required, on his corporal oath, to make discovery of all payments made upon the debt referred to in said deed of trust, with the date and precise amount of each payment, and if any payments have been at any time made by assignment or transfer of claims, notes, or demands against third parties, that he further so make discovery and answer touching each and every such transaction, what claim, note, or demand he received, against whom, of what date, amount, and rate of interest, on what day he realized thereon, and exactly what sum.

And, finally, that all the defendants hereinbefore named whose rights and interests are affected by the relief herein especially prayed may by proper process be required to appear hereto and answer, &c.

And for such other and further relief, &c.

WM. A. MELOY,
Sol'r for Pl'ff.

34 DISTRICT OF COLUMBIA, *ss:*

Nathan C. Draper, being duly sworn, deposes and says he is the complainant named in the foregoing supplemental bill of complaint; that he has heard the same read and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and those therein stated on information and belief he believes to be true.

NATHAN C. DRAPER.

Subscribed and sworn to, June 11th, 1877, before me.

R. J. MEIGS, *Clerk.*

(Endorsement:) 5425 Eq. N. C. Draper vs. Anthony Hyde et al. Am'd and supplemental bill.

Leave granted to file.

A. WYLIE.

Filed June 13th, 1877.

R. J. MEIGS, *Clerk.*

Adv't & deed ref'd to in sup'l bill.

Trustee's sale of a very valuable planing and sawing mill property, situated at the intersection of 13th, C streets, and Ohio avenue northwest.

By virtue of a deed of trust, duly executed to William Y. Fen-
35 dall and Charles H. Winder, trustees, bearing date the 2nd day of May, 1867, and recorded in liber E. C. E., No. 4, folio 282, of the land records of Washington Co., District of Columbia, the subscriber, as surviving trustee, will offer for sale at public auction, in front of the premises, on Thursday, the 14th of June, 1877, at 6 o'clock p. m., all of that very valuable property situated at the intersection of 13th, C streets, and Ohio avenue, northwest, being known and described on ground plan or plat of Washington City as being all of lot 4, in square 294, and the west three feet of lot No. 3, in said square, as described in said deed, the said property being a leasehold for 99 years, together with all the buildings, improvements and appurtenances thereon and thereto belonging, being a planing-mill with all the machinery necessary for active business operations. Also all the goods, chattels, furniture, upon said premises, as set forth in said deed of trust.

Terms of sale.—One-third cash, of which $200 must be paid on the day of sale when the property is knocked down, the balance of the cash payment within ten days; notes for the deferred payments at one, two, and three years, bearing 8 per cent. per annum interest, secured by a deed of trust on the property, which deed must provide for the maintenance of sufficient insurance on the premises, and the payment of
36 the taxes and rent as the same shall become due. If the terms be not complied with within ten days from the day of sale, the property shall be resold upon five days' notice in some one newspaper published in the city of Washington at the risk and cost of the purchaser. All conveyancing at the cost of the purchaser.

CH. H. WINDER,
Surviving Trustee.

Trust—Recorded May 14th, 1867.

Nathan C. Draper to William Y. Fendall et al.

This indenture, made this second day of May, eighteen hundred and sixty-seven, between Nathan C. Draper and Anna E., his wife, Johnson P. Thomas and Josephine, his wife, and John W. Bodine and Eugenia, his wife of the first part, and William Y. Fendall and Charles H. Winder of the second part, all of the city of Washington.

Whereas by reason of the purchase of a leasehold estate, and the machinery and other articles set forth and described in a deed bearing date the 1st day of May, 1867, executed by Henry T. Davis and wife, conveying said leasehold estate and machinery to the said parties of the

first part, they the said parties became and are justly indebted unto the said Henry S. Davis in the full and just sum of twenty thousand
37 dollars for which sum the said parties hath given their twenty several joint promissory notes each for one thousand dollars, bearing even date with these presents, drawn to the order of said Henry S. Davis and payable with interest respectively six months, one year and six months, two years. two years and six months, three years, three years and six months, four years, four years and six months, five years, five years and six months, six years, six years and six months, seven years, seven years and six months, eight years, eight years and six months, nine years, nine years and six months, ten years after date, and the said parties of the first part, being desirous to secure the prompt payment of the said promissory notes, with all the interest and cost which shall accrue thereon when the same shall become due and payable.

Now, therefor', this indenture witnesseth, that for and in consideration of the premises, and for the further consideration of five dollars to them, the said parties of the first part, in hand by the said parties of the second part, at and before the sealing and delivery of these presents, the receipt whereof is acknowledged, they, the said parties of the first part, have given, granted, bargained and sold, and by these
38 presents do give, grant, bargain and sell unto the said parties of the second their heirs, and assigns, all that leasehold estate assigned by the said Henry S. Davis, by the aforementioned deed dated 1st May, 1867, to wit, all those pieces or parcels of land lying and being in the said city of Washington and described as follows:

All of lot numbered four (4) in square two hundred and ninety-four (294), and all that part of lot number three (3) in said square number (294) two hundred and ninety-four, contained in the following metes and bounds, to wit: Beginning for the same at the northeast corner of said lot number four (4) and running thence on the line of C st. northeast three feet; thence south forty-nine feet three inches; thence to a point on Ohio avenue three feet eastwardly from the southwest corner of said lot number four; thence westwardly along said avenue three feet to the east line of lot number four; thence along said line to the beginning, together with all the buildings, improvements, and appurtenances thereon, being the same pieces or parsels of land granted, leased, and assigned to Truman & Draper by Ulysses Ward by deed bearing date 1 June, 1860, for the period of 99 years, and the said party of the first part also hereby bargain and sell unto the said parties of the second part, their heirs and assigns, all the machinery and other
39 goods and chattels in and on said premises, to wit: One thirty horse-power engine with all the appurtenances belonging to the same; one large saw table and saws, one flooring mill, one plaining mill, one resaw mill with two saws, two saw tables with saws, one grindstone with frame, together with all the running-gear and line and other shafting, belting, &c., &c., two vices, one cistern pump, two tin oil cans forty gallons each, one iron safe and office furniture, one truck, one smithforge, anvil and appurtenances, one patent saw-file and the following machinery on the second floor of said premises, to wit, one circular-saw table and saws, one moulding machine, one feasing machine, two scroll saws, four lathes, shafting, pulleys, and belting to run the said machinery, and also all other machinery and other articles now in and on said premises not above 'numerated or which may be hereafter placed in and upon said premises.

To have and to hold said pieces or parcels of land and premises to

and for the proper use of the said parties of the second part, their heirs and assigns, for all the residue of the term of ninety years originally granted with aforementioned deed, and also all the machinery and other
40 articles hereinbefore mentioned, to the said parties of the second part, their heirs and assigns, in trust, nevertheless, to suffer and permit the said parties of the first part, their executors, administrators, and assigns to retain possession of, use, and enjoy all the property hereby bargained and sold until default be made in the payment of said promissory notes, or any of them, or any interests or costs which shall have accrued thereon, and it is hereby understood and agreed that the said interest, at the rate of six per cent. per annum, shall be paid every six months, upon the whole of the outstanding deferred payments, that is to say, that upon maturity of the first of said notes, besides the payment of said note the said parties of the first part are to pay six months' interest on twenty thousand dollars, and upon maturity of the second note, the interest on $19,000 must be made, and so on to the last of said notes.

But in default or failure being made in the payment of said notes or either of them at maturity, or of the interest or any part thereof as herein agreed upon, or of any proper costs that shall have accrued thereon, then the said parties of the second part, at the written request of the said Henry S. Davis or the holder or holders of said notes shall
41 proceed to sell and dispose of the said premises and chattels hereinbefore described at public auction to the highest bidder, upon such terms and conditions as shall be decreed by said parties of the second part, most advantageous to all parties concerned, first giving fifteen days' notice through some newspaper published in the city of Washington, and such sale to repeat and postpone from time to time as the said parties of the second part shall deem expedient, and out of the proceeds arising out of said sale or sales after paying all proper expenses of this trust, including five per centum on the gross amount of said sale, to pay in the first place all of said notes with all interest and costs that may then due and unpaid at the time of said sale or sales; secondly to pay whatever of said notes, interest, and cost that may then remain unpaid, although the same may not have become due and payable, and lastly the surplus, if any, to pay over to the said parties of the first part, their heirs, executors, and administrators, and upon this further trust, that the said parties of the first part for themselves, their heirs, executors, and administrators by these present consent and agree to and
42 with the said parties of the second part, their executors, administrators, and assigns, that they, the said parties of the first part, will insure and keep insured the said premises and machinery hereby bargained and sold in the full sum of fourteen thousand eight hundred dollars ($14,800) in some good and safe insurance offices, approved by the said Henry S. Davis, and that the policies shall be made in his name and to be kept in his possession until this trust shall cease and determine.

And in case of a failure on the part of said parties of the first part, their executors and administrators, to keep said property insured as aforesaid, and the policies placed in the possession of the said Davis, his heirs, executors, or administrators, it shall and may be lawful to and for the said parties of the second part, their heirs or assigns, to insure and kept insured the said property as aforesaid, and the costs and charges of said insurances shall and may be considered part and parsel of such debt hereby secured or intended to be secured and payable out

of the proceeds of any of the sale or sales made by virtue of these presents.

In testimony whereof they, the said parties of the first dart,
43 have hereunto set their hands and seals the day and year first hereinbefore written.

N. C. DRAPER. [SEAL.]
A. R. DRAPER. [SEAL.]
JOHNSON P. THOMAS. [SEAL.]
S. J. THOMAS. [SEAL.]
JOHN. W. BODINE. [SEAL.]
EUGENIA E. BODINE. [SEAL.]

Signed, sealed, delivered and stamped.
JOHN T. C. CLARK.
A. LEPREUX.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, John T. C. Clark, a justice of the peace in and for the county and District aforesaid, do hereby certify that Nathaniel C. Draper and Anna E. Draper, his wife, Johnson P. Thomas and Josephine Thomas, his wife, and John W. Bodine and Eugenia E. Bodine, his wife, parties to a certain deed bearing date the second day of May, 1867, and hereto annexed, personally appeared before me in my county aforesaid, the said parties being known to me as the parties who executed the said deed, and each respectively for himself and herself acknowledge the same as their
44 act and deed; and the said Anna E. Draper, Josephine Thomas, and Eugenia E. Bodine having been examined by me apart from their respective husbands aforesaid, each respectively for herself declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Witness my hand and seal this 7th day of May, 1867.

JOHN T. C. CLARK, *J. P.* [SEAL.]

Subpœna to answer.

In the supreme court of the District of Columbia, 13th June, 1877.

NATHAN C. DRAPER, COMPLAINANT,
against
HENRY S. DAVIS ET AL., DEFENDANT.
} No. 5425. Eq'y dock.

The President of the United States to Anthony Hyde, Catharine S. Forrest, Johnson P. Thomas, Sarah J. Thomas, Henry S. Davis, Charles Winder, and Edward Champlin.

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the amended and supplemental bill this day filed
45 and entitled as above under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Carter, chief justice.

MEMORANDUM.—That the defendant, herewith served, is to enter appearance in this suit, in the clerk's office, on or before the day at which this writ is returnable, otherwise the bill may be taken for confessed.

(Endorsement:) Original. No. 5425. Eq'y docket, 16. Nathan C. Draper vs. Henry S. Davis et al. Issued June 13, 1877, returnable 20th June, 1877.

Sum'd & served notice of inj'n on H. S. Davis and Chas. Winder June 14, 1877.

F. DOUGLASS, *Marshal.*

Restraining order.

The defendants are hereby restrained as prayed in the within-mentioned supplemental bill until further order, to be made, if at all, after a hearing which is fixed for the 20th day of June, 1877, of which take notice.

By the court.

A. WYLIE *Justice.*

In the supreme court of the District of Columbia.

N. C. DRAPER
vs.
46 ANTHONY HYDE ET AL. } Equity. No. 5425.

The seperate answer of Henry S. Davis, one of the defendants, to the supplemental bill of complainant.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said supplemental bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer thereto, answering saith:

First. In answer to the allegations contained in the first paragraph of said supplemental bill, he admits that the said plaintiff filed an original bill against said Hyde, and other of the defendants hereto, but as to the allegations therein contained he does not now remember, but he
47 denies that said plaintiff has paid him large sums of money which have not been properly applied, as charged by said plaintiff.

Second. I' answer to paragraph second of said supplemental bill, he admits that he caused to be advertised for sale the property in said supplemental bill described, but denies that a sale thereof would work injustice or in any way prejudice the rights of any one, but on the contrary avers that a postponement of the sale would be greatly prejudicial to the interests of all the creditors of said plaintiff, and would work a great injury to this defendant, and be in violation of his rights.

Third. He denies each and every allegation contained in the third paragraph of said bill; and for further answer thereto says that the only persons secured in any way by said property, in addition to this defendant, is the defendant Hyde, whose deed of trust is long subsequent to that of this defendant; and a deed of trust to one Champlain from the partner of said plaintiff, to secure said plaintiff in the sum of $2,600.00, which deed of trust is now being contested in this cause.

Fourth. He dmits that the said deed of trust to Fendall and Win-
48 der was a conveyance of title to both of said trustees and their respective heirs, and avers that said Winder is vested with power to sell and convey said property, he being the surviving trustee.

Fifth. In answer to the fifth paragraph of said supplemental bill, he denies that said deed was executed upon the express condition that the confidence and duty reposed in said Fendall and Winder, as such trustees, should be exercised by them jointly and not severally, but on the contrary avers that nothing was said or done or in any way intimated as to the exercise of the trusts and duties reposed in said trustees, excepting as is set forth in the deed itself; and for a further answer thereto he says that said trustees were nominated by this defendant, to whom there was no objection expressed by said plaintiff.

Sixth. I' answer to the sixth paragraph of said bill, he answers the same as in the fourth paragraph of this answer.

Seventh. In answer to the seventh paragraph of said bill, he admits that there was an engine, but of whose power he is unable to say, and other goods and chattels on the premises in said supplemental bill described subject to said deed of trust. And for further answer
49 thereto, says that the said mill in February, A. D. 1875, was partly burned by fire, and that the said plaintiff and one Johnson P. Thomas, the partner of said plaintiff, came to the defendant for money to repair said mill and purchase new machinery therefor, and that this defendant at his earnest solicitations advanced to them sums of money from time to time, amounting in the aggregate the sum of $3,029.56, wherewith to purchase new machinery and repair said mill. A statement of the sum advanced & the time that they were advanced is filed herewith, marked Exhibit A, and is prayed to be made a part of this answer. This defendant further says that some of said money so advanced nor the interest thereon has been repaid. He also says that the machinery thus purchased constitutes all the machinery that has been placed in said mill since the execution of said deed of trust, with the exception of about $3000.00 worth of machinery, which was purchased out of the funds of said firm of Draper and Thomas. He denies that any of the machinery and articles now in and on said premises is free from said incumbrances, but, on the contrary, he avers that said deed of trust covered everything that was on the said premises at the time of
50 the execution of said deed, or that should thereafter be placed on said premises, as will more fully appear by reference to said deed, which he prays may be read upon the hearing of the injunction granted in this cause.

Eighth. In answer to the eighth paragraph of said bill, he says he has no personal knowledge of the matters and things therein contained, and cannot therefore neither deny nor admit the same; but that he is advised that they are immaterial and to that end he avers.

Ninth. In answer to paragraph ninth of said supplemental, he says that the said deed of trust was to secure this defendant in the sum of $2,0000.00 in 20 promissory notes of $1,000.00 each; that of these notes the first ten only have been paid; and on the eleventh note the sum of $269.32 has been paid, thus leaving a balance now due of $9,730.68 with accrued interest, on which sum of $9,730.68 nothing has been paid. Of the other matters and things in said paragraph nine of said bill this defendant has no personal knowledge and cannot therefore either deny or admit the same.

Further answering, this defendant says that the greater part of
51 said indebtedness has been due for a long time, on which there has been nothing paid since 1872, and that there has been no interest paid on said indebtedness since November 2nd, 1875. That in addition to his being deprived of the payment of said indebtedness and the interest thereon, he has been compelled to pay large sums of money

for insurance and ground rent, although by said deed of trust the said plaintiff and the other grantors were to keep the said premises insured and pay the premium thereon. That he has paid as insurance premium and ground rent the sum of $1,206.18, no part of which nor the interest thereon has been repaid him. That there is now due on said premises the sum of $ as taxes, as will more fully appear by reference to the answer of the defendant Hyde to the plaintiff's original bill, which this defendant prays may be read at the hearing of the injunction granted as aforesaid. He further says that he is advised and believes and therefor avers that a postponement of a sale is sought merely for delay, and that the said plaintiff declared to this defendant, in response to the requests of this defendant for payment of the interest money, that he would keep this matter in court for four years.

52 For answer to the interrogatories in the said supplemental bill contained he says to the first interrogatory, he makes answer the same as is contained in the ninth paragraph of this answer. In answer to the other interrogatories he files herewith a statement, marked Exhibit B, which is as full and complete answer as this defendant can make.

And now, having answered said supplemental bill and the interrogatories therein contains, he humbly submits that the plaintiff is not entitled in this suit to the relief sought in and by the first and second prayers of the supplemental bill, or for the purposes thereof to have any injunction granted or interrogatories answered, and he claims the same benefit of the objection as if he had demurred to the relief so sought.

H. S. DAVIS.

JOHN E. NORRIS and
FRANK T. BROWNING,
Sol'rs for Def't Davis.

53 EXHIBIT A.

Advances to N. C. Draper & Co. 1875.

By check:

Feb'y	26	$500	
"	27	200	
March	13	400	
"	16	288	
"	31	267	06
"	"	200	
April	15	900	
June	9	50	
July	3	102	
About Feb'y 25th, 1875. C. W. Howard's check to me. Endorsed by me over to Draper & Co		85	
Paid arbitrators		37	50
Total		$3,029	56

Which entire amount was advanced by me to Draper & Co. between Feb'y 24 and July 3d, 1875.

EXHIBIT B.

Assignments to me by N. C. Draper & Co.

Aug. 4th, 1876. Two notes of Entwisle & Barron for $210.22 each $420 44

The proceeds to be applied to pay the ground rent advanced by me on March 9th, 1876, amounting to $276.18. The balance, if any, after such application to be credited on the general account. On these notes Entwisle & Barron have paid me in money and work $114.86,
54 not enough to cover the ground-rent; deed for the balance, $305.58. I now hold their new note, not endorsed by Draper & Co.

Feb'y 5th, 1877.	Draper & Co.	*vs.*	Thompson & Michael, judgment.....	$115 52
"	"	"	U. H. Painter, claim.	217 30
"	"	"	Augustus Davis, " .	153 54
"	"	"	George Burgess, " .	241 42
"	"	"	J. L. Parsons, " .	258 21
"	"	"	Sam'l Bell, " .	572 54
Amounting to				$1,598 53

Although I have made diligent efforts, I have been unable to collect one cent of this amount, having to the contrary been to some expense in serving useless notifications to the parties.

All these claims and judgments I consider utterly worthless, except the claim against Augustus Davis, should the suit against him prove successful.

55 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Henry S. Davis, being first duly sworn, do depose, and on my oath say, that I have heard read the foregoing answer by me subscribed, and the Exhibits H & B thereto annexed, and know the contents thereof; that the matters and things therein stated of my personal knowledge are true, and those stated upon information and belief I believe to be true.

H. S. MILLS.

Subscribed and sworn to before me this 18th day of June, A. D. 1877.

SAM'L C. MILLS, *J. P.*

(Endorsement:) Filed June 20th, 1877. R. J. Meigs, clerk.

Replication.

In supreme court D. C.

NATHAN C. DRAPER
vs.
ANTHONY HYDE, HENRY S. DAVIS, ET AL. } Eq. No. 5425.

And the plaintiff joins issue with the defendant Henry S. Davis upon his answer to the supplemental and amended bill herein.

WM. A. MELOY,
Sol'r for Pl'ff.

(Endorsement:) Filed June 20th, 1877. R. J. Meigs, clerk.

In the supreme court of the District of Columbia.

NATHANIEL C. DRAPER
vs.
ANTHONY HYDE ET AL. } In equity. No. 5423. Doc. 16.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses begun and held on the 14th day of April, A. D. 1877, and continued from time to time until the 3d day of May, A. D. 1877, when the within depositions were taken, I, John N. Oliver, an examiner in chancery, did cause to be personally present at the office of Wm. A. Meloy, and at my office, No. 460 Louisiana avenue, in the city of Washington, in said District, the witness whose deposition is herewith returned, to testify on the part and behalf of the plaintiff in a certain cause now depending in the supreme court of the District of Columbia, wherein Nathaniel C. Draper is complainant and Anthony Hyde et al. are defendants.

57 DRAPER
vs.
HYDE ET AL. } Equity. 5423. Doc. 16.

APRIL 14, 1877—11 a. m.

NATHANIEL C. DRAPER, a witness of lawful age, produced, sworn and examined on the part and behalf of plaintiff, deposed as follows:

I am the plaintiff in this case, and a member of the late firm of N. C. Draper & Co., the other partner being Johnson P. Thomas. I am the sole owner of lot No. 8 and the north half of lot No. 7 in square No. 296, and also lot No. 24 in subdivision of square 510—that is, I hold the legal title, but as regards the last-named property it is in trust for N. C. Draper & Co. The mill property at the corner of Ohio avenue, 13th & C streets mentioned in the bill is the property of N. C. Draper & Co. In my opinion the property on the island lot, 8 and north half of lot 7, in square 296, is worth $15,000, and that lot No. 24 in subdivision of square 510 is worth $4,000, and that the mill property, aside from machinery, saws, implements, & furniture and fixtures, is worth $5,000, and these latter are worth in addition nearly $16,000. The $10,000
58 loaned by Mrs. Forrest on my note was for the purpose of buying out a one-third interest of one of my partners, Mr. John W. Bodine. No portion of that was for my individual benefit—it was for the benefit of N. C. Draper & Co. The mill was burned down on the morning of the 2d of February, 1875, and we commenced rebuilding in about two weeks after the fire, and it was entirely completed in the month of March. Subsequently to the rebuilding of the mill, I bought new and additional machinery; one piece was a large moulding machine worth $1,000, and one small moulding machine worth $350. I also bought a dimension machine, which cost $160; automatic grinder $90; saw table $20; belting $1,000; blacksmith tools $50; about $1,000 worth of small tools also I bought, which are now on the premises that were not there before, and which are not included in the several items I have mentioned. Subsequent to the fire Mr. Hyde received $1,292.66 for insurance—a portion of this was applied to the payment to Mrs. Forrest

for interest on her note $302, for interest then due, and $393.46 was applied in anticipation of the interest to become due. I received
59 from Mr. Hyde, on the 18th of May, 1875, $597.20. That was all of the insurance money I received from Mr. Hyde. The applications of interest money of which I speak were made, the first, $202, on the 13th of April, 1875, balance of interest to January 1, 1875; and the next, as advance of interest due the 1st July, 1875, was made May 6th, 1875, $100; the next May 17, 1875, paid for balance of interest due July 1, 1875, $393.46. Not one dollar of the $597.20 received from Mr. Hyde was used to pay for this new machinery I have spoken of it; had already been purchased, put in, and in running order.

Cross-examination by Mr. MATHEWS:

I could not say how much machinery was in the mill at the date of the conveyance to Mr. Hyde in trust. We took no invoice of it. There is a great deal more at the present time than there was then. The fire of the 2nd February, 1875, was a partial de'truction of the mill. There remained after the fire of the machinery before in the mill about $10,000 worth, consisting mainly of a flooring and, surfacing machine
60 worth $2,000; shafting and pulleys worth $3,000; cutters worth $1,000; an engine worth $1,500, and other small items, such as a saw-table, and a re-saw machine, several turning lathes, and saws.

MAY 3, 1877—11 a. m.

Met pursuant to agreement. Present Mr. Meloy, solicitor for plaintiff; Mr. Mathews, sol'r for Mr. Hyde; and Mr. John E. Norris, solicitor for Mr. H. S. Davis.

Whereupon the cross-examination of N. C. Draper was resumed by Mr. Mathews.

The firm of N. C. Draper & Co. bought out Mr. Bodine, I think, in 1869, but am not positive. I gave him a note in settlement, which was paid, I think, in 1870. All the articles enumerated in my cross-examination on page 4 of the testimony were in the mill at the time the deed of trust to Mr. Hyde was executed, and are there now. The $597.20 received 18th of May, 1875, from the insurance was applied by me in various ways. It did not assist directly in refurnishing the mill, nor indirectly. There is interest due on this debt up to January last, $990, and will be due on the 1st July next $500 more. I am not stating
61 this positively, but to the best of my recollection. The witnesses attention is here called to 5th paragraph of Mr. Hyde's answer, and he states that the amount stated there of $1,119.30 of interest is approximately correct, as due on the 8th of March, 1877. I know the taxes on this property are not paid. I know there is a considerable amount due.

Cross-examination by Mr. NORRIS:

You state that you expended some $2,900, or something like that, in reconstructing this building; please state where that money came from.

(Objected to by Mr. Meloy as not responsive to any part of the direct examination.)

A. $2,640, or thereabouts, I received from Mr. Davis—Mr. Henry S. Davis—one of the parties to this suit.

N. C. DRAPER.

Sworn to and subscribed before me this 3d day of May, 1877.

JOHN N. OLIVER,
Examiner in Chancery.

Mr. Draper further states, in answer to a question by Mathews, that Mr. George W. Ayres and A. F. Belt are in the occupancy of
62 the mill property under authority; that they had a verbal lease of the upper part of the mill from N. C. Draper & Co. Entire charge of the mill was given to them 2 or 3 weeks ago by me.

N. C. DRAPER.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John N. Oliver, examiner in chancery, do hereby certify that in pursuance of agreement the foregoing deposition was taken down and by me reduced to writing in the presence of and from the statement of the witness at the time and place designated in the caption thereof, and was then and there by me read over to the witness, and by him subscribed in my presence and in the presence of the solicitors for the parties who were then and there attending, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties in said cause, or in any manner interested therein.

JOHN N. OLIVER,
Examiner in Chancery.

(Endorsement:) Filed May 8th, 1877. R. J. Meigs, clerk.

63 In the supreme court of the District of Columbia.

NATHANIEL C. DRAPER
vs.
ANTHONY HYDE E' AL. } In equity. No. 5425. Doc. 16.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses begun and held on the 3d day of May, A. D. 1877, when the within depositions were taken, I, John N. Oliver, an examiner in chancery, did cause to be personally present at my office, No. 460 Louisiana avenue, in the city of Washington, in said district, Henry S. Davis, whose deposition is herewith returned, to testify on the part and behalf of the defendant in a certain cause now depending in the supreme court of the District of Columbia, wherein Nathaniel C. Draper is complainant and Anthony Hyde et al. are defendants.

64 DRAPER
vs.
HYDE ET AL. }

MAY 3, 1877.

Met pursuant to agreement to take depositions on the part and behalf of defendant Anthony Hyde. Present, Mr. Meloy, sol'r for plaintiff; Mr. C. M. Mathews for def't Hyde; & Mr. John E. Norris sol'r for defendant Davis.

Whereupon, HENRY S. DAVIS, a witness of lawful age, produced, sworn, and examined on the part and behalf of defendants, in answer to questions by Mr. MATHEWS, deposed as follows:

Qu's. Do you hold any liens upon this mill property?

A. Yes; I hold a vendor's lien. I sold the property about the first of

May, 1867, to N. C. Draper, a gentleman by the name of Bodine—I do not remember his initials—and Mr. J. P. Thomas. The balance due me on the notes is about $9,700, and in addition to that I have had to pay in ground rent and insurance a little over $1,000, and on the $9,700, say *say*, no interest has been paid me since, I think, the 1st of November, 1875. I have solicited from Mr. Draper payment of these sums
65 on various occasions. The reason he gave me for not paying them was that he could not pay; that he had nothing to pay with. And I particularly requested him, time and again, to pay up the ground rent, the interest and insurance, and he declined to pay anything, and, in my opinion, made no effort whatever to do it. He said that times were very dull and the mill was making very little money. I told him it would be impossible for me to keep on in that way, for if I had to keep up the insurance, which was pretty heavy, and the ground rent, it would eventually eat up my interest entirely in the property, and that the property must be sold, as I could not and would not stand this business any longer.

He has not made any declaration to me in relation to this suit since it has been brought, but prior to bringing it he did. About the time the property was advertised by Mr. Hyde to be sold, I cannot say whether before or after, Mr. Draper was in my office, and in a conversation between us about my claim on the property, I told him that
66 if Mr. Hyde did not sell the property I would, and he said Mr. Hyde could not sell that property for interest money, and if he undertook to do it he would take it into court and keep it there for 4 years. I asked him if he thought he could keep me—the vender of the property—there that length of time; to which he replied he thought not. I am satisfied now that this conversation took place shortly before the advertisement came out. My entire debt there is overdue.

(Mr. Meloy, sol'r for plaintiff, objects to all the foregoing as irrelevant, and to so much of the testimony of the witness as tends to show any lien on the property in witness' favor, or the amount of any such pretended lien or incumbrance for ground rent, for the reason that if any such lien exists it is evidenced by written documents, and for the further reason that the testimony is irrelevant.)

H. S. DAVIS.

Sworn to and subscribed before me this 3d day of May, 1877.

JOHN N. OLIVER,
Examiner in Chancery.

67 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John N. Oliver, examiner in chancery, do hereby certify that in pursuance of agreement the foregoing deposition was taken down, and by me reduced to writing, in the presence of and from the statement of the witness at the time and place designated in the caption thereof, and was then and there by me read over to the witness and by him subscribed in my presence and in the presence of the solicitors for the parties who were then and there attending, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

JOHN N. OLIVER,
Examiner in Chancery.

(Endorsement:) Filed May 8th, 1877. R. J. Meigs, clerk.

68 In the supreme court of the District of Columbia.

N. C. DRAPER
vs.
A. HYDE ET AL. } In equity. No. 5425. Doc. 16.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered, that at an examination of witnesses, begun and held on the 23' day of June, A. D. 1877, when the within depositions were taken, I, John N. Oliver, an examiner in chancery, did cause to be personally present at the office of Wm. A. Meloy, esq., solicitor for the plaintiff, in the city of Washington, in said District, N. C. Draper, whose deposition is herewith returned, to testify on the part and behalf of the plaintiff in a certain cause now depending in the supreme court of the District of Columbia, wherein N. C. Draper complainant and Anthony Hyde et al. are defendants.

69 In the supreme court of the District of Columbia, the 21st day of June, 1877.

N. C. DRAPER
vs.
HYDE, DAVIS, ET AL. } Equity, 5425.

By direction of solicitor for the plaintiff, you will take notice that on Saturday, the 23d day of June, 1877, at 10 a. m., depositions will be taken on the part and behalf of the plaintiff at the office of W. A. Meloy, esq., No. 460 Louisiana avenue, N. W.

JOHN N. OLIVER,
Examiner in Chief.

70 *Amount of machinery in the mill at the present time that was there when bought from H. S. Davis.*

1 flooring machine	$1,200
1 surfacing "	800
1 re-saw	350
1 saw-table	50
1 emery grinder	15
1 engine	1,500
1 vice	10
1 double-scroll saw	75
1 single " "	50
3 lathes	90
2 work-benches	14
Saws	175
Shafting & pulleys	1,800
Desk and 3 chairs	30
Sundry tools	15
	$6,174 00

EXHIBIT A.

DRAPER vs. HYDE ET AL. } Equity. No. 5425. Doc. 16.

JUNE 23, 1877—10 a. m.

Met pursuant to notice to take depositions on the part and be-
71 half of the plaintiff. Present Mr. W. A. Meloy, solicitor for the plaintiff, and Mr. F. T. Browning, of counsel for defendant Davis, and C. M. Mathews, esq., sol'r for defendants Thomas & Hyde.

The defendant Davis by his counsel protests against the taking of any further testimony in this cause, as the same is on the calender and ready for hearing.

NATHAN C. DRAPER, being duly sworn, deposed as follows:

I am a practical mill-man, and have operated the planing mill now known as the Mechanics' Planing Mill, of N. C. Draper & Co., from the year 1860 to the present year. I first started it in connection with Mr. Trueman. In 1860, or the early part of 1861, the defendant, Henry S. Davis, took a third interest in the business, and in 1864 Mr. Davis and myself took the entire business as equal partners. My particular business was to carry on the mill and the business operations of the firm. He had more especially the charge of the finances, and full knowledge of the pecuniary situation and progress of the business. In 1865 or 1866 Mr. Davis represented
72 to me that the mill property was not paying to justify him in running the establishment, and therefore proposed to put the property up for sale for cash, as he was determined to close up the business and go out of it. I did not at that time know the actual condition and value of the business, but relied entirely upon Mr. Davis' statement, and relying upon his statements, I consented, and the property was accordingly advertised for sale for cash and sold. It was struck off to a stranger to me at the price of $10,000. Immediately afterwards Mr. Davis took entire and exclusive control of the property, and admitted to me that he had got this party to bid in the property for him, and had furnished him the means with which to do it. In the year 1866, subsequent to the sale to Mr. Davis, he engaged me to run the mill, and I did so until May, 1867.

About that time Mr. Davis was quite sick and confined to his bed, and while he was so confined to his house, Messrs. Bodine and Thomas urged me to go in with them and buy back the property from Mr. Davis. Overtures were made to him to know what he would sell for, and
73 he declined to sell for less than $23,000. He offered to sell for that amount, $3,000 cash down, and the balance, $20,000, to be secured by deed of trust. We concluded to effect the purchase, and I accordingly advanced the $3,000 cash payment out of my individual means, and gave company notes for the $20,000, secured by the deed of trust to Winder & Fendall, referred to in the pleadings. After that deed of trust was executed, and before July, 1872, we purchased and placed in the mill—

One boiler of the present value of.....	$1,500
One large saw-table, cost $400, of the present value of.....	300
One stove " 90, " " "	20
Shafting & pulleys " " "	120

After July, 1872, and before fire, Feb'y, 1875—

One pump,	present value	60
3 turning lathes	" "	110
1 saw-table	" "	20
1 feasing machine	" "	30
1 emory grinder	" "	60
Cutters	" "	1,000
1 band-saw	" "	300
1 iron safe	" "	500
2 desk chairs	" "	6
1 wardrobe & 1 desk, costing $40	" "	20
74 1 heater	present value	$400
Grind-stone fixtures	" "	30
Shafting & pulleys	" "	1,000

After February 2, 1875—

1 automatic grinder, cost $ 106,	present value	$90
1 dimension plainer, " " 200,	" "	160
1 small saw-table, " " 60,	" "	20
1 large moulding machine	" "	1,100
1 small " " 325,	" "	300
Belting	" "	1,000
Blacksmith and other small tools		1,100

All the articles I have mentioned are still in the mill, besides others, a schedule of which I herewith file, with a statement of their present value—upwards of $6,000—and which were in the mill at the time of the purchase from Davis.

(Schedule marked Exhibit A, here filed, attached.)

Of the machinery and articles which I have enumerated as purchased and placed in the mill since the deed of trust to Winder & Fendall, the boiler, pump, and the $400 large saw-table are probably fixtures. All the other articles and machinery are removable at pleasure—not attached or fastened in any way to the real estate or building, ex-
75 cept as is the case with regard to some of them, by screws or bolts and nuts to make them more firm in position for the time being.

Mr. Thomas has not a dollar's worth of property outside of the partnership assets.

I have property of about $15,000 in value outside of the partnership assets that is subject to the payment of the partnership debts.

My indebtedness outside of the partnership liabilities will not exceed $300.

Previous to the fire in 1875 the business of the partnership was prosperous. By the fire, over and above the insurance moneys, the firm lost a large amount, and that loss, in conjunction with the derangement of business while the mill was being rebuilt, followed by the very great business depression in 1876, so crippled operations that about the 1st of January, 1877, I found it impossible, as, indeed, it had been for some time before, to carry on the business from day to day without advancing the means out of my private resources and on my personal credit, to pay the current expenses, even to the cost of the fuel to run the engine. That was why I determined to wind up the partnership. I
76 thought I had done this long enough, and could do so no longer without being utterly ruined myself.

Besides these two principal debts of the firm (Davis' & Forest's), the

firm owe about $2,000, by their note held, I believe, by Rob't P. Dodge for himself or his sister, and secured by deed of trust to Mr. Dodge on the firm property and my individual property also; these three are the only secured debts; besides these the firm owes unsecured debts amounting to not over $1,500, including debts to employees.

The suit brought by me for a dissolution of partnership and an accounting with J. P. Thomas, the other member of the firm, was some time since referred to the auditor to state the account. All the evidence has been taken before the auditor on both sides and the case submitted. The auditor has made out his report, in which he finds Mr. Thomas indebted to me on such accounting to the amount of about $2,000. This sum does not include any allowance in my favor for the $2,600 note referred to in the bill in this cause. Mr. Thomas justly and legally owes me, aside from the $2,600 note, between $2,000 and $2,500.

77 (No cross examination.)

N. C. DRAPER.

Sworn to and subscribed before me this 23d day of June, 1877.

JOHN N. OLIVER,
Examiner in Chancery.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John N. Oliver, examiner in chancery, do hereby certify that in pursuance of the annexed notice the foregoing deposition was taken down and by me reduced to writing in the presence of and from the statement of the witness at the time and place designated in the caption thereof, and was then and there by me read over to the witness and by him subscribed in my presence and in the presence of the solicitors for the parties who remained to the taking thereof, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

78 I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

JOHN N. OLIVER,
Examiner in Chancery.

(Endorsement:) Filed June 25, 1877, and published by R. J. Meigs, clerk.

In the supreme court of the District of Columbia, holding an equity court.

NATHAN C. DRAPER
vs.
ANTHONY HYDE ET AL. } Equity. No. 5425.

This cause came on to be heard by consent of counsel of the respective parties, and was argued and submitted to the court upon the original and supplemental bills, the answers of the defendants, Henry S. Davis, Anthony , and Johnson P. Thomas, the exhibits and other papers

79 read in the cause; upon consideration whereof it is adjudged, ordered and decreed, on this 6 day of July, A. D. 1877, that the injunction prayed for against Henry S. Davis and Charles Winder be

and the same is hereby refused, and that the said Charles Winder, the surviving trustee named in the deed of trust of May 2nd, 1867, be directed to advertise and sell the property therein mentioned, including all the machinery and other fixtures, upon the terms of one-fourth to be paid in cash and the residue of the purchase money in two equal installments, at one and two years with six per cent. interest, the purchaser to execute his notes secured by deed of trust on the entire property; provided that he make report of such sale as soon as may be, and bring the proceeds of sale into court to abide the future order or orders thereof; and provided further, that the said trustee do enter into bond, with surety to be approved by the court, in the penalty of twenty thousand dollars, and deposit the same in the above cause with the clerk of the court, conditioned for the faithful discharge of his duty. And it is further adjudged, ordered, and decreed that the said Anthony Hyde
80 be and he is hereby injoined and restrained from making sale of the property, or any part of it, mentioned in the deed of trust executed to him by the said Draper and others of July 1st, 1872, or otherwise interfering therewith until further order of the court. The court retaining the cause in the mean time for the purpose of ascertaining the condition of all the parties after the sale hereby authorized shall have taken place.

By the court.

A. W.

M. 12, p. 216.

NATHAN C. DRAPER
vs.
ANTHONY HYDE, HENRY S. DAVIS, ET AL.

The plaintiff hereby appeals to the general term from the decree entered in this cause in special term on the 6th day of July inst.

The clerk will enter thesame.

WM. A. MELOY,
Sol'r for Pl'ff.

O. B. 6, p'g. 206.

81 Proceedings before the supreme court of the District of Columbia in general term commencing Monday, April 15, 1878.

Present, Chief Justice Cartter and Justices Humphreys and MacArthur.

N. C. DRAPER
vs.
ANTHONY HYDE ET AL. } Equity. No. 5425.

This cause came on regularly to be heard on an appeal by the plaintiff from the decree of the 6 of July, 1877, entered in the special term of this court, and the same having been heard and considered by the court, it is adjudged, ordered, and decreed on this 30th day of April, A. D. 1878, that the said appeal be and the same is hereby dismissed, and the said decree be, and the same is hereby, affirmed, & with costs.

By order of the court.

D. K. CARTTER.

TUESDAY, *May* 7, 1878.

Session resumed pursuant to adjournment. Present, &c.

82 NATHAN C. DRAPER, COMPLAINANT,
vs.
ANTHONY HYDE, CATHARINE S. FORREST, Johnson P. Thompson & wife, Sarah J., Henry S. Davis, Charles Winder, & Edward Champlin, defendants. } In equity. No. 5425.

The complainant, by his solicitor, Mr. Meloy, here now in open court appeals to the Supreme Court of the United States from the decree of this court herein on the 30th day of April, 1878, and the said appeal is hereby allowed.

3 M. G. T., 177.

83 In tl e supreme court of the District of Columbia, the day of June, 1878.

NATHAN C. DRAPER
vs.
HENRY S. DAVIS ET AL. } No. 5425. Eq.

Know all men by these presents that we, Nathan C. Draper, as principal, and Amasa S. C. Dodge, A. H. Voss, & Albert Grant, sureties, are bound unto the above-named Henry S. Davis in the sum of one thousand dollars to be paid to the said Henry S. Davis, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this day of June, 1878.

Whereas the above-named Nathan C. Draper has prosecuted his appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Nathan C. Draper shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

N. C. DRAPER. [SEAL.]
A. T. C. DODGE. [SEAL.]
A. GRANT. [SEAL.]
A. H. VOSS. [SEAL.]

Sealed and delivered in presence of—
WM. A. MELOY.

Approved.

ARTHUR MACARTHUR,
Justice.

(Endorsement:) Filed June 29, 1878. R. J. Meigs, clerk.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 12th day of October, 1878.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 12 day of Oct., 1878.

[SEAL.] D. K. CARTTER,
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 12th day of Oct., 1878.

[SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 309. Nathan C. Draper, appellant, vs. Henry S. Davis et al. Dist. of Columbia sup. court. Filed 21st October, 1878.

WRIT OF CERTIORARI AND RETURN. No. 65.

Supreme Court of the United States,

OCTOBER TERM, 1881.

NATHAN C. DRAPER, APPELLANT,
vs.
HENRY S. DAVIS ET AL. } No. 65.

Filed October 24, 1881.

1 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the supreme court of the District of Columbia, greeting:

Whereas in a certain suit in said supreme court, between Nathan C. Draper, complainant, and Anthony Hyde, Catharine S. Forrest, Johnson P. Thomas, Sarah J. Thomas, Henry S. Davis, Charles Winder, and Edward Champlin, defendants, which suit was removed to the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That Exhibit A to complainant's bill, being the deed of trust from Nathan C. Draper & wife, of the first part, & Nathan C. Draper & wife & Johnson P. Thomas & wife, of the second part, to Anthony Hyde, of the third part, has been wholly omitted from said record."

You, therefore, are hereby commanded that, searching the rec-
2 ords and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fourteenth day of October, A. D. 1881.

JAMES H. McKENNY,
Clerk Supreme Court U. S.

3 CLERK'S OFFICE SUPREME COURT
DIST. OF COLUMBIA:

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, hereby certify that in obedience to a mandate of the Supreme Court of the United States in said cause, having searched the records in said cause, I find the accompanying Exhibit A omitted from the record, and herewith send the same, together with said mandate.

Witness my hand and the seal of said court this 15th day of October, A. D. 1881.

[SEAL.]

R. J. MEIGS,
Clerk Sup. Court D. C.,
By M. A. CLANCY,
Ass't Clerk.

(Indorsed:) 5425. Eq. doc. Draper vs. Hyde. Certiorari from Sup. Court U. S. suggesting diminution of record.

4 (Copy.)

Liber 693, folio 87; stamp, $10.00.

Nathan C. Draper et al. to Anthony Hyde. Trust. Recorded August 22, 1872—1 p. m.

This indenture, made this first day of July, A. D. eighteen hundred and seventy-two, between Nathan C. Draper and Ann E., his wife, of Washington City, of the first part, and the said Nathan C. Draper and wife, Johnson P. Thomas and Sarah J., his wife, of the same place, of the second part, and Anthony Hyde, of Georgetown, District of Columbia, of the third part.

Whereas the said Nathan C. Draper is justly indebted to Catharine S. Forrest, of Richmond County, Virginia, in the sum of ten thousand (10,000) dollars, borrowed money, for which he hath passed his promissory note to the said Forrest, bearing even date herewith, and payable to the order of the said Catharine S. Forrest five years after date, with interest thereon at the rate of ten (10) per centum per annum until paid, the said interest to be paid at the office of Riggs and Co.,
5 in Washington City, half yearly, the prompt payment of which said note and the semi-annual instalments of interest thereon as the same shall respectively become due and payable, according to the true intent and meaning of said promissory note, the said parties hereto of the first and second parts desire by these presents to secure:

Now, therefore, this indenture witnesseth that the said parties hereto of the first and second parts hereby convey as follows, to wit: The said Draper and wife, parties of the first part, for and in consideration of the premises and of the sum of one dollar, in lawful money of the United States, to them in hand paid by the said party hereto of the third part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, and conveyed, and by these presents do grant, bargain, and sell, alien, enfeoff, convey, and confirm, unto the said party hereto of the
6 third part, his heirs and assigns, all those certain pieces, parcels, and lots of ground situated in the city of Washington, District of Columbia, and known and designated on the plat of said city as lot numbered 8 (eight), and the north half of lot numbered 7 (seven), in square number 296 (two hundred and ninety-six), and lot number 24 (twenty-four), in the subdivision of square number 510 (five hundred and ten), as made by the commissioners appointed by the court to divide the Hollidge estate; together with all the buildings, improvements, ways, rights, hereditaments, and appurtenances to the same belonging, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity, of the said parties hereto of the first part in and to the same, and each and every of them; to have and to hold the same unto and to the use of the said party hereto of the third part, his heirs and assigns, upon the trusts, nevertheless,
7 hereinafter mentioned and declared.

And this indenture further witnesseth that the said parties hereto of the second part, in consideration of the premises and like sum of money (one dollar), at the same time and in the same manner to them paid by the said party hereto of the third part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, assigned, transferred, and set over, and delivered, and do by these presents grant, bargain, and sell, assign, transfer, set over and deliver,

unto him, the said party hereto of the third part, his executors, administrators, and assigns, all the right, title, estate, and interest in and to all that piece or parcel of ground in the said city of Washington and known on the plat thereof as lot numbered 4 (four), and part of lot numbered 3 (three), in square numbered 294 (two hundred and ninety-four), beginning for said part of lot three, at the north-
east corner of said lot four (4), and running thence east, on
8 C street, three (3) feet; thence south forty-nine feet three inches
(49 ft. 3 in); thence to a point on Ohio avenue three (3) feet east from the southeast corner of said lot four (4); thence northwestwardly on said avenue three (3) feet to the east line of said lot numbered four (4), and thence with said east line to the beginning; being and intended to be the same set forth and described in and subject to a certain lease from Ulysses Ward to said Nathan C. Draper and Josiah C. Truman, dated on or about the ninth day of June, A. D. 1868, and recorded in liber J. A. S., No. 204, folio 264 et seq., of the land records of Washington County, and subsequently by Henry S. Davis, by deed dated the first day of May, eighteen hundred and sixty-seven, and recorded in liber E. C. E., No. 4, folio 280 et seq., of the aforesaid land records, and all the buildings, mill, factory, tenements, engines, ma-
chinery, saws, implements, fixtures, and furniture of every kind
9 on, or belonging, or any wise appertaining to said ground and
premises.

To have and to hold said parcels of ground, with the buildings, mill, et cetera, as aforesaid, and all the furniture, goods, chattels, and personal property, materials, et cetera, unto and to the use of the said party hereto of the third part, his executors, administrators, and assigns, upon the trusts and for the uses and purposes following, that is, in trust, to permit the said Nathan C. Draper, his heirs and assigns, to use and occupy the said pieces or parcels of ground and premises first hereinbefore conveyed, and the rents, issues, and profits thereof to take and apply to and for his and their use and benefit.

And the said parties of the second part, to use the said parcels of ground and premises, with the buildings, &c., as aforesaid, in square number two hundred and ninety-four (294), and the machinery, goods,
and chattels, and other materials and personal property thereon
10 or belonging thereto, until default shall be made in the payment
of said note, or of any instalment of interest thereon, or that may be done thereon, or any proper cost, charge, commissions, half commissions, or expense about the same.

And upon the full payment of said note and the interest thereon, and all proper costs, charges, commissions, half commissions, and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Nathan C. Draper and the said parties of the second part respectively, their heirs and assigns, and executors, administrators, and assigns, respectively, at their cost and request. And upon this further trust, that upon default being made in the payment of said note, or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same, then and at any
time thereafter to sell the said pieces or parcels of ground and
11 premises, said leasehold, interest, and said machinery, engines,
and all other property and chattels, as hereinbefore mentioned, at public auction, at such time and place, after such public notice, and upon such time, terms, and conditions, and postponements of sale as said trustee, the said party hereto of the third part, may deem most for

the interest of all parties concerned in said sale or sales; and in the event of a sale to convey the same in fee simple, or assign and deliver, as the case may require, to and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money. And out of the proceeds of said sale or sales the said trustee shall pay, first, all the proper costs, charges, and expenses thereof, and retain as commissions for compensation five per centum on the gross amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said note, and interest thereon, whether the same shall have become due or not, according to the true in-
12 tent and meaning thereof; and, lastly, to pay the remainder, if any, to the said Nathan C. Draper, or the said Draper and Thomas, their respective executors, administrators, or assigns.

And the said Nathan C. Draper and John P. Thomas do each covenant and agree with the said party hereto of the third part that they will keep their respective premises hereby conveyed insured in some office or officers of good credit and standing, during the continuance of this trust, against loss or damage by fire, in the name or to the satisfaction of the said party hereto of the third part, who shall apply whatever may be received thereon to the payment of said note and interest; and on their neglect or failure so to insure, the said party of the third part, or the holder of the said note, may insure the said premises, in his discretion, in amount not exceeding, in the aggregate, ten thousand dollars; and the amount of premium so paid shall be considered a part of the expense of the said note, in default of pay-
13 ment of which said party hereto of the third part shall have power to sell any part of the real or personal property hereby conveyed, and shall dispose of the proceeds of the sale or sales as hereinbefore provided.

And it is further covenanted and agreed that at any time hereafter, whether the said note or interest is due and payable or not, whenever, in the judgment of the said party hereto of the third part, or his heirs, the security of the personal property is in any manner endangered by removal of goods, non-payment of rent, or the rendering of a judgment or decree, or any other manner, or if, in the judgment of the said party of the third part, any defect in the title to the property hereby conveyed, now known to exist, shall not be removed, when acquired, by said party of the third part, that is to say, particularly a release from the heirs of McGill, and a release from Henry S. Davis, which have been applied for, the said party of the third part may take
14 possession and sell and dispose of the property as herein provided as on failure to pay said note and interest, and dispose of the proceeds thereof as hereinbefore directed.

In testimony whereof the said parties of the first and second parts and the said trustee have hereunto set their hands and seals the day and year first hereinbefore written.

N. C. DRAPER. [SEAL.]
ANN E. DRAPER. [SEAL.]
JOHNSON P. THOMAS. [SEAL.]
SARAH J. THOMAS. [SEAL.]

Signed, sealed, and delivered by N. C. Draper and wife, and stamped ten dollars.

JOHN F. C. CLARK, as to the signature of Johnson P. Thomas and Sarah J. Thomas, his wife, and Nathan C. Draper.

J. M. KENNEDY, as to N. C. Draper & wife.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John F. C. Clark, a justice of the peace in and for the county aforesaid, in the said District, do hereby certify that Johnson P. Thomas and Sarah J. Thomas, his wife, parties to a certain deed bearing date on the 1st day of July, A. D. 1872, and hereto annexed, per-
15 sonally appeared before me, in the county and District aforesaid, the said Johnson P. Thomas and Sarah J. Thomas, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Sarah J. Thomas, wife of the said Johnson P. Thomas, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowlegded the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and seal, this 13th day of August, A. D. 1872.

JOHN T. C. CLARK, *J. P.* [SEAL.]

DISTRICT OF COLUMBIA,
Washington County, to wit:

I, J. M. Kennedy, a notary public in and for the county of aforesaid, do hereby certify that Nathan C. Draper and Ann E., his wife,
16 parties to a certain deed bearing date the first day of July, A. D. eighteen hundred and seventy-two, and hereto annexed, personally appeared before me, in my county aforesaid, the day of the date of this certificate, they being personally well known to me as the persons who executed the said deed, and the said Nathan C. Draper and Ann E. Draper did acknowledge the said deed to be their act and deed; and the said Ann E., the wife of the said Nathan C. Draper, being thereupon by me first duly examined privily and apart from her said husband, and having the deed aforesaid first duly explained to her, she, the said Ann E. Draper, acknowledged the same to be her act and deed, and declared that she had willingly signed, seal', and deliv' the same, and that she wished not to retract it.

Given under my hand and seal, this 21st day of August, A. D. eighteen hundred and seventy-two.

[NOT'L SEAL.] J. M. KENNEDY,
Notary Public.

17 A true copy.
[SEAL.] Test: R. J. MEIGS, *Clerk*,
By M. A. CLANCEY,
Ass't Clerk.

(Indorsed:) 5425. Eq. Doc. 16. "Exhibit A." Paid $2.75.

(Indorsed:) Supreme Court U. S. 1881, October term. No. 65. Nathan C. Draper, app'l't, vs. Henry S. Davis et al. Writ of certiorari & return. Filed 24th October, 1881.

This is to certify that the within is a true and verified copy of a deed as recorded in liber No. 693, folio 87 et seq., one of the land records for the District of Columbia, Washington, D. C. Mar. 10, 1877.

GEO. F. SCHAYER,
Dep. Recorder.

Original filed Jun' 21, 1877. R. J. Meigs, clerk.

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OFFICE SUPREME COURT U.S.
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IN SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

NATHAN C. DRAPER, *Appellant*,
vs.
HENRY S. DAVIS ET ALS., *Appellees*.
No. 309.

Brief for Appellees.

JOHN SELDEN,
LEIGH ROBINSON,
Counsel for Appellees.

R. O. Polkinhorn, Printer.

In Supreme Court of the United States.

October Term, 1880.

NATHAN C. DRAPER, *Appellant*,
vs.
HENRY S. DAVIS ET ALS., *Appellees.*
No. 309.

Brief for Appellees.

STATEMENT OF THE CASE.

This is an appeal from the Supreme Court of the District of Columbia.

Davis, one of the appellees, was assignee of a term for years, in lot 4 and part of lot 3 in square 294, in the City of Washington, in said District.

The improvements upon the property consisted of a *planing-mill*, fitted up with machinery, tools and the like.

On May 1st, 1867, *Davis* sold and assigned his estate in the entire property to *Draper*, the appellant, *Thomas*, one of the appellees, and a certain *Bodine*, (*Rec.*, 2, 12–13, 22–23, 25), then doing business as partners, under the firm name of *N. C. Draper & Co.*

The unpaid balance of the purchase-money was evi-

denced by the twenty promissory notes of the purchasers, payable each in the sum of $1,000, to the order of *Davis*. One of the notes was to fall due and be paid at the end of every six months. And upon each note, until paid, interest was to be paid semi-annually. (*Id.*, 13, 14.)

On May 2, 1867, and for the purpose of securing payment of the principal and interest of the notes, the purchasers conveyed the property, with the improvements, machinery, tools and the like, in trust, to one *Fendall* and the appellee *Winder*,—this conveyance covering, in express terms, not only certain machinery and appliances particularly mentioned in the deed of trust, *but also all other machinery and other articles which then were, or might thereafter be placed in or upon the premises.* (*Rec.*, 13.)

The trustees, in case of default in payment of the principal or interest of any of the notes, were empowered "*to sell and dispose of*" the premises and chattels "at public auction to the highest bidder" (Id., 14), and the grantors covenanted to keep the premises and machinery insured [against fire] for the sum of $14,800, in offices to be approved by, and under policies to be made out in the name and retained in the possession of *Davis*, during the continuance of the trust; and in case of their failure so to do, *Davis* was himself empowered to effect such insurance, and his advances in this respect were to stand secured by the deed, in the same manner as the notes already mentioned. (*Ib.*)

Subsequently, and in the year 1869, *Bodine* had sold and released his interest in the property, either to *Draper* alone (*Rec.* 2), or to the continuing members of the firm of *N. C. Draper & Co.* (*Id.*, *20*, *21.*)

To accomplish this transfer, there had been borrowed of the appellee Mrs. *Forrest*, and upon the individual note of *Draper*, the sum of $10,000 (*Id.*, 20.)

And to secure the payment of this note, there had been executed by *Draper* a certain deed of trust to the appellee *Hyde*. (*Id.*, 1.)

What was the exact date of this last deed of trust, or what the precise property thereby conveyed, or whether the appellee *Thomas* united therein, it is impossible, in the present state of the record, to determine.

On February 2, 1875, the planing-mill, with certain of its implements and machinery, had been partially destroyed by fire. (*Rec.*, 1–2, 26.)

The insurance money had been collected by *Hyde*, who had paid part of it to *Draper*, and applied the residue to keep down interest on the note held by Mrs. *Forrest*. (*Id.*, 20–21.)

To reconstruct and refit the premises, after the fire, *Davis* had advanced to *Draper* in the neighborhood of $3,000. (*Id.*, 5, 17, 18, 21.)

And subsequent to the date as well of the deed of trust to *Fendall* and *Winder* as of the deed of trust to *Hyde*, new and additional machinery, implements and the like had been placed by the firm upon the property, at their own expense. (*Id.*, 20–21, 25–26.)

On March 8, 1877, large arrears of taxes had accumulated against the property covered by the two deeds of trust. (*Rec.*, 6, 8, 18, 21.)

On the note held by Mrs. *Forrest*, interest to the amount of $1,119.30, remained due and unpaid. (*Id.*, 8, 21.)

Of the principal of the debt due to *Davis*, and evidenced by the notes for $1,000 each, payable respectively at inter-

vals of six months, there remained overdue and unpaid, $8,-730.68. The maturity on May 2, 1877, of the last note of the series, had added $1,000 to the overdue principal, when, on June 20, 1877, *Davis* answered the amended and supplemental bill. (*Rec.*, 17, 23.)

The entire amount of interest paid upon this debt since November 2, 1875, was less than $36. (*Id.*, 5, 17, 23.)

And the advances made by *Davis* for rebuilding and refitting the premises, after the fire (*Rec.*, 17), and his disbursements on account of ground-rent and insurance were left wholly unpaid. (*Id.*, 5, 18, 23.)

The firm had become insolvent, (*Id.*, 6, 10, 11), and was in course of liquidation under proceedings instituted for that purpose by *Draper*, against his co-partner, in equity. (*Id.*, 11,26.)

In this situation of affairs, *Draper*, the appellant, filed his bill in the court below, against the present appellees, alleging, amongst other things, in substance, that though the deed of trust executed to *Hyde* to secure Mrs. *Forrest*, embraced none of the real estate previously conveyed in trust for the security of *Davis*, to whom an indebtedness of about $11,000 was still admitted, nor any of the machinery, implements or the like, which had been placed upon the premises after the fire; yet *Hyde*, under color of the deed so made to him, and at a period of great business and financial depression, had advertised and was about to sell, along with other real and personal estate belonging either to the firm, or to *Draper* alone, the said property so exempt from the operation of the said conveyance; that interest for less than one year, and no part of the principal, on the debt to Mrs. *Forrest*, was overdue; that, in the event of

a sale of any portion of the property actually conveyed in trust to *Hydes*, uch sale should be made only under the decree of and by an impartial trustee appointed by the court; and, finally, that in the year 1870, the appellee *Thomas*, then owning a third interest in said lot 4, and part of lot 3, in square 294, and in order to secure his certain note of that date for $2,600, made to the order of *Draper*, and payable twelve months thereafter, had, by a certain deed of trust, which had been afterwards lost before being recorded, conveyed said third interest, with power of sale, in case of default, unto one *Champlin*, who, by reason of such loss, had become unable, though the note still remained unpaid, to proceed under the trust.

And the bill prayed, besides general relief, that *Hyde* might be enjoined from selling the advertised property, perpetually, as to such portions of it as, according to the theory of the bill, were not included in the deed under which he assumed to act, and *pendente lite*, as to the rest; that the priorities of encumbrances might be ascertained; and that *Thomas* might be decreed to execute, *nunc pro tunc*, a new conveyance, for the security of the complainant. (*Rec.*, 1–3.)

A temporary injunction was awarded on the filing, and according to the prayer, of the bill. (*Id.*, 4.)

The answers of *Davis*, (*Id.*, 5), *Thomas* (*Id.*, 5–6), and *Hyde*, (7–8), completely disposed of all the equities asserted in the bill against the proposed sale.

After replication, and the taking of the deposition of *Draper*, on his own behalf, (*Id.*, 21) and of that of *Davis*, on the part of the defendants below, (*Id.*, 22–23) *Draper*, on

June 11, 1877, filed, by leave, *an amended and supplemental bill.*

In this amended and supplemental bill, it was, amongst other things, in substance, averred, that notwithstanding the previous proceedings had in the cause, *Winder*, under color of the deed of trust to himself and *Fendall*, [who was deceased, (*Id.*, 2)], and by the order and direction of *Davis*, was about to make sale of said lot 4 and part of lot 3 in square 294, with all the improvements, machinery, implements and other articles then in and upon the premises; that the proposed sale was wanton and useless in itself, destructive of the object of the pending suit, and injurious to the parties thereto, as well as to the creditors of the insolvent firm, whose affairs were then being wound up in a court of chancery; that a joint title had been vested, and a joint confidence reposed in the trustees named in the said deed; that *Winder*, under said deed, was not empowered to make conveyance of the property which it embraced; that certain valuable implements and machinery had been placed upon the property, since the execution of, and were not, therefore, embraced by, said deed; and that *Winder* was himself beyond, and without property within, the jurisdiction of the court, and couldnot be compelled to account for the proceeds of sale.

Wherefore, it was prayed that *Davis* and *Winder*, "during pendency of this action and until final decree therein," might be enjoined from making the proposed sale; that *Davis* might make discovery of all payments by him received on account of his debt; that all the defendants whose rights and interests might be affected by the relief specially prayed in the premises, might appear and answer; and that the complainant might have general relief. (*Rec.*, 9, 11.)

A temporary injunction was likewise granted on the filing of this amended and supplemental bill. (*Id.*, 16.)

Davis alone answered. And his answer disposed of all the points raised in the amended and supplemental bill. (*Id.*, 16, 19.)

After replication to this answer, there was taken the further deposition of *Draper*, on his own behalf. (*Id.*, 25, 27.)

On July 6, 1877, a decree was rendered at the special term below,—

(1.) Refusing an injunction against *Davis* and *Winder*, his surviving trustee;

(2.) Directing a sale by *Winder* of the property conveyed to secure *Davis*, and requiring the proceeds to be brought into court to abide its future order,—*Winder* first giving bond in the penalty of $20,000;

(3.) Enjoining any sale by *Hyde* "until further order of the Court;" and

(4.) "Retaining the cause, in the meantime, for the purpose of ascertaining the condition of all the parties, after the sale" authorized by the decree. (*Rec.*, 28.)

On appeal by *Draper*, this decree was affirmed in the General Term, on April 30, 1878. (*Rec.*, 28.)

By further appeal from the decree of affirmance, the case was brought to this court.

Points and Authorities.

The prediction of the appellant that he "*would keep this matter in court for four years*" (*Rec.*, 18, 23), has been completely verified.

And this, notwithstanding the entire absence of the faintest equity to question or delay a sale of the property.

The pretenses set up in the amended and supplemental bill, are as untenable as they are transparent.

1. As the power vested in *Fendall* and *Winder*, under the deed of trust, was coupled with the legal estate, the trust might well be executed by the survivor. (10 *Pet.*, 564; 6 *Wall.*, 354.)

2. In the absence of specific directions in the deed of trust, as to the mode in which the power should be executed, power "to sell *and dispose of*" the property, embraced also authority to execute to the purchaser the usual evidence of title.

3. The deed of trust was, in express terms, made to cover all such machinery and other articles as might be placed upon the premises during the continuance of the trust.

It has long been completely settled in this court, that, under such circumstances, the after acquired property becomes subject to the operation of the mortgage.

4. It is impossible to understand upon what theory the bill filed by *Draper* against his co-partner, for a disolution of the firm and for an account, (*Rec.*, 27), could, of itself, disable *Davis* from enforcing the security for his overdue demand, when that demand had been both established by proof and admitted by *Draper* himself.

5. Nor can it be explained why, upon once granting an injunction against *Hyde*, under the original bill, the Court became thereby bound to afterwards award an injunction against *Winder*, also, under the amended and supplemental bill.

From the nature of the decree below, the pretensions asserted, under the original bill, against *Hyde*, are not now under review.

In the only aspect in which the decree below can be considered, it is obvious that no error exists in that decree, and that this appeal has been prosecuted merely for delay.

JOHN SELDEN,
LEIGH ROBINSON,
Counsel for Appellees.

OFFICE SUPREME COURT U. S.
FILED
OCT 27 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT

NATHAN C. DRAPER, *Appellant*,
vs.
HENRY S. DAVIS.
No. 65.

Brief for Defendant, Catharine S. Forrest.

On the 18th of August, 1872, a deed of trust was made between N. C. Draper and wife, of Washington city, of the first part; N. C. Draper and wife, and Johnson P. Thomas and wife of the same place, of the second part; and Anthony Hyde, of Georgetown, of the third part. This deed recited that to secure the prompt payment of a note of the said Draper to Catharine S. Forrest in the sum of $10,000, with the interest stipulated thereon, the said N. C. Draper and wife, parties of the first part, conveyed to the party of the third part lot (8) and the north half of lot (7) in square 296, and lot (24) in the subdivision of square 510, and that the parties of the second part in consideration of the premises, conveyed all the right, title, estate and interest in and to the piece of ground known as "lot numbered 4 (four) and part of lot numbered 3 (three) in square (294) two hundred and ninety-four;" (the said lot (4) and part of lot (3) being a leasehold interest, whereon was a planing mill). Upon default being made in the payment of the note for $10,000, or any installment of interest thereon, or any proper cost or charge in and about the same, the trustee Hyde was authorized then, and at any time thereafter, to

sell "the said pieces or parcels of ground and premises, said leasehold interest, and said machinery and engines and all other property and chattels as hereinbefore mentioned at public auction."

The said Draper and Thomas covenanted with the said party of the third part, to keep their respective premises thereby conveyed insured in some office or offices against loss or damage by fire, "in the name or to the satisfaction of the said party thereto of the third part, who shall apply whatever may be received thereon to the payment of said note and interest;" and it was further covenanted that whenever in the judgment of the party of the third part, this security for any cause was rendered insecure, the trustee might take possession of, sell and dispose of the property, as provided on failure to pay said note and interest. This deed was recorded August 22, 1872, and is Exhibit A, to complainant's bill.

After default in the payment of interest (which was payable semi-annually) for more than a year, and after the said N. C. Draper had utterly failed, for more than four years, to pay either the general or special taxes, assessed upon said real and personal property, the said Hyde with the consent and approval of the said Thomas, party of the second part, in accordance with and by virtue of the terms of the said deed of trust, advertised the property conveyed thereby, for sale on the 8th and 9th days of March, 1877. Upon the first of the above mentioned days appointed for the sale of the property, viz.: on the 8th day of March, 1877, Draper filed his bill to enjoin the sale thereof, and restrain the said Hyde from proceeding under the deed of trust to him.

The bill stated that the property advertised to be sold was the property either of the complainant exclusively, or of the complainant with the defendant Johnson P. Thomas;

that every dollar of the loan was for the firm of N. C. Draper & Co.; that since the execution of the deed of trust a building on one of the lots had been burned ; that by reason of the political and financial condition of the country, business was prostrated ; that the deed of trust to Hyde, did not convey any part of lot (4) in square (294), or any part of lot (3) in said square, nor any right, title, estate, or interest therein, or in any part of either of said lots, nor has the complainant at any time made such conveyance to said Hyde.

All of these averments except the last are frivolous, and the last is defiantly false, as will appear from the deed of trust itself, which, having been omitted from the record prepared by appellant's counsel, has been brought up by *certiorari* applied for by the counsel for the appellee, Forrest.

The bill further avers, that even if a sale could lawfully be made, it ought to be made under a decree of the court, and by an impartial trustee selected by the court. The court did afterwards make a decree, and any sale would have been under it; but it is this decree from which the appellant has appealed. The trustee was the trustee accepted by the appellant himself. The decree provided that the trustee should bring the proceeds of the sale into court to be distributed under order of the court.

The bill says that upon a portion of this property, there is a deed of trust to H. S. Davis, which antedates that to Hyde. But if Davis was willing the sale should proceed subject to his priority, it need not to have vexed Draper. Ultimately Davis through his trustee advertised a sale of the property conveyed to secure him, but it resulted in a supplemental bill against Davis.

Finally the complainant says that the defendant Thomas has a third interest in the property, and has given a deed of trust thereon, to secure a debt to the complainant. The

answer of Thomas himself, (page 5 of Record,) effectually disposes of any ground of interference from this quarter. No such deed has ever been recorded.

Rule No. 116 of the Supreme Court of the District of Columbia, provides that in all cases where a bond or undertaking with surety is required by law or by rule of court to be executed and filed, in order to suspend the entry of judgment, or to act as a supersedeas, no such bond shall be approved, "save upon affidavit of two days notice of application for such approval to the opposite party in interest, and without such notice no such approval shall be operative."

This is a rule of fair and round dealing even where it is not a rule of court. On the very last of the sixty days in which the bond could be approved, without any notice whatever to the opposite party in interest, a bond in the penalty of $1,000 was presented for approval and approved. On the very last of the sixty days, Sundays exclusive, on which a citation could be served, *i. e.* eight days after the approval of the bond, the citation was served for the first time on the attorney of the opposite party in interest, who, until the date of such service, was not aware of such approval. Notice was instantly given, that opposition would be made to such a bond, and on July 20th, the justice who approved the first bond ordered an additional bond in the penalty of $3,000.

It appearing on the record that the additional bond so ordered had never been approved, a petition was filed on April 12th, 1880, in behalf of the defendant Forrest, setting forth that there had been no compliance with the law respecting supersedeas, and praying that the injunction against Hyde might be removed, and that leave might be granted him to sell. Upon a rule to show cause, and after an answer from Draper, the court in Special Term passed the following order:

"This cause coming on regularly to be heard on the petition of Catherine S. Forrest, it is this 7th day of May, 1880, adjudged, ordered and decreed that the interlocutory injunction heretofore in force against Anthony Hyde be and the same is hereby dissolved in respect to lot (8), and the north half of lot (7) in square 296 and lot 24 in square (510); and it further appearing that no supersedeas exists to the decree heretofore made in this cause of April 30th, 1878, the trustee Charles Winder (the surviving trustee named in the deed of trust of May 2d, 1867) is allowed to advertise and sell the property therein mentioned, including all the machinery and other fixtures, in accordance with the terms of said decree."

From this order Draper, on May 26, 1880, appealed to the General Term of the court below, and subsequently moved this court for a writ of supersedeas in the following terms:

"IN THE SUPREME COURT OF THE UNITED STATES.
October Term—1880.

NATHAN C. DRAPER, *Appellant*,
vs.
HENRY S. DAVIS, *et al.*, *Resp'dts.*

"And now comes the appellant, and upon the record herein already before the court, and upon the affidavit and exhibits this day filed in the cause, moves the court for its writ of supersedeas against the defendants Henry S. Davis, Charles A. Winder, A. Hyde and C. S. Forrest, and each of them, commanding them and each of them to cease and abstain from all proceedings in said cause in the Supreme Court of the District of Columbia, and from all action under any decree or order heretofore passed therein by said court, and from offering for sale any of the property referred to in said decrees or orders, and for such other and further relief as to the court may, on consideration of the premises, appear necessary and proper."

Attorney for Appellant.

Upon consideration of this motion this court delivered an opinion, which, after discussing the question of supersedeas, concluded in these words:

"Consequently, the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us it will not attempt to do so."

If the court below had and has no power to proceed with the execution of any part of the decree appealed from, it must be because every thing included in said decree is within the jurisdiction of this court. In this state of affairs it is of importance that the decree of this court should be an adjudication of the whole case, so as to mitigate, for the future, at least, the grievous injury which is done to the defendant, Catharine S. Forrest (whose all was secured, or supposed to be secured, by the deed of trust to Hyde), by the delay of an appeal, which would seem to have been taken for the purpose of wringing from an impoverished defendant and appellee, the surrender of rights which the law secured to her.

In no case could the doctrine *Le Guen* vs. *Gouverneur* be more appropriately exercised: "It very frequently became indispensable to reverse, alter, or modify the previous proceedings in order to make them consistent with the decree here pronounced. All antecedent matter is, therefore, necessarily before the court and subject to its control. I have also no doubt that this court may proceed further if it appear that the merits are fully in its possession, and determine, finally, between the parties. That such is the power and, frequently, the practice of the House of Lords in England is evident from the cases which have been cited."

1 Johns. Cas., 498.

A decree which is affirmed in its main features may be varied in some others by the appellate court.

Tyrrell vs. *Bank*, 10 Ho. of Lords, 27.

ELLIOT & ROBINSON,

For the defendant, Catharine S. Forrest.

FILED
OCT 21 1881

In the Supreme Court of the United States.

No. 65, *October Term*, 1881.

——— (o) ———

NATHAN C. DRAPER, APPL'T,

vs.

HENRY S. DAVIS ET AL., RESP.

——— (o) ———

STATEMENT OF THE CASE.

On May , 1867, the plaintiff, Draper, with his partners in business, Thomas and Bodine, bought of defendant, Davis, an estate in certain parcels of ground in the city of Washington (on which was a planing mill) with certain articles of machinery, some, as e. g., a steam-engine, attached to the realty, and others, as e. g., office safe and furniture, vices, truck, etc., not attached. The purchase price was $23,000. Of this Draper paid down $3,000, and the firm gave their notes for the $20,000—all maturing within ten years. To secure this sum they gave a deed of trust upon all the property purchased [Vide Record, p. 37, et seq.] to Wm. Y. Fendall and Charles H. Winder, their heirs and assigns, with power to them upon default, to sell at public auction on such terms as *they* should deem most advantageous to all parties, and to convey the "said premises and chattels" &c.. &c.

In the description of the property conveyed by this deed it contained this clause, "and also all other machinery and other articles—which may be hereafter placed in and upon said premises."

As early as November, 1875, this $20,000 had been reduced by payments to somewhat less than $10,000; but the exact amount was in dispute because of disagreement between Draper and Davis as to the amount of certain collections made by the latter and in respect to which an accounting was desired by Draper.

Subsequently Wm. Y. Fendall, one of the grantees in the deed of trust, died, leaving divers heirs, and Chas. H. Winder removed from the District.

In June, 1870, Thomas being indebted to his partner Draper in the sum of $2,600, executed and delivered a deed conveying to one Edward Champlin as trustee, all his (Thomas') interest in the property, to secure this debt, no part of which has ever been paid. This deed was not put upon record however, and shortly before the commencement of this suit was accidentally destroyed or lost.

July 1, 1872, Draper and Thomas bought out Bodine's interest, and for that purpose borrowed of Mrs. Forrest $10,000, to secure the note for which, they gave a deed of trust to Anthony Hyde upon the same real estate, and upon all the machinery and chattels then pertaining to or on said premises.

February 2, 1875, the mill and most of the machinery and chattels were destroyed by fire.

The mill was afterwards rebuilt on the same ground, immediately after which Draper bought new machinery

and tools at a cost of upwards of $3,600, none of which were fixtures, and all of which remain on the premises. (Vid. Record, f. 58.)

In March, 1877, the defendant Hyde, on default of payment of annual interest, only, on the Forrest note proceeded to advertise for sale all the property referred to, including all the machinery and tools purchased subsequent to the fire.

At the same time Davis made the claim that this very property was liable for his remaining debt of $9,700, and must be sold subject to that as a prior incumbrance.

Under these circumstances the plaintiff deeming it of the gravest importance to himself that before any sale should be made, it should be determined by the court whether the property purchased after the deed of 1867 was given, was liable under that deed; and

Secondly, whether the deed to Hyde authorized a sale of any chattles purchased since the execution of that deed in 1872, filed his bill in equity in the Supreme Court of the District of Columbia, asking that Hyde be enjoined from selling, and these preliminary questions determined &c. This bill the defendants Hyde, Davis and Thomas answered.

Meanwhile, however, the defendant Davis caused the defendant Winder to advertise the whole property for sale, under the deed to himself and Fendall, deceased. (Record, f. 35.) Thereupon Draper filed a supplemental bill (Record, f. 9,) reciting the before stated facts; alledging the legal incapacity of Winder to act alone in the trust—the unsettled state of the accounts with Davis; and asking, in addition to the settlement of liens

and priorities, a perpetual injunction against Winder, and an account with Davis.

To this supplemental bill Davis alone made answer, admitting that Winder was proceeding to sell, and that the deed was a conveyance to both Fendall and Winder and to their heirs, but averring that on Fendall's death the title, and power to sell and convey vested entirely in Winder as survivor.

This answer further admitted the purchase of machinery in the mill, subsequent to February, 1875, but claimed that all was subject to the deed of trust of May, 1867.

Issue was joined, and evidence taken on behalf of all parties.

The foregoing facts, as stated by the complainant, were substantially proven; and it was also proven (Rec., folios 73–74,) that of the machinery and chattles now in the mill, there were purchased after the Fendall and Winder deed, and before the execution of that to Hyde,

articles to the value of	$1,940.00
After July, 1872, and before the fire,	3,500.00
After the fire of February, 1875,	3,670.00
Before the Fendall & Winder deed (Rec., f. 70),	6,174.00

Each article being named and classified.

The cause was submitted on the pleadings and evidence in July, 1877, and thereupon the court *Decreed*—

That Charles Winder be directed to sell the property, including all the machinery, etc., on the premises, upon terms and conditions fixed and specified by the decree, the court to find out afterwards "THE CONDITION OF ALL THE PARTIES."

On due appeal this action was affirmed by the Court in General Term, from which final decree appeal was duly taken to this court.

The appellant alledges that this decree is erroneous in this:

1st. The Court held that all the chattels were liable under the Davis trust.

2d. The decree proceeds upon the assumption that on Fendall's death the full title and power given by the Davis trust deed passed to the survivor.

3d. The decree gave affirmative relief to the defendant, Davis, without any cross-bill or even prayer for relief.

4th. It was erroneous to make such a decree, unless upon a cross-bill.

I.

Possibly it may be suggested that the decree is not final, and so not appealable. But we submit that it is final in the meaning and intent of the statute granting appeal to this court, and that this point is res adjudicata.

The circumstances of the case of Whiting vs. Bk. of the U. S., 13 Pet., p. 6, and the reasoning of the court, (Story J., p. 15,) are precisely in point.

This is a decree of foreclosure and sale. It is final upon the merits of the controversy. It declares every tool, implement and machine on the premises liable to sale under the deed of May, 1867, though the iron had not then been dug from the mine, nor the wood cut from the forest. It leaves no room for any relief or benefit sought by the complainant in his bill and supplemental bill.

See also 2 Bl., 524, Bronson vs. R. R Co., 10 Wal., 299, Washington R. R., vs. Bradley.

II.

The deed of May, 1867, granted to Fendall and Winder and to their heirs, all the property then purchased from Davis for the purpose of securing the unpaid part of their price. It also purported to grant, in addition, anything and everything which the grantors might at any time thereafter bring upon the premises, and the decree declares that this was valid, and gives it effect.

And yet no principle of the common law has been more clearly held than that "a man cannot grant a thing which he has not, though he afterwards possess it."

Com. Dig., Grant, C;
Wagner vs. Watts, 2 Cr. C. C., 169.

And in the language of Mr. Justice Nelson for this court: "Equity no more than law can deny it. The thing itself is an impossibility. The mortgage is, (to that extent,) inoperative and void."

And though in the case in which this court gave such plain expression of the common law doctrine it nevertheless held for equitable reasons that as between the parties, the rule in that case was shorn of its effect through the influence of a strong equity, yet we submit those reasons have no place in the case at bar.

In Pennock vs. Coe a loan was made for the very purpose of finishing and equipping a railroad, only a part of which was completed. The loan was, by the agreement, to be used solely for the purpose of completing and stocking. and security was given upon the incomplete thing, with its AUGMENTATION, to be PROCURED WITH THE LOAN ITSELF. Here was the increase, so to speak, of

the flock pledged. Here was the investment of the loan in the very augmentation, and so there were recognized strong equities, apart from the mortgage itself.

The case at bar is wholly lacking in these elements.

Davis, who bought the property from himself and Draper for $9,000, placed a valuation of $23,000 upon it, received $3,000, and took security on all for the remainder, of which $10,000 has been paid.

It is not shown or claimed that any increase of machinery was made with Davis' money; or that on any principles of equity, apart from the "letter of his bond," he has any interest in it.

Besides, the rights of third parties have intervened, which are denied by the decree. Giving validity to the deed in this respect is denying Mrs. Forrest's equity.

III.

At the first step in this controversy the trustee, Hyde, was at fault because he clearly had no title or authority to sell, as he attempted, the chattles ($7,170.00 in value) bought by Draper after the execution of the deed to Hyde; and the court rightly enjoined him.

At the second step Winder was at fault, because even if the deed of 1867 is held to bind the chattles subsequently placed on the premises, yet that deed says, "in default, the said *parties*" [Fendall and Winder] "shall proceed to sell, &c., upon such terms and conditions as shall be deemed by said *parties* (ibid.) most advantageous," &c. (Rec., f. 41.) And the terms and conditions of a sale are of highest moment.

Winder alone had no power to sell. (See Rec., pg. 14.) The instrument gave specified, discretionary powers of most vital character to two persons acting in harmony; consenting; two persons chosen by the complainant. We say chosen by Draper, for whether they were first named by him or by Davis is immaterial; acquiescence is choice.

"But where discretionary powers are given personally to the original trustees, the same rule applies as in case of devisees, and the surviving trustees will not be competent unless authorized to do so by the trust instrument."

See Hill on Trustees, p. 303(*);
I Sug. on Powers, 148, 152, (6th ed.);
Peyton vs. Beang, 2 P. Wms., 626;
Townsend vs. Wilson, 1 B. & Ald., 608;
Sharp vs. Sharp, 2 B. & Ald., 405;
Cole vs. Wade, 16 Ves., 27.

In the language of the text in Washburn on Real Property, Vol. 2, p. 9, [*197], by the deed "they (Fendall and Winder) were clothed with a special confidence of a personal nature." "The act to be done requires an exercise of the judgment and discretion of the several persons named as trustees—it can only be exercised by them all."

IV.

Even if the court below was correct in holding all the property "on the premises" pledged for the payment of the balance due on the Davis debt, and correct in the

opinion it seems to have entertained that Fendall and Winder were joint tenants, and that Winder was by survivorship vested not only with exclusive title, but also clothed with full power to perform the duties imposed by the deed of 1867, still the decree is at variance with itself—and flatly at variance with the established practice and limit of authority known to all courts of equity in the absence of legislative permission.

Under such findings, the only possible decree the court could properly have made would be one declaring all the property liable, and denying the plaintiff's prayer for an injunction against Winder. This would have left him free to execute the powers given by Draper and his partners in the exact manner, and on the terms fixed by their deed. But the decree set aside the deed itself, and practically denied the capacity of Winder to act in accordance with the provisions of the deed. The decree fixed other terms of sale and of subsequent action.

In other words, the court below made Winder its own trustee, to execute, not the deed of 1867, and the contract of the grantors therein, but its own will, just as if by a cross-bill Davis had sought such a relief because the power given Fendall and Winder had lapsed.

But Davis filed no cross-bill; asked no relief; and the decree was a total surprise, unwarranted by the pleadings and evidence. We quote but the words of this court in Washington R. R. vs. Bradleys, 10 Wal., 303, and submit the cause:

"It is hardly necessary to repeat the axioms in the equity law of procedure,—that the court can consider only

what is put in issue by the pleadings;—that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills.

That is what was done by the decree under consideration."

WILLIAM A. MELOY,

Appellant's Counsel.

14-350

SUPREME COURT OF THE UNITED STATES.

No. ~~510.~~ 31

EDWARD MILLER & COMPANY, APPELLANTS,

vs.

THE BRIDGEPORT BRASS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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1 Supreme Court of the United States.

E. MILLER & CO.
vs.
THE BRIDGEPORT BRASS CO. } In equity.

Know all men by these presents that we, Edward Miller of the town of Meriden, in New Haven County, State of Connecticut, as principal, and William H. Perkins, of said town, as surety, are held and firmly bound unto The Bridgeport Brass Company, a corporation organized under the laws of the State of Connecticut, and doing business in and located at the town of Bridgeport, in the district of Connecticut, in the sum of two hundred & fifty dollars, to be paid to the said The Bridgeport Brass Company, its successors and assigns. To which payment, well and truly to be made, we bind ourselves, and each of us jointly & severally, and our and each of our heirs, executors, administra-
2 tors, successors and assigns firmly by these presents, sealed with our seals, dated this first day of June, 1878.

Whereas the above named E. Miller & Co. have taken an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled action by the circuit court of the United States for the district of Connecticut:

Now, therefore, the condition of this obligation is such that if the above named E. Miller & Co. shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EDWARD MILLER. [SEAL.]
WILLIAM H. PERKINS. [SEAL.]

JUDGE'S CHAMBERS,
Hartford, Conn., June 21st, 1878.

The above bond is approved & the appeal allowed.

N. SHIPMAN,
District Judge.

3 United States circuit court district of Connecticut. In equity.

E. MILLER & CO., COMPLAINANTS,
vs.
THE BRIDGEPORT BRASS COMPANY, DEFENDANTS. }

To the honorable the Supreme Court of the United States:

The appeal of E. Miller & Co., the above named complainants and appellants respectfully shows—

That on the 7th day of March, 1876, the said complainants and appellants filed their bill against The Bridgeport Brass Company, the above named defendants, therein alleging that the said appellants are a corporation organized under the laws of the State of Connecticut, and doing business in and located at the town of Meriden in said district of Connecticut, and that the said defendants are also a corporation organized under the laws of the State of Connecticut, and doing business in and located at the town of Bridgeport in said district; that on the
4 16th day of October, 1860, letters patent of the United States for a new and useful improvement in lamps were issued to Joshua E. Ambrose, of Plattsville, Colorado Territory, securing to him and his

representatives the exclusive right to said improvement for the term of fourteen years from said date; that the said Ambrose, for good and lawful cause, surrendered said letters patent, and that new letters patent for the same invention were issued to Sarah T. Ambrose and Edward Miller, assignees of said Joshua Ambrose, bearing date the 20th day of May, 1873, for the residue of said term of fourteen years from said 16 day of October, 1860, and that such proceedings were afterwards legally had that said last-named letters patent were extended to the said Joshua Ambrose for the term of seven years from and after the 16 day of October, 1874, and that by assignment from said Joshua Ambrose, the said complainants became the owners of the exclusive rights secured under said extended term, and being the owners thereof for due and lawful cause surrendered said last named letters patent and new letters patent for the same invention were issued to the said com-
5 plainants for the residue of said term, the same bearing date the 11th day of January, 1876, and designated as reissue No. 6884; and further alleging that the defendants, well knowing the premises, had unlawfully infringed upon the exclusive rights secured to said complainants by said last mentioned letters patent, and praying for a decree of injunction and account and for damages, as by reference to said bill will more fully appear.

And the said defendants on the 25th day of May, 1876, filed their answer to said bill of complaint, admitting the issue of said letters patent to said Joshua Ambrose, the surrender and reissue of the same to the said Sarah T. Ambrose and Edward Miller, assignees of said Joshua Ambrose, the extension of said letters patent to the said Joshua Ambrose, and the assignment of said extended term to the complainants and the surrender of said letters patent and their reissue to said complainants, bearing date January 11, 1876, as alleged in said bill of complaint; but denying that said letters patent were surrendered for good and lawful cause, but alleging that said surrender was made and said reissue obtained for the purpose of covering as the invention of said Ambrose what was not described or contained in said original
6 letters patent as the invention of said Ambrose, and also denying infringement, and also denying that the said Ambrose was the first and original inventor of the improvement in said letters patent described, to which answer the said complainants filed their replication, and the cause being at issue, the parties proceeded to take testimony in support of their respective allegations; and at the April term of said circuit court, 1877, were fully heard by their counsel thereon.

That at a stated term of said circuit court held at Hartford, in said district, on the fourth Tuesday of September, 1877, a final decree was made and pronounced in the cause, wherein it was adjudged and decreed that the said bill of complaint of the said complainants be dismissed with costs.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said
7 decree of the circuit court, and every part thereof, may be reviewed and a decree made reversing said decree with costs, or such other decree as to the said Supreme Court may seem just.

Dated at New Haven this first day of June, 1878.

JNO. S. BEACH,
Solicitor for Appellant & of Counsel.

By the honorable Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut.

To the Bridgeport Brass Company:

Whereas E. Miller & Co. have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Connecticut, made in favor of you, the said The Bridgeport Brass Company, and has filed the
8 security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next to do & receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Hartford, in the district of Connecticut, in the second circuit, the 21st day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

N. SHIPMAN,
One of the Judges of the Circuit Court for the District of Connecticut.

NEW HAVEN, CONN., *June* 22, 1878.

Due & timely service of the foregoing appeal is hereby acknowledged.

C. R. INGERSOLL,
Attorney for the Defendants.

The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing appeal.

The bill, answer, pleadings, proceedings, evidence, & decree whereof mention is therein made follow, in these words, viz:

9 E. MILLER & CO.
vs.
BRIDGEPORT BRASS CO. } In equity.

Be it remembered that on the 7th day of March, A. D. 1876, John S. Beach, esq., of New Haven, solicitor for the complainant, filed court a bill of complaint as follows, viz:

United States circuit court, district of Connecticut.

E. MILLER & CO.
vs.
BRIDGEPORT BRASS CO. }

To the honorable the judges of the circuit court of the United States for the district, of Connecticut, in chancery sitting:

E. Miller & Co., a corporation organized under the laws of the State of Connecticut, and doing business in and located at the town of Meriden, in the State of Connecticut, and a citizen of said State, bring this bill of complaint against the Bridgeport Brass Company, a corporation organized under the laws of said State, and doing business in and located at the town of Bridgeport, in said State.

And thereupon your orators complain and say that before the 16th day of October, eighteen hundred and sixty, Joshua E. Ambrose, of Plattsville, Colorado Territory, was the true, original, and first inventor of certain new and useful improvements in lamps not known or used by others before his said invention thereof, and which had not, at the time

of his application for a patent therefor, been in public use or on sale with his consent or allowance, as your orators verily believe.

And your orators further show unto your honors, that the said Joshua Ambrose, so being the inventor of said improvement, and being a citizen of the United States aforesaid, made application to the proper department of the Government of the United States for letters patent therefor in accordance with the then existing laws of Congress,
10 and he having duly complied, in all respects, with the conditions and requisitions of said laws, such proceedings were had, that on the 16th day of October, eighteen hundred and sixty, letters patent of the United States for the said improvement and invention, under the seal of the Patent Office of the United States. signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the day and year last aforesaid, were issued in due form of law and delivered to the said Joshua Ambrose, whereby was granted and secured to him and his heirs, executors, administrators, or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right of making, using, and vending to others to be used, the said improvement and invention, a description whereof is given in the words of said inventor, in a schedule in writing, accompanied by drawings and references thereto duly annexed to said letters patent when the same were issued, and made a part thereof.

And your orators further show unto your honors that afterwards the said Joshua Ambrose, for good and lawful cause, surrendered said last mentioned letters patent to the Commissioner of Patents, and duly made application for a new patent to be issued for the same invention, and accompanied such application with a corrected description and specification, and with the requisite drawings, and in all respects complied with the acts of Congress in such case made and provided; whereupon, on the 20th day of May, eighteen hundred and seventy-three, new letters patent for the same invention last mentioned were, in accordance with law, duly granted, issued, and delivered to Sarah T. Ambrose and Edward Miller, assignees of said Joshua Ambrose, for the residue of said term of fourteen years; that said last mentioned letters patent were issued in accordance with and in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bear date the day and year last aforesaid, and were designated as reissue No. 6884, and that there was, by said reissued letters patent, secured to the said Sarah T. Ambrose and Edward Miller, their heirs, executors, and administrators, and assigns, for the term of fourteen
11 years from the 16th day of October, eighteen hundred and sixty, the full and exclusive right of making, using, and vending to others to be used, said original improvement and invention; that a legal corrected description and specification of said original improvement and invention contained in the said reissued letters patent is given in the words of the said Joshua Ambrose in a schedule accompanied by drawings and written references thereto, which was in due form of law annexed to said reissued letters patent, at the time the same were issued and made a part thereof.

And your orators further show that such proceedings were afterwards legally had thereon that said last named letters patent were duly extended by the hon. Commissioner of Patents to the said Joshua Ambrose for the term of seven years from and after the said 16th day of October, 1874, and that afterwards, by an instrument in writing duly executed for that purpose and recorded in the Patent Office of the

United States, the said Joshua Ambrose assigned and conveyed all his right, title, and interest in said letters patent and in said extended term to your orators, and your orators ever since have been and now are the exclusive owners of said extended letters patent and of the rights thereby secured.

And your orators further show unto your honors that afterwards they, for good and lawful cause, surrendered said last mentioned letters patent to the Commissioner of Patents, and duly made application for a new patent to be issued for the same invention, and accompanied such application with a corrected description and specification, and with the requisite drawings, and in all respects complied with the acts of Congress in such case made and provided; whereupon, on the 11th day of January, eighteen hundred and seventy-six, new letters patent for the same invention last mentioned were, in accordance with law, duly granted, issued, and delivered to your orators for the residue of said term of twenty-one years; that said last mentioned letters patent were issued in accordance with and in due form of law, under the seal of the Patent Office of the United States, signed by the Acting Secretary of the Interior, and countersigned by the Commissioner of Patents,
12 and bear date the day and year last aforesaid, and were designated as reissue No. 6884, and that there was by said reissued letters patent secured to your orators, their heirs, executors, administrators, and assigns, for the term of twenty-one years from the 16th day of October, eighteen hundred and sixty, the full and exclusive right of making, using, and vending to others to be used, said original improvement and invention; that a legal corrected description and specification of said original improvement and invention contained in said reissued letters patent is given in the specification thereto annexed in a certain schedule accompanied by drawings and written references thereto, which was in due form of law annexed to said reissued letters patent, at the time the same were issued, and made a part thereof, as by the said last mentioned original reissued letters patent, or a duly authenticated copy thereof, to be produced, as the court shall direct, will fully appear.

And your orators further show unto your honors that the said improvement and invention, patented as aforesaid, has hitherto been in the exclusive possession of Joshua Ambrose or of his grantees, and has hitherto been and still is of great value and profit to your orators, and but for the infringement hereinafter complained of your orators would now be in the undisturbed possession and enjoyment of the exclusive privileges secured by said reissued letters patent.

Yet the said defendants, as your orators are informed and believe, well knowing the premises, but contriving to injure your orators, and without their consent or allowance, and without right and in violation of your orators' said rights, have, within said State of Connecticut and within said district of Connecticut, made, used, or vended, and are still making, using, or vending to others to be used, large numbers of lamps, but how many your orators cannot state, but pray that the defendants may discover and set forth the number, containing substantially the improvement and invention, or a material part thereof, set forth and patented in and by said reissued letters patent, and thereby the said defendants have infringed, and still do infringe, and your orators fear that in future they will infringe upon the exclusive rights and privileges secured to your orators as aforesaid.

To the end, therefore, that the said defendants may, if they
13 can, show why your orators should not have the relief herein

prayed, and may and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises, and that they may be decreed to account for and pay over to your orators all gains and profits realized by them from the unlawful making, using, or vending the improvement vested in your orators as aforesaid, together with all damages sustained by your orators therefrom, and may be perpetually restrained, by an injunction to be issued out of this honorable court, from making, using, or vending any lamps containing the improvement and invention secured as aforesaid to your orators, or any material part thereof; and that your orators may have such other or further relief as equity may require and to your honors may seem meet.

May it please your honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the defendants and commanding them at a certain time, and under a certain penalty, to appear before your honors in this court, then and there to answer unto this bill of complaint, and to abide by and perform such decree as the court shall make in the premises; and your orators will ever pray, etc.

EDWARD MILLER & CO.,
By EDWARD MILLER, *Prest.*

JNO. S. BEACH,
Solicitor and of Counsel for Complainant.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Edward Miller, president of E. Miller Co. corporation, the complainant named in the foregoing bill, personally appeared before me this fourth day of March, 1876, and made oath that he has read the above bill by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

Meriden, Conn.
[SEAL.] W. H. PERKINS,
Notary Public.

And on the same day the writ of subpœna directed to the defendants, issued out of court returnable on the following April rule day, which was duly served on the defendants, and which with the return endorsed is in the following words & figures, viz:

14 The President of the United States of America to the marshal of the district of Connecticut, sendeth greeting:

You are hereby commanded to summon The Bridgeport Brass Company, a corporation organized under the laws of the State of & located in the town of Bridgeport, in the State and district of Connecticut, to appear before the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of April, 1876, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said Bridgeport Brass Company, in said court, by E. Miller & Co., a corporation organized under the laws of the State of Connecticut, & located in the town of Meriden, in the State & district of Connecticut, and then and there to answer the same, and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of April, 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 7th day of March, A. D. 1876.

[SEAL.] LOREN P. WALDO, *Clerk.*

The defendants are required to enter their appearance in said cause in the clerk's office of said court on or before the day at which this writ is returnable, or by the rules of said court said bill will be taken as confessed.

LOREN P. WALDO, *Clerk.*

JOHN S. BEACH,
Complainant's Solicitor.

UNITED STATES OF AMERICA,
District of Connecticut:

BRIDGEPORT, *M'ch* 10, 1876.

Then & there I left a true & attested copy of the within writ in the hands of D. H. Kissam, who is the secretary of the within named Bridgeport Brass Company.

Attest:

P. R. CARLE,
U. S. Marshal for Dist. of Conn.

Travel, 3.60; service, 2.00; copy, .75.—$6.35.

15 And on the 22d day of March, A. D. 1876, the defendants, by Hon. C. R. Ingersoll, their solicitor, entered their appearance in said cause.

On the 15th day of May, 1876, the defendants filed in said court their answer to said bill of complaint in the words & figures following, viz:

Circuit court of the United States, district of Connecticut. In equity.

E. MILLER & CO.
vs.
THE BRIDGEPORT BRASS CO.

To the honorable judges of the circuit court of the United States for the district of Connecticut:

The answer of the Bridgeport Brass Company to the bill of complaint exhibited against it by the corporation E. Miller & Company.

The defendant saving and reserving unto itself all advantage and benefit of exception to the said bill of complaint, for answer thereunto or unto so much and such parts thereof as it is advised is material or necessary for it to make answer unto, answering, says:

The defendant is informed, and believes, that letters patent of the United States were, on the 16th day of October, 1860, granted to Joshua E. Ambrose, for an alleged improvement in lamps, and that afterwards said letters patent were surrendered and received and subsequently were extended to the said Ambrose, but whether the same were thereafterwards assigned to the complainant it has no knowledge, save by

said bil', and leaves the complainant to the proof thereof; and the defendant is also informed, and believes, that subsequently the said letters patent were again surrendered and again reissued as is alleged in said bill; but the defendant denies that they were so surrendered for good and lawful cause, but on the contrary alleges that said surrender was made and said reissue obtained for the purpose of covering, as the invention of said Ambrose, what was not described or claimed or contained in said original letters patent as the invention of said Ambrose, and what was in the arts known and used anterior to the grant of said original letters patent, and that said surrender and reissue was fraudulent, and said reissued letters patent therefore null and void.

16 II. And the defendant denies that under any proper construction of said reissued letters patent it has, in the construction of lamps or lamp burners manufactured and sold by it, made use of or employed any device or combination of devices described or claimed in said reissued letters patent.

III. And the defendant, further answering, says that a substantial and material part of the said invention claimed as new in the said reissued letters patent, to wit, the several combinations of parts described in the first, second, and third claims thereof, were for a long time before said alleged invention known and used, and was described in the following letters patent of the United States or some of them:

Letters patent granted to Rufus S. Merrill, June 14th, 1859.
Letters patent granted to S. Cheney, January 25th, 1859.
Letters patent granted to Nathaniel Cradit, December 14th, 1858.
Letters patent granted G. T. Parkhurst, Sept. 13th, 1859.

And such prior use and knowledge will also be proved at the trial by the persons next hereafter named, whose residences and the places where such use was had or known to them are set opposite their names, respectively.

N. J. Botsford, New York..... at New York.
John Struber, Astoria..... at Astoria.
William Carleton, Boston ..... at Boston.
R. E. Dietz, New York..... at New York.

IV. And the defendant prays that it may have the same advantage of the facts hereinbefore stated as if it had set up the same in a plea to the bill of complaint.

And the defendant denies all else wherewith it is by said bill charged without this that there is any other matter, cause, or thing in said complainants' said bill of complaint contained material or necessary for the defendant to make answer to and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, is true to the knowledge and belief of the defendant. All which matters and things the defendant is ready and willing to aver and maintain and prove
17 as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

BRIDGEPORT BRASS COMPANY,
By D. W. KISSAM, *Sec't'y.*

UNITED STATES OF AMERICA,
District of Connecticut:

At the city of Bridgeport, in said district, on this 24th day of May, 1876, before me personally appeared D. W. Kissam, who, on oath, says that he is secretary of the Bridgeport Brass Company, and that he has

read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated to be on information and belief, and as to those matters, he believes them to be true.

F. W. MARSH,
Notary Public.

And on the 21st day of October, A. D. 1876, the complainants filed in court their replication to said answer, as follows, viz:

18 Circuit court, United States, district of Connecticut. In equity.

E. MILLER & Co.
vs.
BRIDGEPORT BRASS Co.

The replication of the above-named complainant to the answer of the Bridgeport Brass Company, respondents.

The repliant saving and reserving to itself all and all manner of advantage and exception to the manifold insufficiencies of said answer for replication thereto saith that it will aver and prove its said bill to be true and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law, to be replied unto, confessed, and avoided, traversed, or denied, is true. All which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as by said bill already prayed.

JNO. S. BEACH,
Solicitor for Complainant.

19 And said cause was duly continued, the parties appearing as aforesaid, until the term of said court, held at New Haven, on the fourth Tuesday of April, A. D. 1877, when the said cause, having been duly noticed for trial, was fully heard and argued.

And the following evidence was filed, admitted, and used upon the hearing:

Evidence.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Be it remembered, that on this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, I, Johnson T. Platt, an examiner duly appointed by the circuit court of the United States for the district of Connecticut, in the second circuit, in pursuance of the notice and stipulation hereto annexed, did call and cause to be and personally appear before me, John E. Earle and William H. Perkins, to testify and the truth to say, on the part and behalf of the complainant, in a certain suit or matter of controversy, now pending and undetermined in the circuit court of the United States, for the district of Connecticut, wherein Edward Miller & Company are the complainants and the Bridgeport Brass Company defendants.

Present, John S. Beach, esq., counsel for complainant, and Charles R. Ingersoll, esq., counsel for defendant.

20 Complainants' counsel puts in evidence letters patent of the United States, issued to Joshua E. Ambrose, of Plattsville, Colorado Territory, assignor by mesne assignments to Edward Miller & Co., of Meriden, Conn., for an alleged new and useful improvement in lamps, bearing date the 11th day of January, 1876, being reissue No. 6844.

Complainants' counsel also puts in evidence exhibit marked Complainants' Exhibit, Defendants' manufacture, being a box of lamp-burners which it is agreed by the defendants' counsel were made and sold by the defendants after the date of the reissued letters patent above mentioned, and are specimens of lamp-burners made and sold by the defendants after the date of said reissue and prior to the bringing of this suit.

JOHN E. EARLE, a witness produced by and on behalf of the complainant, after being duly cautioned and sworn to interrogatories propounded by JOHN S. BEACH, esq., answered as follows:

1st int. What is your name, age, residence, and occupation?

Ans. John E. Earle, 45 years old, resides in New Haven, solicitor of patents.

2d int. Have you frequently been improved as a witness in patent cases?

Ans. I have.

3d int. Have you examined and do you understand the letters patent, being reissue No. 6844, put in evidence in this cause, and the lamp structure therein described?

Ans. I have examined that patent, and I believe I understand the same.

4th int. Will you please look at Exhibit A, being a box of lamp-burners, put in evidence as above, and state whether you find in these burners the combination set forth in either, and which, of the claims of the said reissued letters patent, and if you do, describe the combination you so find?

Ans. I have examined one of the burners in this exhibit, and I find it to contain all the elements claimed in combination in second and third claims of said reissue. The second claim recites these elements in combination to be, 1st, a deflector. The deflector in Exhibit A is substantially such a deflector as shown in the patent. 2d, a perforated

21 air-distributer. In Exhibit A I find a perforated air-distributer which consists of a perforated plate at the base of the deflector, and which, with the deflector, forms the combustion-chamber substantially the same as described in this reissue. 3d, a wick-tube extending from the fount to the combustion-chamber. In Exhibit A I find substantially the same tube to carry the wick, and that it extends from the fount to the combustion-chamber, as described in said reissue. 4th, a tube or passage to conduct the gas from the fount to the combustion-chamber. This tube or passage conducts the gas which may be generated in the lamp to the combustion-chamber, and into proximity with the flame. In Exhibit A I find such a passage, which consists of a tube arranged in substantially the same manner, and so as to conduct the gas from the lamp-fount to the combustion-chamber, as described in said reissue. For these reasons I find Exhibit A to contain all the elements of the combination recited in the second claim of said reissue.

The third claim recites the same four elements in combination as the second, together with a fifth element, to wit, a device for adjusting the elevation of the wick, and substantially such a device for adjusting the

wick I find in Exhibit A, differing somewhat from the construction or operation of the adjuster described in the reissue, but being simply a substitute of a well-known adjusting device. I understand it to be a substantial equivalent for the 5th element in the combination recited in the 3d claim of said reissue. For these reasons I find in Exhibit A the combination of elements recited in the 3d claim.

No cross-interrogatories propounded.

JOHN E. EARLE.

Subscribed and sworn to before me this 5th day of January, A. D. 1877.

JOHNSON T. PLATT,
Examiner.

WILLIAM H. PERKINS, a witness produced by and on behalf of the complainant, after being duly cautioned and sworn to interrogatories propounded by JOHN S. BEACH, Esq., answered as follows:

1st int. What is your name, age, residence and occupation?

22 Ans. William H. Perkins; age, 35; residence, Meriden, Conn.; occupation, secretary of Edward Miller & Co.

2d int. How long have you been the secretary of, or connected with, the corporation of Edward Miller & Company?

Ans. I have been connected with the corporation since its organization in 1866, and have been secretary since 1868 or 1869.

3d int. Are you familiar with the improvement in lamps, described in the reissued letters patent No. 6844, put in evidence in this cause?

Ans. I am, somewhat.

4th int. Do you know whether since the date of that reissue, which is the 11th of January, 1876, the corporation of Edward Miller & Co. have manufactured and sold lamp-burners containing the improvement described in the second and third claims of said reissue? and if they have, please give an approximate estimate of the number of lamp-burners so made and sold by them.

Ans. I do know they have made and sold burners containing said improvement, and I should say at least one hundred thousand dozen since the date of said reissue.

Cross-interrogatories propounded by CHARLES R. INGERSOLL, Esq., counsel for defendant:

1st cross int. Please exhibit, if you have one, a sample of the burner referred to in your last answer.

Ans. (Witness produces a burner and says:) I submit this as a sample of the burner, marked Complainants' Manufacture, Defendants' Exhibit No. 1.

2d cross int. How many dozen of lamp-burners were sold by E. Miller & Co. during the preceding year, or the year 1875?

Ans. Approximately, I should say one hundred and fifty thousand dozen.

1st redirect. What proportion of this number was constructed under letters patent, of which 6844 is the reissue?

Ans. I should say about two-thirds.

W. H. PERKINS.

Subscribed and sworn to before me this 5th day of January, A. D. 1877.

JOHNSON T. PLATT,
Examiner.

23 United States circuit court, district of Connecticut. In equity.

E. MILLER & CO.
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The defendants will please take notice that pursuant to the stipulation filed in said cause, the examination of witnesses on the part of said complainant will be had before Johnson T. Platt, esq., one of the examiners of said court, at his office, No. law chambers in the city of New Haven, on the 5th day of January, A. D. 1877, at 11 o'clock a. m., and proceed as said examiner may direct.

Dated at New Haven, Dec. 27, 1876.

JOHN S. BEACH,
Plaintiffs' Solicitor.

To C. R. INGERSOLL, Esq.,
Defendants' Solicitor.

Due service of the foregoing is accepted.

C. R. INGERSOLL.

Defendants' counsel puts in evidence certified copy of original letters patent to Joshua E. Ambrose, dated October 16, 1860, and numbered 30381, for improvement in lamps, marked Defendants' Exhibit, Ambrose Original. Also certified copy of reissued letters patent to Ambrose for same improvement, dated May 20, 1873, being numbered reissue 5412, marked Defendants' Exhibit, Ambrose First Reissue. (Complainant's counsel waives certification of last exhibit.)

Also certified copy of letters patent of the United States for improvement in lamps, granted to Rufus S. Merrill, dated June 14, 1859, and numbered 24379, marked Defendants' Exhibit Merrill Patent.

Also certified copy of letters patent of the United States for improvement in lamps, granted to Samuel Cheney, dated January 25, 1859, being numbered 22703, and marked Defendants' Exhibit Cheney Patent.

Also certified copy of letters patent of the United States for im-
24 provement in lamps, granted to the assignee of N. Cradit, dated December 14, 1858, being numbered 22327, and marked Defendants' Exhibit Cradit Patent.

Also certified copy of letters patent of the United States for an improvement in safety lamps, granted to William Pratt, dated November 24, 1857, being numbered 18704, marked Defendant's Exhibit Pratt Patent.

(The last exhibit is objected to by complainant's counsel for the reason that no notice thereof is given by the answer as on file.)

JOHN J. MARCY, a witness produced by and on behalf of the defendants, after being duly cautioned and sworn to interrogatories propounded by CHARLES R. INGERSOLL, Esq., answered as follows:

1st int. What is your name, age, residence, and occupation?

Ans. John J. Marcy; age, fifty-eight years; residence, Worcester, Mass.; occupation, superintendent of Bridgeport Brass Company, Bridgeport, Conn.

2d int. Are you familiar with the mechanical construction of lamp-burners, generally?

Ans. I am.

3d int. Have you examined and made yourself familiar with the spec-

ification and drawings of the original letters patent to Jos'ua E. Ambrose, now in evidence, with a view to the construction of a burner in accordance with the same?

Ans. I have.

5th int. Please examine the burner now shown to you and marked Defendants' Exhibit, Original Ambrose Burner, and state whether it was made by you, and whether it was so made in accordance with the specification and drawings of said original letters patent, and whether it accurately represents the burner therein described.

Ans. It was made by me in accordance with said specifications and drawings as nearly as I could understand them, and I think it accurately represents the burner therein described.

5th int. Have you examined and are you familiar with the specifications and drawing of the letters patent in evidence granted to William Pratt, and have you made the model of a lamp in accordance with the same so far forth as they exhibit the wick and gas tube?

25 (Question objected to for the same cause of objection as stated against admission of exhibit marked Defendants' Exhibit Pratt Patent.)

Ans. I am familiar with the specifications and drawings referred to and made a model in accordance therewith, which I now produce (model produced and marked Defendants' Exhibit Pratt Lamp). In my judgment the model accurately represents the same.

6th int. Have you also examined the letters patent granted to the assignee of N. Cradit, and now in evidence, and constructed a burner in accordance therewith? If so, please produce it, and state whether it accurately represents the burner described in that patent.

Ans. I have examined said letters patent and constructed a burner in accordance therewith which I now produce (burner produced and marked Defendants' Exhibit Cradit Burner).

In my judgment the model correctly represents the burner described in the patent—correctly, I think.

No cross-interrogatories propounded.

JOHN J. MARCY.

WILLIAM O. LINCOLN, a witness produced by and on behalf of the defendants, after being duly cautioned and sworn, to interrogatories propounded by CHARLES R. INGERSOLL, Esq., answered as follows:

1st int. What is your name, age, residence, and occupation?

Ans. William O. Lincoln; age, forty-nine years; residence, Boston, Mass.; occupation, superintendent of William Carleton's lamp and gas establishment.

2d int. Are you familiar with the mechanical construction of lamp burners generally, and what opportunity have you had to become so familiar?

Ans. I am familiar with them. I have had the construction of all the burners in the above-mentioned establishment under my supervision, and the drawing of plans for the same, and manufacturing of the tools for the same purposes.

3d int. For how long have you been connected with that establishmen', with the duties you have just indicated?

Ans. Twenty years; I went there in 1856 and have been there since.

26 4th int. Where has that establishment been?

Ans. In Boston.

5th int. Is William Carleton, whom you have referred to as the proprietor of that establishment, living or dead; if dead, when did he die?

Ans. He is dead, and died in December, 1876.

6th int. Where did he reside?

Ans. In Boston.

7th int. What was William Carleton's business, and for how long had he been engaged in it?

Ans. A lamp and gas fixture manufacturer—everything pertaining to that business. I think he was engaged in it for forty-five years—he was one of the oldest manufacturers in the country.

8th int. Look at the lamp burner now shown to you, and marked Defendants' Exhibit Wade and Burnham Original, and state whether it was made by William Carleton at his factory in Boston; and, if so, when made?

Ans. It was made by him at his factory about September, 1857.

9th int. How considerable were the sales of that kind of burner, before 1860, by Mr. Carleton?

Ans. They were made and sold in quite large numbers.

10th int. Look at the burner now shown to you, and marked Defendants' Exhibit Jones Burner, and state whether that burner was made by Mr. Carleton, of Boston, and, if so, when was it first made, and how largely before 1860 was that kind of burner made and sold by him?

Ans. The burner was made by Mr. Carleton. That kind of burner was first made by him about December, 1857. It was made and sold in large numbers before 1860.

11th int. In the exhibit just produced there are holes surrounding the base of the burner. Were any of this kind of burner made and sold without these holes and with a close or tight base, and, if so, in what quantities before 1860?

Ans. They were made tight and in considerable quantities before 1860.

12th int. Was there a preference shown for one or the other kind by the buyers?

27 Ans. Different parties called for them made in the two ways.

13th int. Was the Jones burner made by Mr. Carleton before 1860 with what was known as the Merrill attachment?

Ans. It was.

14th int. Look at the burner now shown to you, and marked Defendant's Exhibit Jones Burner with Merrill Attachment, and state whether it was made by Mr. Carleton; and if so, when?

Ans. It was made by Mr. Carleton about June, 1859.

15th int. Did it then include the attachment which is now with it, and stamped R. S. Merrill's patent, June 14, 1859?

Ans. This particular attachment? It did not.

16th int. What attachment did it have, if not that particular one?

Ans. One similar in form but reaching from the base of the burner to the top of the wick tube, meaning thereby from the inside seat of the burner.

17th int. Were there also burners made during the same time with the same Merrill attachment that is shown in this exhibit, and not reaching to the top of the wick tube. I refer to the period before October 16, 1860?

(Objected to as leading.)

Ans. There were none made that way.

18th int. Look at the last exhibit again, and state whether burners constructed in accordance with it, including the Merill attachment now upon it, were made by Mr. Carleton before October 16, 1860?

Ans. Yes, sir; they were made as that is now.

19th int. As you have now placed the attachment, is, or not, its top coincident with the top of the wick tube?

Ans. It is.

20th int. Do you then mean by your answer to the 16th interrogatory that the others that were made of this construction had the Merrill attachment, which reached all the way from the base or seat to the top of the wick tube?

(Objected to as leading.)

Ans. No, sir.

21st int. What do you mean then by saying that the Merrill
28 attachment which was included in the Jones burner last exhibited to you, and made by Mr. Carleton, was one similar in form to that particular attachment, but reaching from the base of the burner to the top of the wick tube?

Ans. I shall have to make a little explanation. I was first asked if the attachment was precisely like this shown in the exhibit. I answered in form; but reaching from the seat to the top of the wick tube—that was my answer to the first question. I was then asked if there were any made not reaching to the top of the wick tube. Now I answer, that they were made too short to reach to the top of the wick tube; but arranged to be kept even with the top of the wick tube.

22d int. Then are you to be understood that this burner with the Merrill attachment was made in two ways, one with the attachment reaching from the base to the top of the wick tube, and the other with the attachment reaching from some point above the base or seat to the top of the wick tube, as shown in the present exhibit as now arranged?

(Objected to as altogether too leading.)

Ans. I am.

23d int. To what extent was this Jones burner with the Merrill attachment made and sold prior to October, 1860, whether considerably or not?

Ans. They were to some extent.

24th int. Look at the exhibit now shown and marked Defendants' Exhibit Wade Burnham with Merrill Attachment, and state whether that burner was made by Mr. Carleton, of Boston, and if so, when, and to what extent that kind of burner was made and sold before October, 1860?

Ans. The burner was made by Mr. Carleton about 1859; not made to any great extent before October, 1860, I should say. It had a limited sale.

25th int. Was it made and sold before 1860?

Ans. It was.

26th int. Look at the burner now shown to you and marked Defendants' Exhibit Jones Burner with Sargent's Attachment, and state whether or not that burner as now shown to you with the attachment marked Sargent, patented July 24, 1860, was made by Mr. Carleton, and sold by him, and if so at how early a date.

29 Ans. It was made by William Carleton and sold by him about July, 1860.

Cross-interrogatories propounded by JOHN S. BEACH, Esq., counsel for complainant:

1st cross-int. Referring to the exhibit marked Defendants' Exhibit, Wade and Burnham Original, you have stated that it was made by Mr Carleton about September, 1857. Do you mean that this identical exhibit was made by him at that time, or do you mean that burners of a similar construction were then so made by him?

Ans. I mean that burners of that construction, made by the same dies and tools.

2d cross-int. Do you know where and when this particular burner which has been put in as an exhibit was made?

Ans. It was made in Mr. Carleton's manufactory; when, I could not state precisely.

3d cross int. State as nearly as you can when the burner was made.

Ans. I think not later than the year 1860.

4th cross int. Where has it been during the last seventeen years?

Ans. It has been in our factory.

5th cross-int. Singly or with others of similar construction?

Ans. Singly.

6th cross-int. Were these burners constructed in accordance with any letters patent, and if so, whose patent?

(Objected to.)

Ans. I understand they were under Wade and Burnham's patent.

7th cross-int. Do you know who owned that patent at the time these burners were made?

Ans. I do not.

8th cross-int. Referring now to the burner marked Defendants' Exhibit, Jones Burner, which you state was made by Mr. Carleton about December, 1857, I make the same inquiry as to whether you mean that this identical burner was made at that time or burners of similar construction were made then.

30 Ans. I mean that that particular burner was made at that time.

9th cross-int. Was that burner made in accordance with any letters patent, and if so, whose?

(Objected to.)

Ans. It was made in accordance with E. F. Jones' patent.

10th cross-int. Do you know who owned that patent at the time this burner was made?

Ans. It was owned by E. F. Jones.

11th cross-int. Do you know whether or not Mr. Carleton made the burner under the license of the patentee?

(Objected to.)

Ans. He did.

12th cross-int. Referring now to the exhibit marked Defendants' Exhibit, Jones' Burner with Merrill's Attachment, will you state whether in your answer that this was made by Mr. Carleton, you refer to this identical burner or to burners of similar construction?

Ans. I refer to this particular burner.

13th cross-int. Was the Merrill attachment constructed under any letters patent, and if so, whose?

Ans. It was under the patent held by R. S. Merrill, of June 14, 1859.

14th cross-int. Was Mr. Carleton a licensee under that patent?

Ans. He was.

15th cross-int. What makes you think that this burner about which we are now inquiring was made about June, 1859.

Ans. Well, judging from the time that we commenced on the patterns for the burners, also from the amount of sales registered on the books of William Carleton.

16th cross-int. You do not then speak as of your present positive recollection of the time?

Ans. Yes, sir.

17th cross-int. Have you not recently endeavored to make some ex.

amination of written memoranda for the purpose of enabling you to fix the date you have mentioned?

Ans. I should say not in regard to the manufacture of the burner; but to designate between the two burners more particularly.

31 18th cross-int. Could you, without reference to such memoranda, fix upon the month in which Mr. Carleton made this burner after the lapse of seventeen years?

Ans. Not the precise month. I can state how I fix the time if you wish. I went into his employ December 1st, 1856, and within one year of that time I was engaged in the construction of these burners.

19th cross-int. And is that the mode in which you fix June, 1859, as the time when this burner marked Defendants' Exhibit, Jones' Burner with Merrill's Attachment, was made?

Ans. Not that precise date I should answer; but not later than that date.

20th cross-int. Was the Merrill attachment exhibited in Defendants' Exhibit, Wade and Burham with Merrill's Attachment, the same attachment as that contained in Defendants' Exhibit, Jones' Burner, Merrill's Attachment?

Ans. It was.

21st cross-int. Referring to the exhibit marked Jones' Burner with Sargent's Attachment, was that burner constructed under letters patent, and, if so, whose?

Ans. That was constructed under Sargent's patent.

22d cross-int. Was it so constructed under a license from Mr. Sargent, the patentee?

Ans. I don't know anything to the contrary.

23d cross-int. When was this identical structure last referred to, which has been put in evidence, constructed by Mr. Carleton?

Ans. As early as the summer of 1860.

WM. O. LINCOLN.

32 UNITED STATES OF AMERICA,
District of Connecticut, ss:

Be it remembered that on this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, I, John B. Mills, a notary public residing in New Haven, in said district—the parties hereto having waived all objection to this testimony being taken before such officer—in pursuance of the notice and stipulation hereto annexed, did call and cause to be and personally appear before me, John E. Earle, to testify and the truth to say, on the part and behalf of the complainant in a certain suit or matter of controversy, now depending and undetermined in the circuit court of the United States for the district of Connecticut, wherein Edward Miller & Company are the complainants and the Bridgeport Brass Company defendants.

United States circuit court, District of Connecticut. In equity.

E. MILLER & CO.
vs.
THE BRIDGEPORT BRASS CO.

In the above-entitled cause it is hereby stipulated and agreed that the testimony of John E. Earle, a witness produced by and on behalf of the complainants, may be taken before John B. Mills, a notary public,

residing in New Haven, in said district, and that it shall be of the same force and effect as if taken before an authorized examiner of this court.

JNO. S. BEACH,
Solicitor for Complainants.
C. R. INGERSOLL,
Solicitor for Defendants.

33 E. MILLER & CO.
vs.
BRIDGEPORT BRASS CO. } In equity.

Testimony in rebuttal taken on the part of the complainants in above entitled suit, pursuant to the 67th rule in equity as amended, before me.

JOHN B. MILLS,
Notary Public.

Present, John S. Beach, esq., counsel for the complainants, and Charles R. Ingersoll, esq., counsel for the defendant.

Complainants' counsel puts in evidence certified copy of letters patent granted William W. Wade and Chas. Burnham, dated April 6, 1858, No. 19855, for "improved lamp attachment," marked Complainants' Exhibit, Wade & Burnham Patent. Also certified copy of letters patent granted Wm. W. Wade, dated June 29, 1858, No. 20748, for "improved method of fastening wick-tube in lamp-caps," marked Complainants' Exhibit, Wade Patent. Also certified copy of reissued letters patent granted Edward T. Jones, dated Jan. 11, 1859, No. 648, for "improvement in lamps," marked Complainants' Exhibit, Jones Patent. Also certified copy of letters patent granted Sumner Sargent, dated July 24, 1860, No. 29321, for "improvement in lamps," marked Complainants' Exhibit, Sargent Patent.

JOHN E. EARLE, a witness produced by and on behalf of the complainant, to interrogatories propounded by JOHN S. BEACH, Esq., answered as follows:

Ques. 1. Have you already been examined as a witness in this cause?

Ans. I have.

Ques. 2. Will you please state what advantage, if any, result from a perforated air distributer in combination with a tube or passage capable of conducting the gas from the fount to the combustion chamber as described in the Ambrose reissued patent No. 6844, and recited in the 2d claim thereof, and if you have made or witnessed any experi-
34 ments testing those advantages please refer to them in connection with your answer.

(Objected to as calling for evidence not in reply.)

Ans. The air distributer, which is a perforated disc, forms, with the deflector, the combustion chamber or the chamber within which the base of the flame is located. It is called an air distributer because it forms the top of the air space below or between the combustion chamber and the base of the burner, and permits the air to pass into the chamber over substantially the whole area of the chamber. The gas which is led into such a combustion chamber will be there consumed and without escape through the perforations. Take away the perforated bottom or plate or air distributer, and if there be openings outward through the base the gas may escape through these openings, and passing upward into a deflector, will become ignited and liable to convey the flame to the lamp fount to cause explosion. I demonstrated this by ex

periments with several burners in connection with Wm. N. Wheeden at Waterbury about three years since. The objects of the experiments were to demonstrate the necessity or importance of the gas tube. To generate gas within the lamp without creating an extensive heat, we placed in the bottom of the lamp fount small pieces of zinc and sulphuric acid, and then partially filled the fount with oil. The gas from the zinc and acid rising through the oil became carbonized, and therefore inflammable. With the gas tube and a close base, that is, the portion within which the ratchet is arranged, the gas passed freely to the wick and was there consumed. We then, in the same burner, removed the gas tube, and the result was an explosion; tried several times, and always with the same result. We then tried a burner having a perforated air distributer with a tube terminating at the under surface of the air distributor as in the Ambrose patent; this conducted the gas to the combustion chamber above the air distributor, where it was consumed with perfect safety. We then removed the gas tube from that burner, leaving an opening through the base and below the air distributer and close beside the wick tube; for a time the gas passed through that opening without reaching the flame; soon, however, the explosion
35 occurred. We made numerous experiments and upon various burners, but in all cases where the gas was led into a combustion chamber above the perforated air distributer we had perfect safety, but without it invariably an explosion. In cases where the base of the burner were tight the air distributer could be dispensed with with safety, but not otherwise.

Ques. 3. Do you mean to be understood that where the base of the burner is tight and there is a ratchet above the base for the purpose of adjusting the wick, that in such a construction the tightness of the base insures against explosion?

Ans. By tight base I have referred to that class of burners in which the ratchet is arranged within the base and with a tube leading from the fount to conduct the gas to the combustion chamber. If, as suggested by the question, the ratchet be open and the gas-conducting tube be present, and the air-distributer, I think there will be equal safety, that is to say, with the tight base the air-distributer may be dispensed with, providing the gas conducting tube be present.

Ques. 4. Look at defendants' exhibit marked Defendants' Exhibit Ambrose Original, and comparing it with the complainant's exhibit Ambrose Reissued No. 6844, state whether you find in the second and third claims of said reissue or in the specification describing the devices purporting to be secured by those claims any other or different devices than those described or shown in the exhibit marked Ambrose Original?

Ans. I do not. The drawings are copies of the original, and all the elements of the combinations recited in the 2d and 3d claims are found in the drawings and in the same combination claimed in said reissue.

Ques. 5. Have you examined letters patent granted to Rufus S. Merrill, dated June 14, 1859, No. 24879, defendants' exhibit Merrill Patent, and if you have, state whether you understand the same?

Ans. I have examined that patent and believe I understand the construction shown and described therein.

Ques. 6. Compare the combination recited in the 2d and 3d claims of the Ambrose reissue No. 6844 with the description and repre-
36 sentation of the lamp burner of said Merrill patent, and state whether you find the combination recited in either the 2d or 3d

claims of said Ambrose reissue described or represented in the Merrill patent, and give your reasons for any conclusions you may express.

Ans. I do not find the combination recited in the said two claims of the Merrill patent. The burner shown in the Merrill patent has a base through which the wick tube extends up into the deflector. The top of the base forms the bottom of the combustion chamber; there is no perforated air distributer between the base and the deflector, and which, with the deflector, forms the combustion chamber as required by the 2d and 3d claims of the Ambrose reissue. Again, there is no conductor to lead the gas from the lamp fount up to the point of combustion; the chamber in the base is open to the atmosphere and to the fount and to the space above the base. Above the base there is a conductor which will direct the air which may enter the base to impinge upon the flame at its base, and should any gas escape from the fount, if it does not pass out through the openings in the base and should rise to within the conductor, then that gas would be mingled with the air or brought to the base of the flame for consumption, but it is in no sense a conductor from the lamp fount to the combustion chamber. This patent therefore lacks another essential element of the claims of the Ambrose reissue, viz, a tube or passage to conduct the gas from the fount to the combustion chamber.

Ques. 7. Have you examined letters patent granted to Samuel Cheney, dated January 25, 1859, No. 22703, defendants' exhibit Cheney Patent, and if you have do you understand the device therein described?

Ans. I have examined that patent and believe that I understand it.

Ques. 8. Compare the combinations recited in the 2d and 3d claims of the Ambrose reissue with the description and representation of the burner described in the Cheney patent, and state whether you find the same combination therein, and give your reasons for any conclusions you may express.

Ans. This burner described in the Cheney patent has a similar base to that of the Merrill patent, but without the opening from the
37 fount to the base. In the top of the base around the wick tube there is an opening formed, and over the wick tube there is arranged a sleeve so as to leave a small space between it and the wick tube and to enclose the openings in the top of the base. This sleeve extends above the end of the wick tube to serve as a conductor of the gas which may be generated around the wick tube to the flame. There is no provision in the burner for escape of gas from the fount, and save that the tube that surrounds the wick tube extends above the wick tube and the absence of the openings from the fount to the base, the burner shown in the Cheney patent is substantially the same as that shown in the Merrill patent, and lacks the same two elements, viz, the perforated air-distributer, which, with the deflector, forms the combustion chamber and the conductor from the lamp fount to that chamber.

Ques. 9. Have you examined letters patent granted to the assignee of N. Cradit, dated Dec. 14, 1858, No. 22327, marked Defendants' Exhibit Cradit Patent? and if you have, state whether you understand the same.

Ans. I have examined and believe I understand the construction shown and described therein.

Ques. 10. Will you please compare the combination recited in the 2d and 3d claims of the Ambrose reissue with the description given in the Cradit patent, and state whether you find in the Cradit patent, the combination recited in said two claims and give your reasons for your conclusions.

Ans. This Cradit burner is an entirely different class of burner, and

can hardly be said to possess any of the elements of combination recited in the 2d claim. It is what is known as a round wick or Argand burner, which requires the presence of air within the tubular wick. To supply this air openings are made into the lamp fount through the base of the burner so as to allow the air to first enter the fount and then flow up within the tubular wick to support combustion. There is a deflector, but it makes no part of the combustion chamber. The chimney forms the only chamber for combustion. The Cradit burner therefore lacks the deflector and perforated air distributer such as is required
38 by the claims of the Ambrose reissue. Should any gas be generated within the lamp it may pass up within the wick to the point of combustion, but it is not such a tube and in a combination as recited in the claims of the Ambrose patent.

Ques. 11. Have you examined and do you understand letters patent granted to William Pratt, dated Nov. 24, 1857, No. 18704 Defendants Exhibit Pratt Patent?

Ans. I have, and believe I understand the construction shown therein.

Ques. 12. Do you find in the Pratt patent the combination recited in the 2d and 3d claims of the Ambrose reissue? and if not, state what elements are wanting.

Ans. I do not. The Pratt lamp is of a different class, having wick tubes arranged in a base to burn in the open air or without any enclosure. There are combined with these wick tubes an auxiliary tube leading from the fount to the base of the flame so as to conduct the gas generated in the fount to the flame for combustion. It has no combustion chamber of any kind or adjuster for the wicks and therefore lacks the deflector, the air-distributer, and the wick adjuster required to make the combination recited in the second and third claims.

Ques. 13. Please look at the model now shown you marked Defendants' Exhibit Wade & Burnham Original, and also look at complainants' exhibit marked Wade & Burnham Patent, and at complainants' exhibit marked Wade Patent, and state whether the defendants' exhibit correctly represents the structure described in said patent; and if not, wherein it differs.

Ans. It represents all shown in that patent with an addition. There is in the model burner a perforated partition between the base and the perforations below the deflector, so that the air which enters through the perforations around the top of the base must pass through that perforated partition to reach the combustion chamber. This perforated partition is not found in the Wade & Burnham patent. There is still another difference, and that which constitutes the leading element in the claims of the Wade & Burnham patent, and that is that the perforated band around the top of the base, and to which the deflector and
39 the chimney are attached, are hinged to the base, and not so hinged in defendants' exhibit Wade & Burnham Original. In regard to the W. W. Wade patent, that is substantially the same as the Wade & Burnham patent, the Wade patent showing a peculiar method of securing the wick tube in place, which is not found in the model Wade & Burnham original; neither is there in the Wade patent the opening through the upper and lower plates of the base as in the model.

Ques. 14. State whether you find described in the letters patent marked Complainants' Exhibit Wade & Burnham Patent, or in the complainants' exhibit marked Wade Patent, or in the structure marked Defendants' Exhibit Wade & Burnham Original, the combination recited

in either the second or the third claims of the Ambrose reissue, No. 6844, and give your reasons for your conclusions.

(Objected to for the reasons that neither of the patents mentioned have been introduced for the purpose of showing that they contain the combinations referred to.)

In view of this objection please refer more especially to the structure marked Defendants' Exhibit Wade & Burnham Original.

Ans. I do not. The burners shown in the Wade & Burnham patent and in the Wade patent are substantially the same burners as that shown in the Merrill patent which I have before referred to, except that in the Wade & Burnham and Wade patent the conductor above the base is not found. The Exhibit Wade & Burnham Original is also substantially the same burner as that shown in the Merrill patent and lacks the conductor above the base shown in the Merrill patent, and has the perforated partition to which I before referred. This Wade & Burnham original, therefore, lacks the same elements to make up the combination recited in the 2d and 3d claims of the Ambrose reissue, viz, a perforated air-distributer which with the deflector forms the combustion chamber and the tube to conduct the gas from the fount to the combustion tube. The two patents referred to also lack the same elements.

Ques. 15. Look at the model now shown you marked Defendants' Exhibit Jones Burner, and state whether it correctly represents
40 the structure described in complainants' exhibit marked Jones Patent; and if not, in what the difference consists.

(Objected to; same objection as to ques. 14.)

Ans. The model correctly represents what is shown in the patent, but there are differences; first in the patent there is no opening between the base and the fount. In the defendants' exhibit, Jones' Burner, there is a large opening around the wick tube through the base. There is also in Exhibit Jones Burner a perforated cup set over the wick-tube which is not found in the Jones' patent. With these exceptions the model correctly represents the burner shown in the Jones' patent.

Ques. 16. State whether you find described in the letters patent marked Defendants' Exhibit Jones' Patent or in the structure marked Defendants' Exhibit Jones' Burner the combination recited in the 2d and 3d claims of the Ambrose reissue No. 6844, and give your reasons for any conclusions you may express.

(Same objection as to ques. 14.)

Ans. I do not. The burner shown in Jones' patent lacks the perforated air-distributer and the conductor for the gas leading to the combustion chamber. The exhibit Jones' Burner has no conductor leading from the fount to the combustion chamber, an element required in the combination recited in the said claim, and in this respect the base of the Jones and the openings through the base are substantially the same as Merrill burner.

Ques. 17. The Jones' burner produced as an exhibit has holes surrounding the base of the burner. If these holes are closed so as to make a tight base, to what extent, if at all, would it affect your answer to the preceding question?

Ans. Not the slightest, because there would be the same chamber to be filled with gas which might escape through the wick-adjuster opening or through the opening around the wick-tube to the combustion chamber so as to be lighted and cause explosion. The conductor which will insure the leading of the gas to the combustion chamber is wanting to embrace the combination recited in the claims of the Ambrose reissue.

Ques. 18. Please look at the model now shown you marked De-
41 fendants' Exhibit Jones' Burner with Merrill Attachment, and state whether you find in that structure the combination recited in either of said claims of the Ambrose reissue; and if not, what elements are wanting?

Ans. I do not. There is lacking, from this exhibit, the perforated air-distributer and the conductor to lead the gas from the fount to the combustion chamber required to make up the combination recited in the 2d and 3d claims. The Merrill attachment consists only in the sleeve arranged to impinge the air upon the base of the flame, as more fully described in my answer to ques. 6.

Ques. 19. Look at the exhibit now shown you marked Defendants' Exhibit, Jones' Burner with Sargent Attachment, and state whether it correctly represents the structure described in complainants' exhibit marked Sargent Patent, and if not, wherein it differs?

(Same objection as before.)

Ans. It does not correctly represent that structure. In that patent there are four partitions extending from close contact with the wick-tube outward to the sides of the burner and there is no opening through the base upward outside the wick-tube. In the exhibit, Jones' Burner with Sargent Attachment, there is an opening around the wick-tube in both the upper and lower plates of the base, and a sleeve around the wick-tube substantially like the Cheney patent, enclosing the openings in the upper plate of the base, and the four partitions extending from this sleeve to divide the burner as in the Sargent patent. With this difference the burner is substantially the same as the patent.

Ques. 20. State whether you find described in the letters patent marked Complainants' Exhibit Sargent Patent, or in the structure marked Defendants' Exhibit, Jones' Burner with Sargent's Attachment, the combination set forth in the 2d and 3d claims of the Ambrose reissue, and state your reasons for your conclusions, referring if you desire to your previous answers?

Ans. I do not. Like the burners before referred to, this patent and burner both lack the air-distributer and the conductor from the lamp fount required to make up the combinations recited in the said 2d and 3d claims.

42 And to interrogatories propounded by CHARLES R. INGERSOLL, Esq., he answered as follows:

1st cross-int. Did you ever see a lamp-burner constructed according to the specifications and drawings of the original Ambrose patent?

Ans. I have seen the one in the Patent Office.

2d cross-int. You mean, I suppose, the model there. With that exception and the model here produced by the defendant, have you ever seen such a burner?

Ans. Not to embody the whole structure shown in the drawings of the patent.

3d cross int. Referring now to the last Ambrose reissue, do you find there anything to limit what is called the deflector in the combination described in the 2d claim to any special construction; and, if so, what?

Ans. No, sir; only that it be a deflector which shall form with the air-distributer the combustion chamber.

4th cross-int. Do you find anything there limiting to a special construction the wick tube?

Ans. Only that it shall extend from the fount to the combustion chamber.

5th cross-int. Anything limiting the perforated air distributer?

Ans. Only that it shall be such an air distributer as is described, and which, with the deflector, will form the combustion chamber.

6th cross-int. Anything limiting to a special construction the passage to conduct the gas from the fount to the combustion chamber.

Ans. The claim requires that it shall be such a tube or conductor as will lead the gas from the fount to the combustion chamber.

7th cross-int. Where in the patent is anything said of its being a conductor?

Ans. The specification says, in referring to this conductor, "so that the gas which is generated within the lamp, instead of passing out through the opening in the tube for the wick-adjuster, as it otherwise would, will pass up through this tube or passage in such prox-
43 imity to the flame that it is consumed." This I understand to be the description of a conductor which will lead the gas from the fount to the combustion chamber.

8th cross int. Please now observe my question, which I repeat. Do you find anything in the patent limiting to a special construction the passage which, in the 2d claim, is mentioned as a means of conducting the gas from the fount to the combustion chamber; and, if so, what is that special construction?

Ans. If by a special construction you mean shape of the conductor, I do not.

9th cross-int. My question is not as to my construction of the patent, but as to yours; and I ask again for you to define the kind of passage, not the kind of conductor, which the patentee limits himself to, if he places any limit upon his claim?

Ans. Simply such a tube as will conduct the gas from the fount to the combustion chamber.

10th cross int. Am I to understand you that the patentee limits himself to a tube as a means of this passage?

Ans. Yes, sir; or an equivalent to it.

11th cross-int. By that expression, "or an equivalent to it," am I to understand that he limits himself to a tube or such a means of passage as will prevent any mixture of air with the gas in its passage from the fount to the chamber?

Ans. Not necessarily.

12th cross-int. In what construction of a tube for the purposes of such a passage could it be possible for the outside air to mix with the gas?

Ans. Such a construction as found in defendant's burner, where a small aperture is made into the conductor or tube within the base, and the base open so as to allow the air to pass in. The air might then pass into the tube and mingle with the gas without liability of the gas going outward or away from its proper channel, the conductor or tube.

13th cross-int. Do you call such a construction as you have just described a tube extending from the fount to the combustion chamber?

Ans. I call it a tube leading from the fount to the combustion chamber so as to conduct the gas from the fount to the combustion chamber.

44 14th cross-int. What special purpose over all other means of passage is secured by a tube unless it may be to keep the air from mingling with the gas?

Ans. It insures the conduction of the gas from the fount to the combustion chamber without liability of escaping at any intermediate point in the burner.

15th cross int. Suppose the base of the burner be tight, and the only

openings into or out of it are openings adjacent to the bottom of the wick tube where it connects with the fount, and a similar opening connecting it with the combustion chamber, would that not ensure the conduction of the gas from the fount to the combustion-chamber without any liability to escape?

Ans. The gas could not escape except through that opening into the combustion-chamber. I assume that you mean that the top of the base shall form the bottom of the combustion-chamber.

16th cross-int. Has the construction of a tube any advantage over such a construction?

Ans. Yes, sir. If the base be made with the openings that you have said, and so that the upper plate of the base forms the bottom of the combustion-chamber, there must be a considerable distance between the upper and lower plates of the base, because to ensure the combustion of the gas as it would pass from the opening in the upper plate to the flame the wick-tube must be short and the deflector correspondingly low, and if the base was not thus made high, the flame would come so near the upper opening as to communicate with the gas in the lamp and cause explosion. In case the conductor or tube is employed, then the base of the burner and the burner itself may be made very low, as is the case in the complainants' exhibit, Defendants' Manufacture, and thereby make a very considerable saving in metal as well as positively ensuring the conduction of gas to the flame.

17th cross int. As the result of your answers, am I, then, to understand that you define the last Ambrose reissue a claim for a passage by which the gas shall be conducted from the fount to the combustion-chamber, limited in its construction to the form of a tube, but
45 irrespective of whether its construction permits the air from the outside to mix with the gas in such passage or not?

Ans. No, sir; the claim is for the combination of such a passage with a peculiar combustion-chamber.

18th cross-int. I vary my question to what I suppose would be understood, so that it shall refer to this tube as an element of the combination stated in the second claim. Do you find as an element of that combination that the gas passage shall be constructed as defined in my last question?

Ans. Yes, sir; it is required to be constructed so as to force the conduction of the gas from the lamp fount to the combustion-chamber, and a small aperture or apertures within the base would not affect such conduct, and might allow the mingling of air with the gas.

19th cross-int. My question had no reference to small apertures in the base, but is simply whether the fact that the outer air may be mixed with the gas in its passage or not affects the character of the claim; that is to say, may the tube to which, as you say, the patentee has limited himself in this particular, be so constructed as to entirely exclude he outer air or to permit any quantity of the outer air to mix the gas, and yet in both cases be within the claim of the patent.

Ans. The fact that air was permitted to pass into the tube below the air-distributer would not qualify the 2d or 3d claims, but the apertures by which the air is admitted might be made so large as to prevent the tube serving as a conductor of the gas. In that case it would not be a conductor within the meaning of the claim. There is a point, therefore, where the tube might cease to be within the claim.

Adjourned until Friday, April 6th, 1877, at 10 o'clock a. m.

20th cross-int. Referring now to the original Ambrose patent, do you

or not find there a special and defined construction for what he calls his vapor tube?

Ans. There is only one construction shown, and that the one described.

21st cross-int. Is not that construction required to be of a tight
46 tube, so that the outer air shall be excluded by it from mixing with the gas in its passage from the fount to the combustion-chamber?

Ans. Not necessarily. There is no mention made of such fact, but it is necessary that it be such a conductor as will conduct the vapor from the fount to the lamp.

22d cross-int. Referring now to your answer to the 29th cross-ques., where you say that the original patent shows only one construction, what is that construction so shown?

Ans. A conductor which will lead the gas or vapor from the fount to the combustion chamber, which is formed by the perforated air distributer and the deflector.

23d cross-int. How does the patent show that that conductor is constructed?

Ans. In the form of a tube opening into the fount and into the combustion-chamber.

24th cross-int. As that tube is shown does it not entirely exclude the air from mixing with the gas in such passage?

Ans. It does.

25th cross-int. Where then, in the patent, either in its specification or drawing, is there anything shown to warrant you in saying that the construction shown by the patent does not necessarily exclude the air from the gas in its passage?

Ans. There is nothing said in the patent which would prevent a certain amount of opening in the gas tube so long as it be a sure conductor to lead the gas from the fount to the combustion-chamber without liability of escape; so long as it is, such a conductor, it is, as I understand it, a clear equivalent for the tube or conductor of the Ambrose patent. To illustrate: The conductor which takes the water from the roof of a house may have numerous perforations at any point in its length, but so long as that conductor is of sufficient capacity to take the water, and the perforations so small as not to interrupt that flow, it would be the same conductor or substantial equivalent for it. But if the aperture be so great as to defeat the object of the conductor then it would no longer be a conductor or an equivalent for it.

26th cross-int. Then I understand you to say that it is not shown in the original patent that there is an auxiliary tube or passage
47 leading from the lamp upward to conduct the gas from the lamp to the flame without the mixture of air with the gas below the upper orifice of the tube. Am I right?

Ans. The tube shown in the patent and in the model, the same as in the reissue, is a close tube from the lamp to the fount, hence no air can mingle with the gas in the tube.

27th cross-int. Where does the original patent show that this tube must be located?

Ans. It must be located above. The tube is located adjoining the wick tube, and it is so shown in the model and drawings. But I find nothing in the patent that makes a particular location imperative.

28th cross-int. Now look at the 2d claim of that original patent, and also to that part of the specification describing the tube F, and state if that patent does not require that the tube shall be located wholly within the cap C.

Ans. In the patent the tube is shown as located within the perforated cap or cylinder C. The original 2d claim locates that tube within that cap, and places it "adjoining or contiguous to the wick tube."

29th cross-int. Do you or not find in that original patent any special provision to prevent the ignition of the vapor below the orifice of the tube, and if so, what is it?

Ans. I find a peculiar wick-adjuster which necessitates a large opening in the wick-tube; unavoidably there will be more or less gas generated in the wick tube by the heat from the flame, and that gas would naturally escape through the adjuster opening. To prevent such escape of gas and thereby force the gas to follow the wick upward, there is a plate provided to cover the wick-adjuster opening. No other gas than that generated by the wick can approach that point when the conductor is present.

30th cross-int. I have asked you nothing about the wick-adjuster or the escape of gas from it, or a provision against its escape, but simply whether you do or not find anything specially provided in the original patent to prevent the ignition of the vapor below the orifice of the tube; and that I may get an answer to that question, I now ask if the patent does not require that the upper end of said tube F shall be covered by a perforated plate, which perforated plate is for the purpose of
48 preventing the ignition of vapor below the orifice of the tube?

Ans. The air-distributer has that for one of its objects. Should there be vapor in the burner below that point it cannot be ignited through the perforated plate. I don't understand that it is necessary or required by the patent that the end of the tube should be covered, although it is shown that the tube terminates close under the under side of the perforated plate, and hence is covered by it. A convenience, I understand it in that construction, rather than a necessity.

31st cross-int. Doesn't that patent give a reason for such a construction, viz. to prevent ignition?

Ans. No, sir; not at all. The ignition to be prevented has nothing to do with the covering of the tube; it is that the plate may prevent the flame passing down around the tube to ignite vapor that might escape below. There is no possibility of ignition through the tube, and hence no necessity for covering the tube.

32d cross-int. And yet you say in answer to the 30th cross-interrogatory that the air-distributer covering the tube has for one of its objects the prevention of ignition of vapor below the orifice. Now, where does the patent show that that is one of the objects of the perforated plate, and where does it show that it has any other object than that?

Ans. Referring to the specification, it says, in closing, and with reference to the whole burner, "By this arrangement the flame is supplied with sufficient oxygen without a chimney to support proper combustion and produce a brilliant illuminating flame, and the vapor which passes up through the tube F is consumed without danger of being ignited below the orifice of said tube." The meaning of this clause, as I understand it, is that the tube surely conducts the gas to the combustion-chamber so that there is no possibility of ignition below that point, and that the perforated plate *c* fitted in the top of the cap or cylinder C, and which forms the bottom of the combustion-chamber, so distributes the oxygen as to support proper combustion, and that the perforated plate will prevent the ignition of any vapor or gas escaping below that plate is a well-known fact.

49 33d cross-int. My question desires you to point out in the orig-

think there would be a perceptible quantity of gas escaping, but gas does escape to a certain extent.

47th cross-int. Do you mean to be understood that this gas of which we have been speaking can be ignited under the arrangement of the Ambrose original patent, before it reaches the flame?

Ans. No, sir.

48th cross-int. While the gas is in what you call the combustion-chamber, does or not the outer air freely mix with it in the Ambrose arrangement?

Ans. It does.

49th cross-int. Now, assuming that the Ambrose original patent requires that its vapor-passage shall be a close tube located within the cap reaching not to the flame but to the perforated plate, and that its orifice should be covered by a perforated plate, do you find in complainants' exhibit marked Defendants' Manufacture, any such construction?

Ans. I find all except the qualification which you made, that the end of the orifice should be covered. It is not so covered in that exhibit.

50th cross-int. I repeat the question—do you find such a construction in that exhibit as I have described?

Ans. I think I have answered the question.

51st cross-int. Do you mean to say that the passage provided in the exhibit is a tight tube?

Ans. I do not mean to say that it is a tight tube, but I do mean to say that it is a direct conductor, such as found in the Ambrose original and reissued patents.

52d cross-int. Do you also mean to be understood that what you call the conductor in the exhibit is located wholly below the perforated plate?

53 Ans. The useful portion of it is located entirely below the perforated plate. It is true the tube extends above the plate, but its office as a conductor from the lamp fount to the combustion-chamber ceases so soon as it reaches that chamber.

53d cross-int. My question is not as to the usefulness of any part of this conductor, but I desire to know whether or not you find its construction such as I have indicated, and can you now say that the conductor shown in this exhibit is located below the perforated plate?

Ans. With the explanation of my previous answer—yes, sir.

54th cross-int. Doesn't it conduct the gas directly to the flame?

Ans. Yes, sir.

55th cross-int. If it had stopped below the perforated plate, would the gas have been conducted directly to the flame?

Ans. Yes, sir.

56th cross-int. In the latter case, would it have been mixed with the outer air before ignition?

Ans. Not with the outer air around the burner, but it would be with the air after it has passed into the combustion-chamber, undoubtedly.

57th cross-int. In the former case, would any such mingling occur?

Ans. No, sir.

Adjourned until Monday, April 9th, 1877, at 10 o'clock a. m.

58th cross-int. Referring to the last Ambrose reissue, what do you understand by the first element in the combination stated in the 2d claim, viz, a deflector? Indicate the letter which shows it in the drawing, and state what purpose does it serve.

Ans. The deflector in this case is double, that is, one over the other. It is a dome-shaped shell, forming a chamber around the upper end of

the lamp-wick, and with a slot over the end through which the
54 flame passes; the base of the wick being within the chamber formed by this dome-shaped part. The commonly-accepted name of this part is deflector. In the drawing it is G. It serves to direct the air, that is, turn it from all directions to the base of the flame, and for this reason is called a deflector.

59th cross-int. Does the letter H also indicate the upper part of the deflector, which you say is in this case double, that is, one over the other?

Ans. That indicates the second part.

60th cross-int. Does the drawing and the specification also show that on the outer side of what you call the deflector G, there are vertical ribs and projections serving as bearings for the other part of what you call the deflector H, for the purpose of admitting of a space between the two?

Ans. I do not call H the other part of the deflector, because the deflector G is perfect in itself. There are ribs outside the deflector G, which support the deflector H, and admit an air space or passage between the two so that air will enter below the second deflector and pass to the flame above the slot in the first deflector and below the slot in the second.

61st cross-int. What in the original patent and first reissue are these two pieces indicated by the letters G H called?

Ans. They are called heaters in their combined condition, because of the space between the two in which "the oxygen passes and becomes highly rarified and unites with the carbon in the flame ensuring perfect combustion; this second deflector, therefore, serving practically the purpose of a chimney, so that no other chimney is necessary where the two are used together. In that sense they are heaters as well as deflectors.

62d cross-int. I repeat the question and desire you to notice that I do not ask for your understanding of their purpose or the correctness of the patentee's sense of his invention, but simply what they are called in the original and first reissued patent?

Ans. As I said before, heaters.

63d cross-int. What are the plates *q*, in combination with these heaters for?

55 Ans. For the purpose of directing the heat "directly against the inner sides of the heater G, so as to supply the flame with warm oxygen."

64th cross-int. Do you not mean to "deflect the air" instead of direct the heat so that the air may become heated by contact with the heater?

Ans. I intended and supposed I had said "air" instead of "heat." They do deflect the air in connection with the openings *r*, which, in the words of the patent, "cause a draught to ascend directly upward to the flame," and air is also deflected directly against the inner sides of the heater G."

65th cross-int. And is it not because of this that they are called deflecting plates in the first reissue?

Ans. That is what is called deflecting plates in the original patent, 1st and 2d reissue, in stating the nature of the invention.

66th cross-int. Please point out where in the last reissue they are called "deflecting plates."

Ans. In the 3d line of second column, 1st page, the part which you quoted in stating the nature of the invention, which says: "3. In the employment of a perforated cap, wick tube, heaters, and deflecting plate

combined and arranged as hereinafter described," being the third clause of the nature of the invention.

67th cross int. Now please point out where in that reissue, in the drawings or specification of that reissue, there is any construction of deflector shown other than that of which these deflecting plates form a part.

Ans. There is nothing in the original, the 1st or 2d reissue, which show that they are a part of a deflector; on the contrary, the deflector was a common and well known structure at the time of the original patent, and this plate *q* is attached to and made practically a part of the wick tube, and by its operation is an element of combination with such a well known deflector.

68th cross int. Then am I to understand you that the deflector mentioned in the 2d claim of the last reissue as forming the first element of the combination claimed is such a deflector as was well known in the act of lamp burner manufacture before the alleged invention of
56 Ambrose, and is not the deflector shown by him in his drawings, under the letters G H, with their combinations as shown?

Ans. You are not to so understand. The deflector G shown in his model, in his drawings, and described in his specification was a well-known structure at that time, and such as since has been, and now is, in general use. Such a deflector he does not claim in the original, or in the reissued patents, except in combination with other elements.

69th cross-int. Does he in the original, in the specification or drawings of either the original or reissued patents, show or claim either separately or in combination, any such thing as you call the deflector G, but which he uniformly calls the heater G, except as it is provided with vertical ribs, at the lower ends of which are projections, which projections serve as bearings for another similar heater, the two heaters being so combined for a special purpose indicated in his patent? If he does, point it out.

Ans. In his original and reissued specifications, he clearly describes the well-known deflector of the time in the following words from the original: "On the upper end of the cap C, there is placed a copper dome-shaped heater, G, which is secured in proper position by a thumb-screw, *m*. This heater is slotted at its upper end, as shown at *n*." So far this identically describes the common and well-known deflector. The inventor further says in this paragraph, "And at the center of the slot there is fitted a longitudinal bar, *o*, the latter dividing the slot *n* into two equal longitudinal parts." This division of the flame was also well known prior to the Ambrose patent. The inventor goes on to describe the wick-tube with the collar *p*, and plates *q*, which are attached thereto. He then describes the ribs which are applied to the outside of the deflector as a support for the outside shell. Such a deflector G is the same element of combination of the 1st claim of the original patent that it is in the 4th claim of the 2d reissue, and is also the same element recited in the 2d and 3d claims of the second reissue. There could be no claim upon the deflector alone without other elements of combination, because that deflector was well known.

70th cross-int. Can you not, without so much explanation,
57 directly and intelligently point out, if it exists, the place in the original patent where the patentee shows that he claims, either by itself or in any combination, that kind of deflector, which you say was then well known in the arts?

Ans. Not when he claims it alone, for that he could not claim. But

he does claim it as one of the elements of the first claim of the original patent in combination with other elements.

71st cross-int. Repeat the language of that 1st claim in the original patent which in your judgment claims that old deflector, apart from the language which refers to the other elements which you say are combined with it.

Ans. "The arrangement of the heaters G H." G is the deflector referred to.

72d cross-int. Do you mean to say that the language immediately following that you have quoted, viz, "With a space between them communicating directly with the external air," is not included by the patentee in the arrangement of the heaters G H, which your quotation refers to?

Ans. I understand that to be a qualification of the relation of the two elements G H but as in no way changing the old deflector G.

73d cross-int. Now, then, am I to understand that in your judgment the element of the combination in the 2d claim of the last reissue which is described as a deflector refers to that kind of deflector well known in the arts before Ambrose's original patent, and not to such a deflector as is shown by the language you have just quoted from the original patent with the qualification which you say is made by the language referred to in the last question?

Ans. It refers to the same well-known deflector G as described in the original patent, but does not necessitate the presence of the second deflector H. I understand this claim to be for any deflector which will perform the same function in combination with the elements mentioned that the well-known deflector G does, and as it does not necessitate the presence of the second deflector H, it does not therefore forbid it.

58 74th cross-int. Do you find in the defendant's burner any deflector having vertical ribs with projections serving as bearings for another deflector so that a space is admitted between the two?

Ans. I do not find in defendant's burner any provision for his second deflector to be combined with the one found therein.

75th cross-int. Do you find in it anything which you call a deflector differing from that kind of deflector which you say was well known in the arts before Ambrose's patent?

Ans. No material difference as a deflector.

76th cross-int. Please point out in the Ambrose drawings by the indicating letters what you regard as the combustion chamber.

Ans. That space between the perforated plate *c* and the deflector G.

77th cross-int. Why do you call that a combustion chamber?

Ans. Because it is where the products of combustion are brought together, viz., the oil from the fount and the air which is necessary to the proper combustion of the oil.

78th cross-int. Is there any such combustion in the space between the two heaters G H?

Ans. No, sir.

79th cross-int. What, then, does the patentee mean when he says, "between the two heaters G H oxygen passes and becomes highly rarified, and unites with the carbon in the flame, insuring perfect combustion?"

Ans. In lamp burners all the carbon may not be consumed at the base of the flame; hence a surrounding shell is applied to the burner, usually a chimney to admit air, which will cause more perfect consumption of the carbon. The air which passes in between the chimney and the de-

flector of the common burner, or the outer and inner shells of the Ambrose burner, is introduced for this more perfect combustion, and to the extent that the air within the chimney is consumed between that and the deflector to that extent there is combustion between the two shells in the Ambrose burner, and to that extent the chimney of the common burner and the outer shell of the Ambrose burner may be called an auxiliary combustion chamber.

80th cross-int. Is it for the same reason that, as the specification states, "the flame at the slot in the heater G is merely a gas-generating flame, the illuminating flame having its base at the slot of the heater H?"

59 Ans. The heater H not being transparent, there can be no illumination below its surface. Remove the second shell and illumination will come from the slot in the deflector G. The flame and the illuminating power begins substantially at the slot in the first deflector, but, because of the opaque character of the heater H, the part of the flame between two slots can only perform the office of heating.

81st cross-int. Therefore, have you any doubt that with the heaters arranged as the patentee describes them, there must be combustion within the upper heater?

Ans. To the extent I have before mentioned, yes. I have said it may properly be called an auxiliary combustion chamber.

82d cross-int. Why, then, in your definition of a combustion chamber mentioned in the second claim referred to of the reissued patent, do you limit it to the lower heater?

Ans. Because the lower heater forms the combustion chamber, and neither necessitates or forbids the presence of the auxiliary combustion chamber.

83d cross-int. Is there any such thing as what you call a combustion chamber referred to as such in the original patent?

Ans. I don't know that the combustion chamber is mentioned in those words, but the combustion chamber is shown in the model and drawings, and the elements that make it are clearly described.

84th cross-int. And do not the model, the drawings, and the elements referred to all and in every part of the patents where they are mentioned, refer to the two heaters combined and arranged as the place where the combustion is carried on?

Ans. Not solely. The two are combined to ensure perfect combustion. The first and principal combustion must occur, however, at the base of the flame, or there could be no flame between the two heaters or deflectors. The two heaters can only be auxiliary to the first or principal combustion chamber below the principal deflector.

85th cross-int. Is there any reference anywhere in either of the issues to one of these heaters forming an auxiliary combustion chamber as distinguished from a principal combustion chamber?

60 Ans. The drawings and model clearly show it, and these facts exist without necessity of description calling those parts principal and auxiliary.

86th cross-int. Whether it is necessary or not was not my question. If any such reference is made as I have asked for please show it.

Ans. The drawings clearly show it in the reissues and original. It is clearly shown in all the drawings in the statement of the second clause of nature of the invention, and again in the words in the second column, "*c* is a perforated air distributer which with the deflector forms the combustion chamber into which the wick-tube D extends." I have misunderstood the question, and I withdraw that part of the answer

after the word original in the second line. I did not understand the question as referring to an auxiliary chamber only.

87th cross-int. After understanding the question what is the answer?

Ans. I have answered it. The drawings and model show it.

88th cross-int. Is there anything in the quotation made in your answer to 86th cross-interrogatory that shows which of the heaters that you call deflectors is referred to as forming the combustion chamber?

Ans. It refers to the deflector which with the perforated plate forms the combustion chamber, and in a burner constructed like the drawings, that is, the deflector G.

89th cross-int. Do you understand that what you call a combustion chamber, that is, a chamber formed by the kind of deflector you have referred to as old, and a perforated air distributer, was well known in the manufacture of lamp burners before the alleged invention of Ambrose?

Ans. No, sir; not as found in the Ambrose patent, I do not. I am aware air had been admitted to the combustion-chamber through perforations in the shell of the burner, but I do not understand that to be an equivalent for that perforated plate which forms the bottom of the air-distributer in the Ambrose burner.

90th cross-int. I did not ask you anything about what is shown in the Ambrose patent, but simply whether before that patent a perfo-
61 rated air-distributer, forming, with what you call a deflector, what you call a combustion-chamber, was not well known in the arts?

Ans. What I call a perforated air-distributer is what I find in the Ambrose patent, and with the explanation of my last answer I say no.

91st cross-int. What do you understand Ambrose to mean, when he says in his original patent, "I am aware that dome-shaped heaters have been previously used, and also that perforated caps have been used in connection with said heaters, and I do not claim said parts when separately considered"?

Ans. Double deflectors or heaters were used to the extent of three in a single burner before Ambrose. What he calls the cap in his specification and shows in his drawing is the cylindrical shell which forms the body of the burner, and is perforated to permit the air to pass through. All burners previous to Ambrose's, in which a deflector was used, to the best of my knowledge at the present time, had a perforated shell or cap. I do not understand that disclaimer to in any sense refer "to what he calls the perforated plate *c* fitted in the top of that cap or shell, and which constitutes the air-distributer," but to the cap or shell combined with more than one deflector.

92d cross-int. Doesn't he distinctly and explicitly describe his cap, C, as having for its upper end the perforated plate, as well as having its sides of perforated metal?

Ans. It has that plate fitted into it, but the cap C does not necessarily include that perforated plate *c*, so as to be embraced in the disclaimer of a "perforated cap," for he calls it the perforated cap or cylinder C.

93d cross-int. What is the invention patented to E. F. Jones, as referred to in your direct examination?

Ans. A device for securing a chimney and deflector to the lamp cap.

94th cross-int. That is equally applicable, is it not, to a burner, whether in its base there is provided a means for the escape of gas or not?

Ans. It is applicable to any burner which uses a lamp-chimney.

95th cross-int. Have you ever examined the original letters patent to Jones?

62 Ans. I am not certain. I have not since the Jones reissue.

96th cross-int. Do you know whether or not in his original patent the drawing represents the burner to which his invention is applied, as having a passage from the fount to the flame for the gas that may escape from the fount?

Ans. I have the Patent-Office copy of the drawing of the original patent, and find there is no opening shown from the lamp-fount to the burner. The drawing of the original and reissue are alike.

97th cross-int. What is the Patent-Office drawing that you refer to. Is it a certified one?

Ans. It is the regular printed copy, like that attached to the certified reissue, but has not the Patent-Office certificate attached to it. It is one of the drawings of the whole class of lamps which I purchased from the Patent-Office about three years ago.

98th cross-int. What was the invention patented to Wade & Burnham, referred to in your direct examination?

Ans. It was a method of securing the deflector into the chimney-band—"the said band being hinged to the lamp-cap."

99th cross-int. What was the invention patented to Wade referred to in your direct examination?

Ans. The method of securing the wick-tube.

100th cross-int. Were these inventions either of them equally applicable to a lamp-burner, the base of which was provided with the means of passage for the gas from the fount to the flame, as well as one not so provided?

Ans. The invention of Wade & Burnham is applicable only to a class of burners which at the present time are very little used. That of Wade is applicable to many burners as now constructed. To either of these two burners the gas-passage from the fount might be applied as well as to other burners, the construction claimed having no bearing upon the question of the gas-tube.

101st cross-int. Please look at defendant's exhibit, Jones burner, and state whether you find in that exhibit a deflector?

Ans. I do.

102d cross-int. Do you find a perforated air-distributer?

63 Ans. I find what may distribute the air, but I do not find an air-distributer so located as to be able to distribute the air, because the plate or disc which can alone make the air-distributer is below the perforations in the cap through which the air passes, and the air which so passes through the cap must pass through the sides of the inner perforated cap, without any possibility of reaching the air-distributer, and a very small portion only of what constitutes the perforated plate or disc receives the air which comes through the perforations below the upper plate of the base of the burner. It is not an air-distributer in the sense in which I have heretofore used that expression.

103d cross-int. Am I to understand by your answer that you do not find in that burner an air-distributer?

Ans. As explained by my last answer, I do not.

104th cross-int. Are you not able upon inspection of that burner to say, without so much explanation, whether it contains an air-distributer or not?

Ans. I am. As I understand what constitutes an air-distributer, there is none.

105th cross-int. What is your understanding of an air-distributer in a lamp-burner?

Ans. I will illustrate it with this exhibit, Jones burner. If there was

in that burner a perforated disc above the perforations through the sides of the lamp cap, separating the deflector from the space below, so that the air passing into the cap or space below must go through the perforations of that plate or disc, then there will be an air-distributer, and that is what I understand by an air-distributer.

106th cross-int. Now suppose in the exhibit you have referred to there were no perforations through the sides of the lamp-cap, do you think it would contain an air-distributer?

Ans. The thing would be there, but there would be no air to distribute. I wish to explain my previous answer, as I think you misunderstand it. I mean that the perforated plate should be arranged at a point above the perforations or apertures directly beneath the base line or bottom of the chimney.

107th cross-interrogatory. Suppose that the upper line of perforations in this exhibit were closed and the lower line left open, do you think it would contain an air-distributer?

64 Ans. In that case what little air would pass through those lower perforations might pass through the distributer, or through the openings between the perforated portion and the wick tube. To the extent that it passed through the perforations they would act as an air-distributer.

108th cross-int. Am I to understand by the last answer that in the case supposed you would or you would not find an air distributer there, without any reference to any degree of perfection?

Ans. No, sir; not what I understand by an air distributer. Practically there would be none. I have supposed you mean no other change in the burner than that you have mentioned.

109th cross-int. Do you mean to give as the reason of there not being an air distributer there, that in the case I have supposed there would be no air to distribute?

Ans. Not entirely, but that the area of opening between the perforated part and the wick tube is greater than the perforated part; hence the air, what little there is, would more naturally find that large opening than the fine perforations, because of there being less obstruction.

110th cross-int. What do you suppose that perforated bottom or perforated cup was placed in the burner for?

Ans. I have no doubt it was put there for two purposes, to prevent igniting the gas, which might flow in through the upper apertures, and to prevent the ignition of gas which might escape in the base below.

111th cross-int. And not to distribute any air, you think?

Ans. Not as an air distributer. Not to distribute any air.

112th cross-int. But you are not willing to give an opinion, are you, that it does not in fact distribute air to the extent that the air may enter the burner by the perforations beneath it?

Ans. I am. For the reasons stated in answer to 109th cross-int. it would not practically distribute air.

113th cross-int. Do you find in that exhibit a wick tube?

Ans. Yes, sir.

114th cross-int. Do you find in that exhibit a passage by which the gas may pass from the fount to the combustion chamber?

65 Ans. There is not in this burner what I have called a combustion chamber, neither is there a passage leading directly from the fount, except the wick tube.

115th cross-int. Did you understand me to ask whether there was a passage leading directly from the fount to any point?

Ans. Most certainly I did, as you referred to what I call the combus-

tion chamber and to the passage leading thereto, which is the only passage concerning which I have been questioned.

116th cross-int. Then you misunderstood me, and I will repeat the question. Do you find in that exhibit a passage, whether direct or indirect, by which the gas may pass from the fount to a point of combustion?

Ans. I find an opening in the base of the burner through which the gas will pass into that base. It may pass to the flame or it may not. The opening would permit if it were not otherwise interrupted.

117th cross-int. Look at defendants' exhibit, Wade & Burnham Original. Do you find in that exhibit a deflector?

Ans. I do.

118th cross-int. Do you find in it an air distributer?

Ans. No, sir.

119th cross-int. Do the perforations in the cylinder of that burner, and also in the bottom of the deflector, allow the passage of air through them?

Ans. The cap or cylinder of the burner is perforated, through which the air passes; within that cylinder is a second cylinder, the upper diameter of which is substantially the same as the interior of the deflector, and the lower diameter slightly contracted so that the sides of the two cylinders are not quite parallel. The perforations in the inner cylinder are finer than those in the outer, but are in no sense an air distributer, or certainly not in the sense in which I have used that term.

120th cross int. Do you find in that exhibit a wick tube?

Ans. I do.

121st cross-int. Do you find in that exhibit a passage by which the gas may be conducted from the fount to the point of combustion?

Ans. No, sir. The opening in the base of this burner is substantially the same as that in the Jones burner, and for the same reason is not a conductor.

66 122d cross-int. Do you mean to say that when that burner is lighted there is not the means of passage for the gas to ascend from the fount to a point of combustion?

Ans. I mean that there is no passage by which the gas may be conducted. There is an opening through which it is possible the gas may find the flame and it may not.

123d cross-int. Why may it not?

Ans. Because the openings directly into the base allow the gas to spread through the base, and any draught of air occasioned by moving the lamp or otherwise tends to draw the gas outward from the base, or from the space into which it passes.

124th cross-int. When the lamp is not thus disturbed is there any difficulty in its passing by this passage as I have indicated?

Ans. If the lamp be not disturbed, or the air which surrounds it be perfectly still—a condition impossible to suppose—then doubtless the gas would find its way to the flame and not escape through the burner.

125th cross-int. Do you wish to be understood that it is impossible for a lamp to so burn without disturbance of air that the gas will not be drawn upward through this passage?

Ans. Not at all, sir; but that naturally when a lamp is burning there are more or less conflicting currents of air. I do not mean to be understood that it is impossible to suppose such a condition, but that the existence of such a condition of the air is practically impossible.

126th cross int. You referred in your direct examination to certain

experiments once made in your presence. Were those experiments made for the purpose of procuring an extension of this patent?

Ans. No, they were not made until after the hearing, and never used in connection with the application for extension. I have made nor witnessed no other experiments than those that I have referred to with Mr. Wheeden.

And to redirect interrogatories he answers as follows:

1st redir. int. In 119th cross-int you were asked whether the perforations of the cylinder in the Exhibit Wade & Burnham Original do not allow the passage of air through them? Do these apertures in
67 this or the other exhibits having similar apertures perform the same functions as the perforations in the plate *c* of the Ambrose burner, and, if not, to what extent and how do they differ?

Ans. They do not. The perforations or apertures in all these cylinders or caps, as they are sometimes called, correspond to the perforations in the side of the cylinder or cap C in the Ambrose patent. None of the exhibits have the plate *c*, through which the air must pass and be distributed into the deflector, found in the Ambrose patent. The burner referred to in 119th cross-int., Exhibit Wade & Burnham Original, is simply a double cap or cylinder within another, and to find the perforated plate *c* of complainants' patent there must be a transverse plate or disc above the apertures in the cap.

JOHN E. EARLE.

Defendant's counsel puts in evidence certified copy U. S. letters patent granted E. F. Jones, dated May 4, 1858, No. 20159, for improvement in lamps, marked Def't's Exhibit Jones Original Patent.

And on the 11th day of August, A. D. 1877, the court filed his opinion in writing, as follows:

68 Circuit court of the United States for the district of Connecticut.

E. MILLER & CO.
v.
BRIDGEPORT BRASS COMPANY.

SHIPMAN, J.:

This is a bill in equity to restrain the alleged infringement by the defendants of reissued letters patent which were issued on January 11th, 1876, to the plaintiffs, as assignees of Joshua E. Ambrose, for an improvement in lamps. The original Ambrose patent was dated October 16th, 1860, and was reissued May 20th, 1873, and the patent as reissued was extended for seven years from October 16th, 1874.

The principal defenses are that the reissue is not for the same invention which was described and claimed in the original patent, and
69 that the patent is void for want of novelty.

In the original patent the patentee declared the object of his invention to be to obtain a lamp, which will burn without a chimney, and without danger of explosion, those hydrocarbons which are volatile, and contain an excess of carbon, and stated that "the invention consists in the employment or use of a perforated cap, vapor tube, heaters, and deflecting plate, arranged" as described, and in a wick-adjusting mechanism, which last named element is immaterial in this case.

In the specification the invention was in substance described to be

the upper part of the body of a lamp, which received at its upper end a cap, C. This cap was of cylindrical form, and might be constructed of perforated sheet-iron, the upper end having a perforated plate, *c*, 70 fitted in it. The wick-tube was within the cap, a perforated cylinder. Adjoining the wick-tube was a tube, F, the lower end of which communicated with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate *c*.

On the upper end of the cap C was placed a copper dome-shaped heater, G, slotted at its upper end. A longitudinal bar in the center of the slot divided it into two parts.

"The wick tube E extends some distance above the perforated plate *c*, and on its upper end a collar, *p*, is fitted, said collar having plates *y* projecting from it, slightly inclined from a horizontal plane. Between the inner ends of the plates *y* and the collar *p* there are openings *r*.

"On the outer side of the heater G there are vertical ribs *e*, at the lower ends of which there are projections *t*. These projections *t* serve as bearings for a heater, H, which is similar to G in form. The 71 ribs and projections *t* admit of a space, *n*, being between the two heaters; and the upper end of the heater H is slotted, as shown at *r*, and has a plate, *w*, extending upward for each end of it, and inclined at an angle of about 45°.

"The tube Y admits of all vapor generated in the body A of the lamp escaping up into the heater G and to the flame, the perforated plate *c* preventing the ignition of the vapor below the orifice of the tube.

"The plates *y* of the collar *p* and the openings *r* cause a draught to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater G and becomes intensely heated, so as to supply the flame with warm oxygen. The bar *o* in the slot *n* of heater G serves to divide the flame, and prevents it from ascending up through the slot *n* before the carbon is consumed. Between the two heaters G H oxygen passes and becomes highly rarefied, and 72 unites with the carbon in the flame, insuring perfect combustion.

"The plates *w* at the ends of the slot *v* of heater H serve to spread the flame and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot *n* in heater G is merely a gas-generating flame, the illuminating flame having its base at the slot *v* of heater H.

"By this arrangement the flame is supplied with sufficient oxygen without a chimney to support proper combustion, and produce a brilliant illuminating flame, and the vapor which passes up through tube F is consumed without danger of being ignited below the orifice of said tube."

The patentee, after stating that he was aware that dome-shaped heaters had been previously used, and also that perforated caps had been used in connection with said heaters, and disclaiming said 73 parts where separately considered, claimed as his invention—

1st. The arrangement of the heaters G H, with a space between them communicating directly with the external air, in connection with the collar *p* and plates *g g*, fitted on the top of the wick-tube E, and the perforated cap C, substantially as and for the purpose set forth.

2d. In combination with the parts aforesaid, the vapor tube F, placed within the cap C, and adjoining or contiguous to the wick-tube, as and for the purpose specified.

This lamp was not a success as a lamp which would burn without a chimney, and did not go into general use, but it contained valuable features. The tube F conducted the gas from the fount to a point near the end of the wick-tube, so that the gas was conveyed to the flame and was consumed, and thus the danger was materially diminished.

74 In addition, the upper part of the perforated cap C was a minutely perforated plate or disk which extended transversely over the entire top of the cap below the flame (forming the floor of what is styled in the reissued patent combustion chamber), and prevented the return of lighted gas to the lamp fount below, or the ignition of gas within the cap C, upon the principle of Sir Humphrey Davy's safety lamp. Thus the combination of the tube and the perforated plate prevented danger of explosion. The perforated plate also performed the office of a distributer of air into the space where the wick was lighted and to the flame.

Lamps having these characteristics in connection with the other well-known parts of volatile-oil lamps, a wick-tube, a dome-shaped chamber, which serves to direct the air to the flame, and is generally called

75 a deflector, and a chimney, was subsequently manufactured by the owners of the patent, and went into general use.

The patent was reissued for the second time in 1876. The specification of the reissue declares that the invention consists, * * * secondly, "in combining in a lamp burner a deflector, a perforated air distributer, with the deflector forming the combination chamber, a wick-tube extending from the fount to the combination chamber, an adjusting device to regulate the elevation of the wick, and a tube to conduct the gas from the fount to the chamber above the air distributer." * * *

The description portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification. In the new specification prominence is given to the perforated plate *c*, which is called "a perforated air distributer, which, with the deflector, forms the combustion chamber."

76 The second claim, which is the only one alleged to have been infringed, is as follows:

"2. The combination, in a lamp-burner, of the following elements: first, a deflector; second, a perforated air distributer, which, with the deflector, forms the combustion chamber; third, a wick-tube extending from the fount to the combustion chamber; fourth, a tube, or passage, to conduct the gas from the fount to said combustion chamber, substantially as described."

The lamps made by both plaintiffs and defendants contain the heater G, without the ribs, or projections, or longitudinal bar; in other words, an ordinary deflector, the perforated plate, the vapor-tube, and a wick-tube, and are in great demand by the public. The utility of the lamp consists in its safety.

A tube, which conducted the vapor from the fount to the flame,

77 was used in its simplest form in the lamp of William Pratt, patented in 1857. In this lamp the flame was not to be protected from the external air. The wick-tubes were the long diverging tubes now in common use.

Air distributers had long been known in lamps of the Ambrose class, but I am of the opinion that the minutely perforated transverse plate *c*, extending across the lower part of the chamber below the frame, thus forming a perforated floor, and performing the double office of preventing the lighted gas from communicating with the gas in the lamp fount and also of distributing air to the combustion chamber had not

been anticipated in the defendant's exhibits. But it is not necessary to determine whether either the tube or the air distributer was novel in itself, as the combination only is claimed, and I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the com-
78 bustion chamber and the perforated plate constructed as in the Ambrose patent and performing its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector, was unknown prior to the date of the patent.

The important question in the case is, whether the lamp which is described and claimed in the second claim of the reissue is the same invention which was described and claimed in the specification of the original patent.

The principles upon which the decision of this question rests are stated in Gill v. Wells (22 Wall., 1), and in Stevens v. Pritchard (10. Pat. Off. Gazette, 505). In the former case, the court, after declaring the rule to be that where a patentee who has invented a new and useful combination of several ingredients also claims to have invented new and
79 useful combinations of fewer numbers of the ingredients, the inventor is entitled to a patent for the several combinations, and may give a description of the several combinations in one specification and may secure the benefit of each of the inventions by separate claims, and if by inadvertence he should fail to claim one of the described combinations, may surrender the original patent, and obtain a reissue for any combinations which were omitted in claims of the original patent, proceed to say:

"Very different rules however apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication, or intimation that any other invention of any kind has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination
80 embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee on the combination of the smaller number of the ingredients by a surrender of his first patent, and a reissue of the same which shall include the second combination as well as the first, because the reissued patent in that event would not be for the same invention as the surrendered original."

The original patents states the object of the invention to be a lamp which would burn without a chimney, and the entire mechanism is directed to accomplish that object. It consisted generally of a wick tube with collar and plates, perforated cap for the conveyance of air, the vapor tube, and two peculiarly constructed heaters, the lower one, G, provided with ribs and projections, which serve as bearings upon which the upper heater, H, was placed. The two heaters are related to each other, and
81 the entire arrangement of the two with their various parts is particularly described in the specification to be designed to supply the flame with sufficient oxygen to support proper combustion without a chimney. The invention, so far as the heaters were concerned, consisted in their joint use. The lamp of the second reissued claim is without this complex arrangement of heater. It contains one deflector, and is the ordinary lamp with a chimney for burning volatile hydrocarbons, plus the vapor tube and the perforated plate.

The specification of the original patent suggested no invention save the one contained in the entire combination; a combination of the vapor tube and the perforated plate either with one heater or with the

other well-known ingredients of a lamp was not indicated as a distinct part of the invention. The second claim of the reissued patent
82 described an article materially different from the article which was originally patented. The claims contained a combination of a lesser number of ingredients than the combination which composed the original invention. One of the heaters and all of the caps except the perforated plate have disappeared. The deflector of this claim is not the heater G of the original specification, because no single deflector was therein described, except in its relations to, and as connected with, the upper heater. The two heaters are described as to be used together and as necessarily related to each other. The whole scope and object of the invention was to produce a lamp by the combined use of the two heaters.

Had the patentee in his original specification suggested that a lamp containing the modified combination of the second claim of the
83 reissue was feasible and within the scope of his invention, or that the combination of the vapor tube and the air distributer with the other well-known parts of a lamp would accomplish a beneficial result, the claim of the reissue would not have been in violation of the rule of law which has been quoted. But, upon the face of the two patents, I am of opinion that the claim of the reissued patent is for a different invention from any combination which is indicated or suggested in the original specification as capable of embodiment so as to compose either an organized structure or a distinct part of an organized structure.

A decree should be entered dismissing the bill.

John S. Beach for the plaintiffs; Charles R. Ingersoll for the defendants.

84 And on the 18th day of September, A. D. 1877, there was entered and & filed in said court the following decree, viz:

At a stated term of the circuit court of the United States of America for the district of Connecticut, held in the city of Hartford, in said district, on the third Tuesday of September, 1878.

Present, Hon. Ward Hunt, circuit justice; Hon. Nathaniel Shipman, district judge.

E. MILLER & CO.
vs.
BRIDGEPORT BRASS CO. } In equity.

This cause having come on to be heard upon the bill of complaint herein, the answer, replication, & the proofs taken & filed in said cause, & having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, & decreed, & the court doth hereby order, adjudge, & decree, as follows:

That the complainants' said bill of complaint be, and the same hereby is, dismissed, with costs to the defendant, taxed at the sum of $79.

N. SHIPMAN,
District Judge.

85 I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the original bill, pleadings, proceedings, evidence, opinion, decree, and record recorded and remaining on file in my office in the case of E. Miller & Company against the Bridgeport Brass Company.

In testimony whereof I have hereto set my hand & the seal of said court at Hartford, in said district, this 12th day of August, A. D. 1878.

[SEAL.] EDWIN E. MARVIN, *Clerk.*

(Indorsement on cover:) No. 510. Edward Miller & Company, appellants, vs. The Bridgeport Brass Company. Connecticut C. C. U. S. Filed 7th October, 1878.

OFFICE SUPREME COURT U. S.
FILED
JAN 19 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

No. 228.—October Term, 1880.

EDWARD MILLER & CO., APPELLANTS,

vs.

BRIDGEPORT BRASS COMPANY, APPELLEES.

IN EQUITY.

APPEAL

FROM THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF CONNECTICUT.

BRIEF FOR EDWARD MILLER & CO.,

Appellants and original Complainants.

JOHN S. BEACH, *of Counsel.*

NEW HAVEN:
TUTTLE, MOREHOUSE & TAYLOR.
1880.

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APPEAL

FROM THE

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BRIEF FOR EDWARD MILLER & CO.,

Appellants and original Complainants.

APPELLANTS' STATEMENT OF THE CASE.

The suit is on a reissued patent, with a combination claim.

The second claim, the only one in controversy, is as follows:

"The combination in a lamp burner of the following elements: first, a deflector; second, a perforated air distributor, which, with the deflector, forms the combustion chamber; third, a wick-tube extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to said combustion chamber, substantially as described."

Appendix, folio 31.

Neither of the elements of the combination are claimed as new. Each is conceded to be old.

The object aimed at is to give to the public a lamp in which hydrocarbon volatile oils can be burned without danger of explosion.

That this danger exists while using such oils in the common lamp, is not to be denied.

That this danger is extinguished by the use of the combination described and claimed in the reissued patent, is not questioned.

That the defendants use the same combination to reach the same result, is obvious upon inspection, is proved by the complainants' evidence, and is by no witness doubted. Record, folio 21.

The defendants assert their right to use this combination:

1st. Because it is not patentable, being a mere aggregation.

2d. Because the combination was well known at the date of the supposed invention.

3d. Because the claim of the reissued patent is for a combination with a less number of ingredients than those enumerated in the claim of the original patent, and is therefore void as being for a different invention.

The invention described in the reissued patent is a simple one:

We have the old fount of glass or metal for holding the oil, the old wick-tube and wick through the capillaries of which the oil is attracted upward to the flame, the old metal deflector for heating the air to promote combustion, the old chimney protecting the heated air from outside currents. All these were not only old in themselves, but old in combination at the date of this

invention. This old combination was successful in the burning of common oil, but when hydro-carbon oils began to be consumed for illumination, the old combination was found to be hazardous.

In this non-explosive lamp of the Ambrose patent, we have two other elements, also old in themselves, but new in this combination.

One is a tube leading from the oil fount and conducting the gas generated therein to the vicinity of the flame, to be there tranquilly consumed.

Appendix, folio 18.

The other is a plate perforated upon the principle of the Sir Humphrey Davy lamp, which plate forms the floor of the chamber of combustion, and while it distributes the air from below, forbids the return of any gas which the conducting tube has guided to the combustion chamber. Appendix, folio 19.

Or, to use the language of the Circuit Court, this non-explosive lamp "is the ordinary lamp with a chimney, for burning hydro carbons, *plus* the vapor tube and the perforated plate."

Record, folio 81.
Appendix, folio 42.

The Court below rejected the defendants' theory that this combination was a mere aggregation of parts not patentable. And for good reason. A loaded cannon with its powder at the bottom of the rifled bore, its ball closely packed against the powder, in combination with the firing mechanism of its breech, is an aggregation while inert, as this lamp is when unlit; but there is in each the same measure of coaction in kind though

not in degree, when the cannon is fired and the lamp is lighted, only the latter coacts quietly, for safety, and the former noisily, for destruction.

Williams vs. Railroad Co., 15 Blatch. 210.

The question of fact involved in the defendants' claim that there was no novelty in the combination described in the reissue, was also decided by the Court below in favor of the patent.

In all of the exhibits put in evidence by the defendants, some of the features of the patented combination are to be found, but in none are they grouped as component parts of the same combination.

These Exhibits are:—

1. Patent to Rufus S. Merrill, June 24, 1859, No. 24,739.
2. Patent to Sam'l Cheney, Jan. 25, 1859, No. 22,703.
3. Patent to N. Cradit, Dec. 14, 1858, No. 22,327.
4. Patent to Wm. Pratt, Nov. 24, 1857, No. 18,704.
5. "Pratt Lamp."
6. "Cradit Burner."
7. "Wade & Burnham original."
8. "Jones Burner."
9. "Jones Burner, with Merrill attachment."
10. "Wade & Burnham, with Merrill attachment."
11. "Jones Burner, with Sargent attachment."

1. The lamp shown in the Rufus S. Merrill patent has a base forming the bottom of its combustion chamber through which the wick tube extends up to the deflector. Above the base, there is a conductor to direct the air which may enter the base to the flame, and should any gas escape from the fount it is free to

pass out through the openings in the base or it may possibly mingle with the air within the base and be also with it conducted to the flame. But it has no tube or passage to conduct the gas from the lamp fount to the combustion chamber, and no perforated air distributor which with the deflector forms the floor of the combustion chamber.

2. The Samuel Cheney patent describes a structure which has a base forming the bottom of the combustion chamber through which the wick tube extends to the deflector and it, like the Merrill patent, lacks the perforated air distributor of this combination. Over the wick tube and extending above its upper end there is a sleeve so arranged as to leave a small space between it and the wick tube. The lower end of this sleeve terminates at or near the bottom of the combustion chamber. Through this space, any gas escaping from the wick tube may be conducted to the flame. There is no pretence of any device to conduct the gas from the lamp fount to the combustion chamber.

3 and 6. The Cradit lamp is an argand burner requiring the presence of air within its tubular wick. The chimney forms its only chamber of combustion. It has neither the deflector, the perforated air distributor, or gas-conducting device of this combination.

4 and 5. The Pratt lamp has not a single element of the combination as described in the claim of the reissue. It has a tube for conducting gas from the fount to the flame. But it has no wick tube of the character described in the specification, no deflector, no air distributor, no combustion chamber, and therefore can have and has, no gas conductor leading to a combustion chamber from the fount.

7 and 8. Of the defendants' exhibits "Wade & Burnham original" and "Jones Burner" it is enough to say that there is no pretence that either has or suggests a tube or passage for the conducting of gas from any place to any place.

9, 10 and 11. In the exhibits "Wade & Burnham with Merrill Attachment," "Jones Burner with Merrill Attachment," "Jones Burner with Sargent Attachment," the "attachments" consist of sleeves over the wick tube as described in the Cheney patent. In each of these "attachments" the lower terminus of the sleeve between which and the enclosed wick tube the gas is supposed to pass, is above the base of a combustion chamber which base being interposed between it and the fount, forbids the ascent of any gas from the fount to the chamber of combustion.

The "attachments" therefore are competent to carry to the flame such gas only as may happen to escape from the wick tube into the combustion chamber.

We submit then that the decision in the Court below rests on solid ground in finding

"Air distributors had long been known in lamps of the Ambrose class, but I am of the opinion that the minutely perforated transverse plate, extending across the lower part of the chamber below the flame, thus forming a perforated floor and performing the double office of preventing the lighted gas from communicating with the gas in the lamp fount, and also of distributing air to the combustion chamber had not been anticipated in the defendants' exhibits. But it is not necessary to determine whether either the tube or the air distributor was novel in itself as the combination only is claimed, and I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber and the perforated plate constructed as in the Ambrose patent and per

forming its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector, was unknown prior to the date of the patent.

But the learned Judge adds,

"The important question in the case is whether the lamp which is described and claimed in the second claim of the reissue is the same invention which was described and claimed in the specification of the original patent."

This question the Circuit Court decided in favor of the defendants, and ordered a decree dismissing the bill.

The learned Judge relied, as will be seen upon the case of Gill vs. Wells, 22 Wallace, then recently published, as an authority constraining him to the conclusion that as the combination claim of the reissue was for a less number of elements than those enumerated in the claim of the original patent, the reissue was for a different invention and void.

From this decree the complainants appeal and under that issue submit the following additional statements.

STATEMENT AS TO THE ORIGINAL LETTERS PATENT.

Letters Patent were issued to Joshua A. Ambrose, bearing date October, 1860, for "Improvement in Lamps."

The described invention consisted in part

"in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate arranged as hereinafter described to effect the desired end." Appendix, folio 2.

The patentee says:

"I am aware that dome shaped heaters have been previously used and also that perforated caps have been used in connection with said heaters, and I do not claim said parts when separately considered, but

I do claim and desire to secure by Letters Patent

1st. "The arrangement of the heaters G H with a space between them communicating directly with the external air, in connection with the collar *p* and plates *gg* fitted on top of the wick tube E, and the perforated cap C substantially as and for the purpose set forth."

2d. "In combination with the parts aforesaid the vapor tube F placed within the cap C and adjoining or contiguous to the wick tube as and for the purposes specified."

Appendix, folios 13 and 14.

This vapor tube was in the specification described and in the drawings shown as being,

"a tube F, the lower end of which communicates with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate C."

Appendix, folio 5.

and the purpose of the tube and the perforated plate was stated to be,

"The tube F admits all vapor generated in the body A of the lamp escaping up into the heater G and to the flame, the perforated plate C preventing the ignition of the vapor below the orifice of the tube." Appendix, folio 10.

The patentee says

"By this arrangement the flame is supplied with sufficient oxygen without a chimney, to support proper combustion and produce a brilliant illuminating flame, and the vapor which passes up through the tube F is consumed without danger of being ignited below the orifice of said tube."

Appendix, folio 12.

That part of the arrangement by which the patentee expected to dispense with a chimney, consisted of "a copper dome shaped" deflector, designated in the patent as the "heater G" secured in its proper place on the upper end of the cap *c*.

"On the outer side of the heater G there are vertical ribs *s* at the lower end of which are projections *t*, these projections serve as bearings for a heater H which is similar to G in form. The ribs and projections *t* admit of a space *u* being between the two heaters, and the upper end of the heater H is slotted as shown at *v* and has a plate *w* extending upward from each end of it and inclined at an angle of about 45°."

Appendix, folios 9 and 10.

The patentee says the effect of this arrangement is to

"cause a draught to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater G and becomes intensely heated, so as to supply the flame with warm oxygen * *. Between the two heaters GH oxygen passes and becomes highly rarefied and unites with the carbon of the flame insuring perfect combustion."

Appendix, folio 11.

It was by the combination of this arrangement for passing highly rarefied air between the deflector and the outer heater, with the vapor tube and the perforated plate, that the patentee expected to achieve the double object of his invention which he states to be,

"The object of this invention is to obtain a lamp that will burn without a chimney and without danger of explosion, those hydro carbons which are volatile and contain an excess of carbon." Appendix, folio 2.

STATEMENT OF FINDING OF CIRCUIT COURT AS TO THE ORIGINAL LETTERS PATENT.

"This lamp was not a success as a lamp which would burn without a chimney and did not go into general use; but it contained valuable features. The tube F conducted the gas from the fount to a point near the end of the wick tube so that the gas was conveyed to the flame, and was consumed, and thus the danger was materially diminished. In addition, the upper part of the perforated cap C was a minutely perforated plate or disc, which extended transversely over the entire top of the cap below the flame and prevented the return of lighted gas to the lamp fount below or the ignition of gas within the cap C upon the principle of Sir Humphrey Davy's safety lamp. Thus the combination of the tube and the perforated plate prevented the danger of explosion. The perforated plate also performed the office of a distributor of air into the space when the wick was lighted, and to the flame.

Lamps having these characteristics in connection with other well known parts of volatile oil lamps, a wick tube, a dome shaped chamber which serves to direct the air to the flame, and is generally called a deflector, and a chimney, were subsequently manufactured by the owners of the patent and went into general use." Record, folios 73 to 75.
Appendix, folios 36 and 37.

* * * "I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber, and the perforated plate constructed as in the Ambrose patent and performing its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector was unknown prior to the date of the patent." Record, folio 78.
Appendix, folio 39.

STATEMENT OF FINDING OF CIRCUIT COURT AS TO THE REISSUED LETTERS PATENT.

"The patent was reissued for the second time in 1876."

Record, folio 75.

"The descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification. In the new specification prominence is given to the perforated plate C which is called "a perforated air distributor which with the deflector forms the combustion chamber."

The second claim, which is the only one alleged to have been infringed, is as follows:

"The combination in a lamp burner of the following elements: first, a deflector; second, a perforated air distributor which with the deflector forms the combustion chamber; third, a wick tube extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to the combustion chamber substantially as described." * * *

Record, folios 75–76.
Appendix, folio 38.

The important question in the case is whether the lamp which is described and claimed in the second claim of the reissue is the same invention which was described and claimed in the specification of the original patent.

The principles upon which the decision of this case rests are stated in Gill vs. Wells (22 Wall, 1.) and in Stevens vs. Pritchard (10 Pat. Off. Gazette, 505). In the former case the Court say:

"Very different rules however apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication or intimation that any other inven-

tion of any kind has been made. Such a patentee as the one last mentioned, may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee on the combination of the smaller number of the ingredients by a surrender of his first patent and a reissue of the same which shall include the second combination as well as the first, because the reissued patent in that event would not be for the same invention as the surrendered original."

Record, folios 78–79–80.
Appendix, folio 41.

The second claim of the reissued patent described an article materially different from the article which was originally patented. The claim contained a combination of a lesser number of ingredients than the combination which composed the original invention. One of the heaters and all of the caps except the perforated plate have disappeared. The deflector of this claim is not the heater G of the original specification because no single deflector was therein described, except in its relations to, and as connected with the outer heater. * * Had the patentee in his original specification suggested that a lamp containing the modified combination of the second claim of the reissue was possible and within the range of his invention, or that the combination of the vapor tube and the air distributor with the other well known parts of a lamp would accomplish a beneficial result, the claim of the reissue would not have been a violation of the rule of law which has been quoted. But upon the face of the two patents I am of opinion that the claim of the reissued patent is for a different invention from any combination which is indicated or suggested in the original specification as capable of embodiment, so as to compose an organized structure, or a distinct part of an organized structure. A decree should be entered dismissing the bill."

Record, folios 82–83.
Appendix, folios 43–44.

Errors Assigned.

We submit the Circuit Court erred in dismissing the bill upon the theory that the reissued patent is invalid because it is for an invention different from the invention described and claimed in the original patent.

Points of Law.

It is not to be disguised that the quotation from *Gill vs. Wells*, as given by the learned Judge, isolated from its context, would seem to sustain the broad proposition that if the claim of an original patent is for a combination of instrumentalities or ingredients, and if it be surrendered and reissued, claiming one or more sub-combinations of these instrumentalities or ingredients, the reissue is *ipso facto*, void, irrespective of the question whether the omission of the patentee to claim the sub-combinations in his original patent, resulted from accident, inadvertence or mistake, and irrespective also of the question whether each feature of such sub-combination is, or is not, to be found clearly described in the specifications and drawings of the original patent.

But we submit that uniformly—with the exception of the case at bar—Courts have held that the decision of the Supreme Court in *Gill vs. Wells*, construed in relation to its context and its application to the facts of that case, does not sustain the proposition that where a patent is for a combination of old ingredients, the invention is so restricted to that combination, as that if one ingredient is relinquished, the combination being gone, the invention is gone, and a reissue granted with a claim to the retained ingredients is for a different invention and invalid.

"In *Gill vs. Wells* (above cited) the reissues omitted one well described ingredient of the patented combination and substituted in its place several other devices, not equivalents, for the omitted elements, nor claimed to be such, and the Court held that this was not admissible and that the reissues were not for the original invention."

Johnson J., Herring vs. Nelson, 14 Blatch., 293.

But says the same learned Judge, page 303, commenting upon the attack there made upon the validity of the reissue:

"The (defendants') position is this, that where a patent is for a combination of old elements producing a new and useful result, the invention consists only in the combination, and, therefore, when one element is relinquished, the combination being gone, the invention is gone likewise. * * It is sought to establish a distinction between patents for combination of old elements and all other patents in regard to reissues, and to deny the power to reissue such a patent for a combination of any fewer elements than were contained in the original combination. Now the patent act makes no such distinction. Its terms are general and relate alike to all patents."

And he refers to the Corn Planter case, 23 Wall. 181, as sustaining his views.

Judge Nixon, in *Kerosene Lamp Heater Co. vs. Littell* (13 Off. Gaz., p. 1009), (Decisions of Comm'r of Patents, 1878, p. 284), says:

"I first had the impression that the reissue in this case came within the principle of the reissue in *Gill vs. Wells* (22 Wall. 1), which the Supreme Court held invalid because one of the elements of the original combination was dropped in the reissue, and a full description of several other devices in lieu thereof inserted, without any allegation that they were equivalents of the one stricken out. Such a change was held to be the intro-

duction of new matter constituting a different invention, because it did not appear that the new devices were known at the date of the original invention as proper substitutes for the ingredients left out.

But it will be observed that the Court did not say in that case, nor in view of their subsequent decision in the Corn Planter case (23 Wall. 181), do I think it ought to be said, that when the patent is originally taken out for a single combination, a reissue may not be had in which separate claims may not be made for sub-combinations of a part of the elements joined in one in the original invention."

So in *Tussell vs. Spaeth*, 14 Off. Gaz., p. 377, Decisions of Comm'r of Patents, p. 331, Judge Nixon says:

"The single claim of the original was for a combination of instrumentalities. * * All of the subdivisions of the combinations in the several claims of the reissue are found in the schedule and drawings of the original patent. It does not appear that anything new has been added or that any matter essential to, or characteristic of, the invention has been omitted. So far from such a reissue being condemned by *Gill vs. Wells* (22 Wall. 24), as was maintained by the Counsel for the defendants, it would seem that the learned Judge who delivered the opinion of the majority of the Court, in that case meant to allow it."

"On the part of the defendants the case of Gill vs. Wells (22 Wall. 24), has been cited as being on all fours with this case and an authority adverse to the position of the Plaintiffs. If I am correct in my understanding of the patents under consideration the case in hand is not precisely like the case of *Gill vs. Wells*, because there, not only was there an omission of one well described ingredient of the patented combination, but there were substituted in its place several other devices not equivalents for the omitted element."

Benedict J., Johnson vs. Railroad Co., 16 Blatch., 198.

In *Christman vs. Rumsey*, 17 O. G., 905, Judge Blatchford says:

"It is further contended that the reissue is not for the same invention or for any invention described in the original specification as the invention of the patentee. The cases of Gill vs. Wells (22 Wall. 1), and Russell vs. Dodge (3 Otto, 460), are relied on as authorities.

The claim of the original patent was this:

"A pump-filter composed of the parts A, B and C, substantially as and for the purposes described."

It is urged that such claim included the three distinct parts A, B and C in combination, embracing the whole of the structure described; that there is no suggestion in the original specification that the patentee had invented any combination of parts less than the whole, and that each of the claims of the reissue is for a combination of parts less than the whole, and is therefore void.

The view taken by this Court in *Herring vs. Nelson* (before cited) of the decisions in *Gill vs. Wells* and *Russell vs. Dodge* seems to me to be a sound one. Under the decision in the Corn-Planter Patent (23 Wall. 181) which was subsequent to that in *Gill vs. Wells*, the reissue in the present case cannot be held to be void. The drawings of the original and reissue being the same and the two specifications describing the same mechanical structure with the same mode of operation, it must be held to be lawful to reissue the patent with claims to combinations of fewer elements than were contained in the combination claimed in the claim of the original patent. The original claimed a general and larger combination, and the reissue claims sub-combinations which enter into such general and larger combination. Such a reissue was sustained in the Corn Planter Patent on the ground that the reissue was for things contained within the apparatus described in the original patent and against the efforts to control the case by the decision in *Gili vs. Wells.*"

We submit then that the rule of law stated in *Gill vs. Wells* as construed by its context and interpreted by later decisions, does not sustain the position that if the claim of an original patent is for a combination of instrumentalities or ingredients and it be surrendered and reissued claiming one or more subcombinations of those instrumentalities or ingredients, the reissue is *ipso facto* void.

Such reissued patent may be good and it may be bad.

To make it good, the patentee must be able to find and to point out in the specification and drawings of the original patent or in the patent office model, all the features of each subcombination, or the equivalent thereof well known as such at the date of the original patent, and he must prove that the omission by him to claim such subcombination in the original patent was not his fault, but occurred by inadvertence, accident or mistake.

That the original patent of Ambrose was inoperative and invalid by reason of a defective or insufficient specification or claim, and that the error arose by inadvertence, accident or mistake, and without any fraudulent or deceptive intention on the part of the patentee has been conclusively established by the action of the commissioner to whom alone the decision of these questions belonged.

Herring vs. Nelson, 14 Blatch., 300.
Seymour vs. Osborn, 11 Wall., 543.

It only remains then to compare the original with the reissue, and upon such comparison to discover whether the second claim of the reissue includes any ingredient not described and shown in the original

specification and drawings, and if it does, whether such ingredient is or is not an equivalent for the omitted ingredient described and shown in the original specification or drawings, well known as such equivalent, at the time the original patent issued.

Upon this point we might rest content with the finding of the Court below, that

"The descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification." Record, folio 75.
Appendix, folio 37.

But it is easy to verify this finding of the Court by an inspection of the two patents.

The ingredients of the second claim of the reissue are four.

1st. A deflector.

2d. A perforated air distributor.

3d. A wick tube.

4th. A tube or passage conducting gas from the fount to the combustion chamber.

Record, folio 76.
Appendix, folio 31.

Each and all of these features are found clearly described in the original specification and fully shown in the drawings.

It will be convenient in making the comparison to reverse the order in which they are stated in the claim.

4th ingredient.

"A tube or passage to conduct the gas from the fount to the combustion chamber."

Extract from original.

"Adjoining the wick tube D there is a tube F, the lower end of which communicates with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate *c*." Appendix, folio 5.

* * "The tube F admits of all vapor generated in the body A of the lamp escaping up into the heater G and to the flame, the perforated plate C preventing the ignition of the vapor below the orifice of the tube." Appendix, folio 10.

3d Ingredient.

"A wick tube extending from the fount to the combustion chamber."

Extract from orginal.

"The wick tube D is of the usual flat form and in it the wick E is fitted, the wick extending down into the body A of the lamp." Appendix, folio 5.

2d Ingredient.

"A perforated air distributer which with the deflector forms the combustion chamber."

Extract from original.

"Adjoining the wick tube D there is a tube F, the lower end of which communicates with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate C." Appendix, folio 5.

"The perforated plate C preventing the ignition of vapor below the orifice of the tube." Appendix, folio 10.

1st Ingredient.

"A deflector."

Extract from original.

"On the upper end of the cap C there is placed a copper dome shaped heater G, which is secured in proper position by a thumb screw *m*. This heater is slotted at its upper end as shown at *m*, and at the center of the slot there is fitted a longitudinal bar *o*, the latter dividing the slot *n*, into two longitudinal parts." Appendix, folio 8.

* * "I am aware that dome shaped heaters have been previously used * * and I do not claim said parts when separately considered." Appendix, folio 13.

It is conceded that the copper dome shaped heater G is neither more nor less than a "deflector."

But the original patent added to this deflector or heater a description of another heater so attached to and connected with, the outer periphery of the dome shaped deflector, as to allow a space between the two, through which rarefied air could pass up to the flame, and this outer heater was described and intended as a substitute for a chimney.

The patentee says in the original specification

"By this arrangement the flame is supplied with sufficient oxygen without a chimney to support combustion."

Appendix, folio 12.

He was mistaken in his expectation that this outer heater would perform the functions of a chimney and answer as a substitute therefor.

The Circuit Court found

"This lamp was not a success as a lamp that would burn without a chimney and did not go into general use."

Record, folio 73.
Appendix, folio 36.

If the discovery of this mistake destroyed the utility of the lamp and the removal of the outer heater extinguished all title to public favor as a new and useful article, or if the outer heater being removed, there was no known equivalent that would perform the functions expected of it, and a new invention must be sought to cure the evil, then the mistake was a fatal one and beyond remedy.

On the other hand, if upon the discovery of this mistake and the removal of the outer heater, the lamp, as described in the original patent, still retained valuable features of which the patentee was the first and original inventor, and if these features could be utilized without any further invention, by simply restoring the old chimney to the place and function which the outer heater had usurped, then we submit the mistake was not fatal and the patent law gave an easy and ample remedy for its correction by surrender and reissue.

Upon this point the Circuit Court found

"This lamp" (speaking of the lamp described in the original patent) "contained valuable features. The tube F conducted the gas from the fount to a point near the end of the wick tube so that the gas was conveyed to the flame and was consumed, and thus the danger was materially diminished. The perforated cap C * * prevented the return of lighted gas to the lamp fount below. * * Thus the combination of the tube and perforated plate prevented danger of explosion. The perforated plate also performed the office of a distributer of air into the space where the wick was lighted and to the flame. Lamps having these characteristics in connection with the other well known parts of volatile oil lamps, a wick tube * * a deflector and a chimney were subsequently manufactured by the owners of the patent and went into general use.

Record, folio 74, 75.
Appendix, folio 36.

"The lamp * * of the reissued claim * * contains one deflector, and is *the ordinary lamp with a chimney, for burning volatile hydro carbons plus the vapor tube and the perforated plate.*"

Record, folio 81.
Appendix, folio 42.

* * "I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber and the perforated plate * * with a wick tube and with either the heater or deflector of Ambrose or the ordinary deflector was unknown prior to the date of the patent."

Record, folio 78.
Appendix, folio 39.

We have then a new invention useful in its best sense as guarding human life from a very common danger. The inventor applied for and obtained a patent on his improved lamp covering the combination of a vapor tube and a perforated plate with other well known parts of volatile oil lamps, but made the mistake of supposing that the invention could be used in further combination with an outer heater affixed to the deflector to better advantage than with an ordinary chimney.

And the question submitted to the Supreme Court is whether this mistake made by inadvertence and without fault on his part divests him of his invention, or whether it is not precisely such a mistake as is recognized by the patent law as good cause for a valid reissue.

The first legislative provision for the surrender of patents and for their reissue is found in the 13th Section of the patent act of 1836. But,

"So strongly was this remedy for the patentee recommended by a sense of justice and of policy that this Court in the case of Grant vs. Raymond, 6 Peters, 218, sustained a reissued and

corrected patent before any legislative provision was made on the subject. * * How much stronger is a case under the statute which secures the rights of the patentee by a surrender, and declares the effect of the reissued and corrected patent."

Battin et al vs. Taggart et al, 17 Howard, 83.

In the case of Grant vs. Raymond above referred to, Chief Justice Marshall gave the opinion. It was decided in 1833.

"It will not be pretended that this question is free from difficulty. * * That sense of justice and of right which all feel, pleads strongly against depriving an inventor of the compensation thus solemnly promised, because he has committed an inadvertent or innocent mistake. * * If by an innocent mistake the instrument intended to secure this privilege fails of its object the public ought not to avail itself of this mistake and to appropriate the discovery without paying the stipulated consideration. The attempt would be disreputable in an individual, and a Court of Equity might interfere to restrain him."

The principles which control the question of the validity of a patent reissued under legislative authority are well settled. A few recent cases only in which they have been recognized and applied are cited.

"If the reissued patent does not upon the face of the instrument embrace anything not substantially described, suggested or indicated in the specification, drawings or model of the original, the defence that the reissued patent is not for the same invention as the original must be overruled. * * On comparing the specification and drawings of the original patent it is found that the drawings are exactly the same, and the Court is clearly of the opinion that there is no such change in the descriptive words of the specification as will support the second defence."

Clifford, J.

Thomas et al vs. Shoe Machinery Mfg. Co., 16 O. G. 548.

Decisions Commissioner of Patents, 1879, p. 541.

On comparing the specification and drawings of this reissue with the original Ambrose patent, it will be found the drawings are exactly the same, and the Circuit Court has found that "the descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification."

"The construction and arrangement covered by the claims of the reissued patent are fully shown and described in the specification and drawings of the original application and in those of the original patent. This appears clearly by a perusal of those papers as above set forth. Therefore there is no foundation for the assertion that the reissued patent is invalid because it claims what is not shown or described in the original patent."

Blatchford, J.
Holmes vs. McNeal, 15 Blatch., 122.

"If the reissues are for any other or substantially any different invention from that described in the original, they are unquestionably void. That the specification or claims of the patent are different, the invention or discovery remaining the same, is of no consequence. The very object of the reissue is to correct the patent so as to make it conform to the invention. The principal objection to these reissues is the specification of a metal canceller in the combination, as well as a canceller of wood, cork, or other elastic material. If a metal canceller had not been mentioned or alluded to, it might well be said that it did not enter into nor form any part of the conception of the inventor, but it was mentioned in the original. It was mentioned as not being so useful or desirable in the combination as the elastic one; but nevertheless it was mentioned as forming a part of an arrangement not patented or desired. The inventor or owner when the reissues were applied for, desired it, the invention comprehended it, and the patent was made to cover it." Wheeler, J., Campbell vs. James, 18 O. G. 981.

"Nothing is seen to show that the original is not valid for what it claimed. If the statute by specification meant that and no more, then on the patents themselves it would appear there was no ground for reissue. But the word seems to be used in a broader sense, and to be intended to cover the specification of claim as well. In that sense, there was a defective specification of the invention as patented, and the patent was inoperative and invalid for that part of the invention not covered by the claim. The invention specified in each is precisely the same. The original did not cover the whole of it and so was inoperative as to part. The reissues do cover the whole. They seem to fall exactly within the intention of the statute in this particular (Seymour vs. Osborne, 11 Wall., 516)."

Wheeler, J., Anelin vs. Higgins, 15 Blatch., 291.

"In the original patent they, (the seats), were to be turned up by weights, when not held down by being sat upon. In the reissue the weights may be dispensed with and the seats moved upward otherwise, or retained. It is argued that so far as they are dispensed with, one element of a combination is removed and a different invention produced. This if well founded might be fatal to the patent; but the weights had nothing to do with the capability of the seats for being turned up out of the way. They were the means only for pulling them out of the way. They were one part of the invention when arranged for that purpose: the construction of the seats was another. The reissue divided the invention into its two parts, when divided, the parts together were the same as before, and separately were the same as the parts were before."

Wheeler, J., Allen vs. City of New York, 17 O. G., 1281.

The facts in that case fit this case.

Ambrose in his original patent divided his invention into two parts. One part was to construct "a lamp which will burn without a chimney," the other part was to construct "a lamp which will burn, without danger of explosion, those hydro-carbons which are volatile and contain an excess of carbon."

Appendix, folio 2.

The outer heater of the original patent resting on the rib projections of the deflector, has nothing to do with the capability of the lamp to guard against explosion. It was a part of the arrangement which the inventor then contemplated might be used in connection with the non-explosive device, but used only for the purpose of dispensing with a chimney, a purpose wholly independent of the function assigned to "the vapor tube" and "perforated plate," and having no more to do with their capability to perform that function than had the weights to do with the capability of the seats for being turned up out of the way. The heater was one part of the invention when the lamp was arranged to burn without a chimney. The construction of the vapor tube in its combination with the perforated plate was another part of the invention. The reissue divided the invention into these two parts and claimed each part separate and independent of the other.

"The important question in the case is whether this specification enlarges the invention by the introduction of new matter, and the reissue is therefore rendered void. The reissue describes the invention in broader terms than were used in the original specification or in the original claims, and, therefore, putting a narrow construction upon the words "applied for" the reissue describes a broader invention than was originally applied for, because the claims and specification were harmonious; but it describes the invention which the history of the art and the patent shows should have been applied for, and the same invention which aided by the light which is thrown upon the original patent by the knowledge of the state of the art, we can see formed the subject of the original specification, but was then cramped within too narrow bounds. There is more matter in the reissue than was contained in the original, and it is matter which presents the invention as consisting of two

separate and independent features, whereas, by the original, it was presented as consisting of those two features in combination; but the original imperfectly described the invention which was really made, though it correctly described the invention which was embraced in the claim. Is such matter new matter within the meaning of the statute?"

This question was asked in 1880 (*Yale Lock Mfg. Co. vs. Scoville Mfg. Co., Federal Reporter*, vol. 3, p. 297), by the same learned Judge who in 1877 held this reissue to be invalid. There is a close analogy between the two cases. In each, the claims and specifications of the original patent were in harmony; and in each the specifications of the original described an invention, which, aided by the light of the state of the art as then known, we can see was set forth in the original specification and should have been applied for. But in each the claim cramped the invention within too narrow bounds. In each, the cramp resulted from the same cause. The patentees both made the mistake of combining in their claims two separate and independent features. They each sought to correct that mistake by the surrender of the original patents which "imperfectly described the invention which was really made, though it correctly described the invention which was embraced in the claim," and by obtaining a reissue which would cover the real invention of the separate and independent features.

"Is such matter new matter within the meaning of the statute?"

The Circuit Court, from whose decree, passed in 1877, this appeal is taken, said that it was, that the reissue was for a different invention from that embodied

in the original patent and dismissed the bill. The same Court in 1880, in answer to the same question, said,

"If the patentee has made a palpable mistake, and has limited his real invention by a misstatement of its principles, so that he is about to lose the fruit of his labor, he should be permitted to re-state, and, if need be, enlarge his specification so as to include the same invention which was plainly the subject of, but was not fully secured by, the original patent; although, literally, the enlarged invention is one which he did not apply for in his original specification, because that specification, by a misstatement of his actual invention, applied for a narrower patent than he was entitled to have. As thus explained there is no substantive new matter in the reissued specification."

Shipman, J., Yale Lock Mfg. Co. vs. Scoville Mfg. Co.
Federal Reporter, Vol. 3, p. 297.

The conflict between these two answers, we can see, is because Circuit Courts are tribunals subordinate to the Supreme Court. While the opinion of that Court in *Gill vs. Wells* stood without question or qualification —as it did when this case was decided in 1877—the Circuit Court of the District of Connecticut was bound to follow its apparent law. The decision of a majority of the Supreme Court in the Corn Planter case, "against the effort to control the case by the decision in *Gill vs. Wells*," and the unanimous acceptance of the law of that case by the subordinate tribunals, compelled the Circuit Court of the District of Connecticut in 1880, to a different conclusion.

The appellants respectfully submit that this reissue is a valid patent.

JOHN S. BEACH,
Counsel for Appellants.

APPENDIX.

SPECIFICATION OF ORIGINAL LETTERS PATENT ISSUED TO JOSHUA E. AMBROSE, DATED OCTOBER 16, 1860, FOR AN "IMPROVEMENT IN LAMPS."

To all whom it may concern :

1 Be it known that I, J. E. Ambrose, of Batavia, in the County of Kane, and State of Illinois, have invented a new and improved Lamp, and I do hereby declare that the following is a full, clear and exact description of the same, reference being had to the annexed drawings, forming part of this specification in which

Figure 1 is a vertical central section of my invention, taken in the line x, x, Fig. 2.

Figure 2 a plan or top view of ditto.

Figure 3 a plan or top view of ditto, with the heaters detached.

Figure 4 a detached plan or top view of the wick-adjust-
2 ing mechanism.

Similar letters of reference indicate corresponding parts in the several figures.

The object of this invention is, to obtain a lamp which will burn without a chimney, and without danger of explosion, those hydro-carbons which are volatile and contain an excess of carbon.

The invention consists in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate arranged as hereinafter described to effect the desired end.

The invention also consists in a wick-adjusting mechanism so arranged as to admit, when operated, of the wick being elevated with certainty, and when not used, admit-
4 ting of the wick being in a loose, free state within the tube, without being subjected to any pressure which would retard the free ascent of the oil in the wick.

To enable those skilled in the art to fully understand and construct my invention, I will proceed to describe it.

A. Fig. 1, represents the upper part of the body of a lamp, provided with a socket, B, at its upper end to receive . . . . the cap, C, the lower end of which is provided with a screw flange, *a*, which screws into the socket, B. The cap, C, is of cylindrical form, and may be constructed of perforated sheet metal, the lower end having a plate, *b*, fitted 5 in it, from which the flange, *a*, projects, and the upper end having a perforated plate, *c*, fitted in it.

Within the cap or perforated cylinder, C, there is secured, centrally, a wick tube, D. This wick tube is of the usual flat form, and in it the wick, E, is fitted, the wick extending down into the body, A, of the lamp. Adjoining the wick tube, D, there is a tube, F, the lower end of which communicates with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate, *c*. 6

The wick tube, D, at one side, the side opposite to that where the tube, F, is attached, has an enlarged space or a chamber, *d*, in which the inner end of a horizontal shaft, *e*, passes. This shaft, *e*, has a horizontal rod, *f*, fitted on it containing spurs, *g*, the rod and spurs being within the chamber, *d*. On the shaft, *e*, there is placed loosely a metal plate, *h*, said plate being at the outer side of the chamber, *d*, the latter having its side slotted to admit the shaft, "*e*," 7 and rod, *f*. On the shaft, *e*, there is placed a spiral spring, *i*, the inner end of which bears against the plate, *h*, the outer end bearing against a plate or step, *j*, which is attached permanently to shaft, *e*. The spring, *i*, it will be seen, has a tendency to keep the shaft, *e*, shoved outward to the extent of its movement, and keep the rod, *f*, and spurs, *g*, within the chamber, *d*, and free from the wick, E. On the shaft, *e*, and at the outer side of the cap, C, there is secured a plate, *k*. The shaft, *e*, passes through a slot, *l*, in the cap, C.

In order to raise or lower the wick, E, the shaft, *e*, is pressed inward, and the spurs, *g*, will penetrate the wick, 8 and by raising or lowering the shaft, *e*, the wick will be

raised or lowered accordingly. The plate, *h*, covers the slot in the side of the chamber, *d*, and prevents the escape of gas or vapor from the wick tube and chamber, *d*, the plate, K, retains the rod, *e*, in a horizontal position as it is raised and lowered.

On the upper end of the cap, C, there is placed a copper dome shaped heater, G, which is secured in proper position by a thumb screw, *m*. This heater is slotted at its upper end as shown at *n*, and at the center of the slot there is
9 fitted a longitudinal bar *o*, the latter dividing the slot, *n*, into two equal longitudinal parts.

The wick tube, E, extends some distance above the perforated plate, C, and on its upper end a collar, *p*, is fitted, said collar having plates, *q*, projecting from it, slightly inclined from a horizontal plane. Between the inner ends of the plates, *q*, and the collar, *p*, there are openings, *r*.

On the outer side of the heater, G, there are vertical ribs, *s*, at the lower ends of which there are projections, *t*. These
10 projections, *t*, serve as bearings for a heater, H, which is similar to G, in form. The ribs and projections, *t*, admit of a space, *u*, being between the two heaters, and the upper end of the heater, H, is slotted, as shown at *v*, and has a plate, *w*, extending upward for each end of it, and inclined at an angle of about 45°.

The tube, F, admits of all vapor generated in the body, A, of the lamp, escaping up into the heater, G, and to the flame, the perforated plate, C, preventing the ignition of the vapor below the orifice of the tube.

The plates, *q*, of the collar, *p*, and the openings, *r*, cause a draught to ascend directly upward to the flame, and air
11 is also deflected directly against the inner sides of the heater, G, and becomes intensely heated, so as to supply the flame with warm oxygen. The bar, *o*, in the slot, *n*, of heater G, serves to divide the flame, and prevents it from ascending up through the slot, *n*, before the carbon is consumed. Between the two heaters, G, H, oxygen passes and becomes highly rarefied, and unites with the carbon in the flame, insuring perfect combustion.

The plates, *w*, at the ends of the slot, *v*, of heater, H,

serve to spread the flame and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot, *n*, in heater, G, is merely a 12
gas-generating flame, the illuminating flame having its base at the slot, *v*, of heater H.

By this arrangement the flame is supplied with sufficient oxygen without a chimney to support proper combustion, and produce a brilliant illuminating flame, and the vapor which passes up through tube, F, is consumed without danger of being ignited below the orifice of said tube.

I am aware that dome shaped heaters have been previ- 13
ously used, and also that perforated caps have been used in connection with said heaters, and I do not claim said parts when separately considered; but

I do claim as new, and desire to secure by Letters Patent,

1st. The arrangement of the heaters G, H, with a space between them communicating directly with the external air, in connection with the collar, *p*, and plates, *q*, *q*, fitted on the top of the wick tube, E, and the perforated cap, C, substantially as and for the purpose set forth.

2d. In combination with the parts aforesaid, the vapor 14
tube, F, placed within the cap, C, and adjoining or contiguous to the wick tube as and for the purpose specified.

3d. The shaft, *e*, provided with the rod, *f*, and spurs, *g*, which are within the chamber, *d*, of the wick tube, in connection with the plates, *h*, *j*, *k*, and spring, *i*, on said shaft, all being arranged to operate as and for the purpose set forth.

JOSHUA E. AMBROSE.

Witnesses:

L. W. BENDIE,
M. M. LIVINGSTON. 15

L. A. B.

SPECIFICATION OF REISSUED LETTERS PATENT GRANTED TO JOSHUA E. AMBROSE, ASSIGNOR, BY MESNE ASSIGNMENTS, TO EDWARD MILLER & CO., OF MERIDEN, CONN., FOR IMPROVEMENT IN LAMPS.

To all whom it may concern :

Be it known that I, JOSHUA E. AMBROSE, of Plattsville, in the county of Weld and Territory of Colorado, have invented a new Improvement in Lamps; and I do hereby declare the following, when taken in connection with the accompanying drawings and the letters of reference marked thereon, to be a full, clear, and exact description of the 15 same, and which said drawings constitute part of this specification, and represent, in—

Figure 1, vertical central section; Fig. 2, top view; Fig. 3, a top view with the heater detached; Fig. 4, detached plan or top view of the wick-adjuster.

This invention relates to an improvement in that class of burners designed for burning hydrocarbons. In this class of burners the wick-adjuster must necessarily penetrate the 16 wick-tube in order to come in contact with the wick. In the use of these burners it is found that the gas which is unavoidably generated within the lamp will escape through the tube around the wick-adjuster and pass off to mingle with the surrounding atmosphere to the discomfort of persons near, if not detrimental to their health, and as this gas is highly inflammable it frequently ignites from the flame 17 of the lamp, and often causes explosion.

The object of this invention is to combine with the wick tube and adjuster such a means of escape for the gas that it may pass so freely directly to the flame as to be there consumed, and thus prevent its escape around the adjuster; also, the construction of a burner which may be used without a chimney.

The invention consists, first, in combining with the wick 18 tube and adjuster an auxiliary passage leading directly from

the lamp up to within such proximity to the flame that the gas from the lamp, flowing freely through this auxiliary passage, will pass to and be consumed by the flame; second, in combining in a lamp-burner a deflector, a perforated air-distributer, with the deflector forming the combustion-chamber, a wick-tube extending from the fount to the
19 combustion-chamber, an adjusting device to regulate the elevation of the wick, and a tube to conduct the gas from the fount to the chamber above the air-distributer; third, in the employment of a perforated cap, wick-tube, heaters, and deflecting-plate, combined and arranged as hereinafter described; fourth, in a wick-adjusting mechanism, arranged so as to admit of the wick being elevated with certainty, and when not in use allow the wick to be loose and free
20 within the tube—that is, without any pressure from the adjuster—to allow the free flow of the oil.

A represents the upper or neck portion of the body of a lamp, provided at its upper end with the usual socket B, to receive the cap C, the lower end of the cap being provided with a threaded flange, *a*, to fit the corresponding thread in the socket. The cap C is, by preference, of cylindrical form, and constructed from perforated sheet metal, the lower end having a plate, *b*, fitted into it, the said plate
21 being a part of, or attached to, the flange *a*. *c* is a perforated air-distributer, which, with the deflector, forms the combustion-chamber, into which the wick-tube D extends. Within the tube the wick E is arranged, and the tube is fitted with an adjuster, (here represented as an improved adjuster,) to be hereinafter described. An auxiliary tube or passage, F, is formed, the lower end of which communicates with the interior of the body of the lamp, and the
22 upper end opening near the upper end of the wick tube, so that the gas which is generated within the lamp, instead of passing out through the opening in the tube for the wick-adjuster, as it otherwise would, will pass up through this tube or passage in such proximity to the flame that it is consumed. The termination of this tube is here represented as at the perforated plate *c*, the perforations of the plate
23 being sufficient for the free passage of gas to the flame. On

the upper end of the cap C there is placed a copper dome-shaped heater, G, which is secured in proper position by a thumb-screw, *m*. This heater is slotted at its upper end, as shown at *n*, and at the center of the slot there is fitted a longitudinal bar, *o*, the latter dividing the slot *n* into two equal longitudinal parts. The wick-tube D extends some distance above the perforated plate *c*, and on its upper end 24
a collar, *p*, is fitted, the said collar having plates *q* projecting from it slightly inclined from a horizontal plane. Between the outer edges of the plates *q* and the collar *p* there are openings *r*. On the outer side of the heater G there are vertical ribs *s*, at the lower ends of which there are projections *t*. These projections *t* serve as bearings for a heater, H, which is similar to G in form. The ribs and projections *t* admit of a space, *u*, being between the two heaters, and the upper end of the heater H is slotted, as shown at *v*, Fig. 2, and has plates *w*, extending upward from each end 25
of it, and inclined toward each other at an angle of about forty-five degrees. The plates *q* of the collar *p* and the openings *r*, cause a draft to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater G, and becomes intensely heated, so as to supply the flame with warm oxygen. The bar *o* in the slot *n* of the heater G serves to divide the flame, and pre- 26
vents it from ascending up through the slot *n* before the carbon is consumed. Between the two heaters G H oxygen passes, and becomes highly rarefied, and unites with the carbon in the flame, insuring perfect combustion.

The plates *w*, at the ends of the slot *v* of the heater H, serve to spread the flame and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot *n* in the heater G is merely 27
a gas-generating flame, the illuminating flame having its base at the slot *v* of the heater H. The wick-tube D at one side (the side opposite that to which the tube F is attached) has an enlarged space or a chamber, *d*, in which the inner end of a horizontal shaft, *e*, passes. This shaft *e* has a horizontal rod, *f*, fitted on it, containing spurs *g*, the rod and spurs being within the chamber *d*. On the shaft *e* there is 28

placed loosely a metal plate, *h*, the said plate being at the outer side of the chamber *d*, the latter having its side slotted to admit the shaft *e* and rod *f*. On the shaft *e* there is placed a spiral spring, *i*, the inner end of which bears against the plate *h*, the outer end bearing against a plate or step, *j*, which is attached permanently to the shaft *e*. The
29 spring *i*, it will be seen, has a tendency to keep the shaft *e* shoved outward to the extent of this movement, and keep the rod *f* and spurs *g* within the chamber *d*, and free from the wick E. On the shaft *e*, and at the outer side of the cap C, there is secured a plate, *k*. The shaft *e* passes through a slot, *l*, in the cap C.

In order to raise or lower the wick E the shaft *e* is pressed inward, and the spurs *g* will penetrate the wick, and by raising or lowering the shaft *e* the wick will be raised or
30 lowered accordingly. The plate *h* covers the slot in the side of the chamber *d*, and prevents the escape of gas or vapor from the wick-tube and chamber *d*. The plate *k* retains the rod *e* in a horizontal position as it is raised and lowered.

I claim as my invention—

1. In combination with the wick-tube and a mechanism for adjusting the wick, an auxiliary tube or passage leading
31 from the lamp upward, to conduct the gas from within the lamp to the flame without the mixture of air with the gas below the upper orifice of the tube, substantially as set forth.

2. The combination, in a lamp-burner, of the following elements: first, a deflector; second, a perforated air-distributer, which, with the deflector, forms the combustion-chamber; third, a wick-tube extending from the fount to the combustion-chamber; fourth, a tube or passage to conduct the gas from the fount to said combustion-chamber,
32 substantially as described.

3. The combination, in a lamp-burner, of the following elements; first, a deflector; second, a perforated air-distributer, which, with the deflector, forms the combustion-chamber; third, a wick-tube extending from the fount to the combustion-chamber; fourth, a tube or passage to con-

duct the gas from the fount to said combustion-chamber; fifth, an adjusting device to regulate the elevation of the wick, substantially as described. 33

4. The combination of the heaters G H, with a space between them, communicating directly with the external air, in connection with the collar *p* and plates *q q*, fitted on the top of the wick-tube E, and the perforated cap C, substantially as and for the purpose set forth.

5. The shaft *e*, provided with the rod *f* and spurs *g*, which are within the chamber *d* of the wick-tube, in connection with the plates *h j k* and spring *i* on the said shaft, all being arranged to operate as and for the purpose set forth.

JOSHUA E. AMBROSE.

Witnesses:

N. B. DEARBORN,
W. H. AMBROSE.

J. E. AMBROSE.

LAMP.

No. 6,844. Reissued Jan. 11, 1876.

Fig. 1

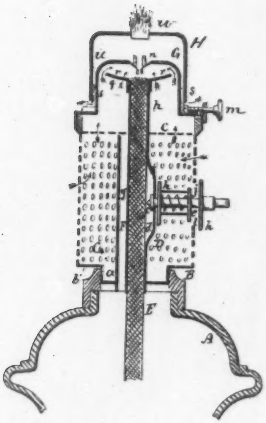

Fig. 2

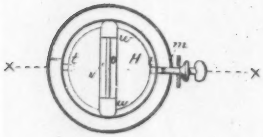

Fig. 3

Fig. 4

OPINION.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

"E. MILLER & CO." *vs.* BRIDGEPORT BRASS CO. } 34

Shipman, J.—

This is a bill in equity to restrain the alleged infringement by the defendants of reissued letters patent which were issued on January 11, 1876, to the plaintiffs as assignees of Joshua E. Ambrose for an improvement in lamps. The original Ambrose patent was dated October 16, 1860, and was re-issued May 20, 1873, and the patent as re-issued was extended for seven years from October 16, 1874.

The principal defenses are that the re-issue is not for the same invention which was described and claimed in the original patent and that the patent is void for want of novelty.

In the original patent the patentee declared the object of 35
his invention to be to obtain a lamp, which will burn without a chimney, and without danger of explosion, those hydro-carbons which are volatile, and contain an excess of carbon, and stated that "the invention consists in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate arranged" as described, and in a wick adjusting mechanism, which last named element is immaterial in this case.

(After quoting from the description given in the original specification the opinion proceeds).

This lamp was not a success as a lamp which would burn 36
without a chimney, and did not go into general use, but it contained valuable features. The tube F, conducted the gas from the fount to a point near the end of the wick tube so that the gas was conveyed to the flame, and was consumed and thus the danger of explosion was materially diminished.

In addition, the upper part of the perforated cap C, was a minutely perforated plate or disc which extended transversely over the entire top of the cap, below the flame (forming the floor of what is styled in the re-issued patent the combustion chamber), and prevented the return of the lighted gas to the lamp fount below, or the ignition of gas within the cap C, upon the principle of Sir Humphrey Davy's safety lamp. Thus the combination of the tube and the perforated plate prevented danger of explosion. The perforated plate also performed the office of a distributor of air into the space where the wick was lighted, and to the flame.

37 Lamps having these characteristics in connection with the other well known parts of volatile oil lamps, a wick tube, a dome shaped chamber, which serves to direct the air to the flame, and is generally called a deflector, and a chimney, were subsequently manufactured by the owners of the patent, and went into general use. The patent was re-issued for the second time in 1876. The specification of the re-issue declares that the invention consists * * * * * secondly "in combining in a lamp burner, a deflector, a perforated air distributor, with the deflector forming the combustion chamber, a wick tube extending from the fount to the combustion chamber, an adjusting device to regulate the elevation of the wick, and a tube to conduct the gas from the fount to the chamber above the air distributor" * * * *. The descriptive portion of the re-issued specification does not substantially differ from the language of the descriptive portion of the original specification. In the new specification prominence is given to the perforated plate, *c*, which is called a perforated air distributor, which with the deflector forms the combustion chamber.

38 The second claim, which is the only one which is alleged to have been infringed, is as follows:

"2. The combination in a lamp burner of the following elements, first, a deflector; second, a perforated air-distributor, which with the deflector, forms the combustion chamber; third, a wick tube extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to the said combustion chamber, substantially as described."

The lamps made by both plaintiffs and defendants contain the heater, G, without the ribs, or projections, or longitudinal bar, in other words, an ordinary deflector, the perforated plate, the vapor tube, and a wick tube, and are in great demand by the public. The utility of the lamp consists in its safety.

A tube which conducted the vapor from the fount to the flame was used in its simplest form in the lamp of William Pratt, patented in 1857. In this lamp the flame was not to be protected from the external air. The wick tubes were the long diverging tubes now in common use.

Air distributors had long been known in lamps of the 39
Ambrose class, but I am of the opinion that the minutely perforated transverse plate, *c*, extending across the lower part of the chamber below the flame, thus forming a perforated floor, and performing the double office of preventing the lighted gas from communicating with the gas in the lamp fount, and also of distributing air to the combustion chamber, had not been anticipated in the defendants' exhibits. But it is not necessary to determine whether either the tube or the air distributor was novel in itself, as the combination only is claimed, and I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber, and the perforated plate constructed as in the Ambrose patent and performing its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector was unknown prior to the date of the patent.

The important question in the case is, whether the lamp 40
which is described and claimed in the second claim of the re-issue is the same invention which was described and claimed in the specification of the original patent.

The principles upon which the decision of this question rests are stated in Gill vs. Wells, 22 Wall. 1, and in Stevens vs. Pritchard, 10 Off. Gazette, 505. In the former case the Court, after declaring the rule to be that where a patentee who has invented a new and useful combination of several ingredients, also claims to have invented new and useful combinations of fewer number of the ingredients,

the inventor is entitled to a patent for the several combinations, and may give a description of the several combinations in one specification and may secure the benefit of each of the inventions by separate claims, and if by inadvertence he should fail to claim one of the described combinations, may surrender the original patent and obtain a re-issue for any combinations which were omitted in the claims of the original patent, proceed to say:

41 "Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication or intimation that any other invention of any kind has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients by a surrender of his first patent, and a re-issue of the same which shall include the second combination, as well as the first, because the re-issued patent in that event would not be for the same invention as the surrendered original."

42 The original patent states the object of the invention to be a lamp which would burn without a chimney, and the entire mechanism is directed to accomplish that object. It consisted, generally, of a wick tube with collar and plates, perforated cap for the conveyance of air, the vapor tube and two peculiarly constructed heaters, the lower one, G, provided with ribs and projections, which serve as bearings upon which the upper heater, H, was placed. The two heaters are related to each other, and the entire arrangement of the two with their various parts is particularly described in the specification to be designed to supply the flame with sufficient oxygen to support proper combustion without a chimney.

The invention so far as the heaters were concerned, consisted in their joint use. The lamp of the second re-issued claim is without this complex arrangement of heaters. It

contains one deflector, and is the ordinary lamp with a chimney for burning volatile hydro-carbons, *plus* the vapor tube and the perforated plate.

The specification of the original patent suggested no in- 43
vention save the one contained in the entire combination. A combination of the vapor tube and the perforated plate, either with one heater, or with the other well-known ingredients of a lamp, was not indicated as a distinct part of the invention. The second claim of the re-issued patent described an article materially different from the article which was originally patented. The claim contained a combination of a lesser number of ingredients than the combination which composed the original invention. One of the heaters and all of the cap except the perforated plate have disappeared. The deflector of this claim is not the heater, G, of the original specification, because no single deflector was therein described, except in its relations to and as connected with the upper heater. The two heaters are described as to be used together and as necessarily related to each other. The whole scope and object of the invention was to produce a lamp by the combined use of the two heaters.

Had the patentee in his original specification suggested 44
that a lamp containing the modified combination of the second claim of the reissue was feasible, and within the scope of his invention, or that the combination of the vapor tube and the air distributor with the other well known parts of a lamp would accomplish a beneficial result, the claim of the reissue would not have been in violation of the rule of law which has been quoted.

But upon the face of the two patents, I am of opinion that the claim of the reissued patent is for a different invention from any combination which is indicated or suggestion in the original specification as capable of embodiment so as to compose either an organized structure, or a distinct part of an organized structure.

A decree should be entered dismissing the bill.

OFFICE SUPREME COURT U. S.
FILED
FEB 28 1881
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

No. 228.

October Term, 1880.

EDWARD MILLER & CO., APPELLANTS,

vs.

BRIDGEPORT BRASS COMPANY.

APPEAL

FROM THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF CONNECTICUT.

SUPPLEMENT BRIEF FOR EDWARD MILLER & CO.,

Appellants and Original Complainants.

JOHN S. BEACH, *Counsel for Appellants.*

NEW HAVEN:
TUTTLE, MOREHOUSE & TAYLOR, PRINTERS.
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The invention described in the patent and embodied in the infringing lamp, is a device in a lamp structure for burning volatile hydrocarbon oils. These oils can be used in common lamps. They are so used. Their cost as compared with heavier oils is trifling. But they are dangerous when so used. The record of injuries, more or less severe, and often fatal from such use, have been, and even now are almost a daily record.

The object of the invention was to guard against this danger, or rather that was one object. Unfortunately the inventor had also another object in view, and that was to dispense with a chimney for a lamp.

"The object of this invention is to obtain a lamp which will burn without a chimney, *and* without danger of explosion, those hydro-carbons which are volatile and contain an excess of carbon." Addition to Record, folio 8.

It was his effort to combine in one patent these two independent features, which has brought the patentee to grief.

If in his original application he had been content to stand upon his devices for preventing explosion, his footing would have been on solid rock.

These devices were very simple. They consisted of a tube or pipe or passage leading from the oil chamber to the combustion chamber, in combination with a minutely perforated plate forming the floor or bottom of the combustion chamber.

The invention was new and useful. Judge Shipman says:

"The utility of the lamp consists in its safety. * * I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber and the perforated plate * * was unknown prior to the date of the patent."
Record, folios 77 and 78.

But the lamp on which the patent was sought had other characteristics which the inventor at the time of his original application supposed would aid in bringing it into general use.

His idea was that by causing highly rarefied air to pass in a space between the dome-shaped deflector and an outer deflector, or heater similar to it in form, he could dispense with the common glass chimney.

No question has ever been made but that the patentee was the inventor of this device for dispensing with a chimney.

It was new, but contrary to his expectation it turned out to be of doubtful utility.

Judge Shipman says:

"The lamp was not a success as a lamp which would burn without a chimney and did not go into general use, but it contained valuable features (describing its non-explosive features). Lamps having these characteristics * * were subsequently manufactured by the owner of the patent and went into general use."

Record, folios 73 and 74.

What was the status of this man Ambrose when he found out that one feature of his invention was valuable and the other was not.

1. As a manufacturer.

2. As an inventor.

When the public tell him, as a manufacturer, that they like his lamp and are anxious to take it into general use as a lamp that will burn these cheap oils without danger of explosion, but that they prefer the old chimney to his new device as a substitute, what will he do as a manufacturer?

Will he insist that if they use his vapor tube and safety plate, they shall also use with them the deflector with rib projections for an outer deflector to allow the passage of heated air between the two? Or will he forego his substitute for a chimney and give the public what

they demand, which in the language of Judge Shipman is, "the ordinary lamp with a chimney *plus* the vapor tube and the perforated plate."

The record tells us, what we should know without evidence, that the manufacturer gave the public what they wanted, and in that form the lamp "went into general use."

What is his status as a *patentee*, when he finds the public demand his safeguard against explosion, but do not want his substitute for a chimney?

His exact device for ensuring safety is copied by other manufacturers, but when he attempts to enforce what he supposes to be his rights, he is advised that although his invention is two-fold, his claim is so worded as to forbid him to interfere with anyone who makes and sells his device acting as a safeguard against explosion, if it be dissevered from his device for dispensing with a chimney.

But, says the patentee, this is all wrong. There is some mistake here. I did not intend the draftsman should so word my claim as to bring about this result. Is there no remedy?

He is advised there is a remedy.

That a statute exists based upon the principle "which pleads strongly against depriving an inventor of promised compensation because of an innocent mistake," which statute secures to him the right of surrender of the defective instrument and the reissue to him of a corrected patent.

The patentee avails himself of this principle of justice and of law. The Commissioner recognizes the mistake, and issues another patent securing to the pantentee the exclusive right to his device for guarding against danger of explosion.

The validity of this reissue is now attacked under the claim that the Commissioner had jurisdiction only to the extent of issuing a corrected patent for the same invention, and this reissue is for a different invention.

We concede that if the premises are true, the conclusion is right. But are they true? The description of the thing claimed is the same in the original and in the reissue.

Judge Shipman says:

"The descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification." Record, folio 75.

The difference then resides in the claim.

A *manufacturer* if fettered by the terms of a contract restricting him in the words of this claim, could of course make safety lamps only when a chimney forms no part of the structure.

So fettered, his manufacture would not as we have seen, prove a success.

But if he can convince a tribunal having jurisdiction over the subject, that this restriction was inserted in the contract by mistake of the scrivener, the contract will be reformed, and being released from his fetters he can supply the demand of the public for "the ordinary lamp with a chimney, *plus* the vapor tube and perforated plate."

But it said if this same mistake is found in the claim of the patent, the pantentee is forever bound, he cannot be released. The Commissioner has no jurisdiction to correct the mistake because,—and here we reach again the assumed premises—the mistake being corrected, the reissued patent is for a different invention.

The fallacy which underlies this assertion is that it assumes the duty of a claim to be to redescribe the invention as set forth in the specification of description. This is not so. The office and duty of the specification of claims are to limit and define the extent of the exclusive rights of the patentee in the thing invented, not to re-describe it in detail.

Take a combination invention with three elements A B and C. The descriptive specification clearly describes them all. They all appear in the drawings and model. The specification of claim is for A and B only. It was a mistake.

Clearly a reissue with a specification of claim to the combination of A, B and C being the exact thing described in the original specification of description and shown in the drawings and model, would not be for a different invention.

Let us go one step further. Suppose in the specification of description and in the drawings and model, A B and C are to be found and in such relations to each other, as to show beyond all doubt that the invention consists of two independent features, one of the combination of A and B, and the other of the combination of B and C, but the specification of claim is made by mistake to cover all the three elements A B and C in combination.

Has the Commissioner no jurisdiction to correct such a mistake?

This is the problem to be solved, and its solution ends this controversy.

We start with the admission that A and B are characterised in the original specification of description, as a combination designed to prevent explosion, and B and C as a combination to be used in lieu of a chimney.

Does the invention of the combination of A and B so described in the original specification of description become a different invention because it was by mistake omitted from the original specification of claim and now appears among the amended claims of the reissue?

We submit that such an argument ignores the distinction between the invention itself as described and as shown in the model and drawings, and the patentee's effort to protect his exclusive rights in that invention in his specification of claim.

The invention itself is one thing, the imperfect evidence of its ownership, is another thing.

A law forbids the use of a barbed wire fence except under certain specified conditions and restrictions, one of which calls for a survey, and provides that the alignment of the fence must follow that survey.

A man buys a field of 100 acres. He procures an accurate survey by courses and distances. Erects his fence, and afterwards discovers that his fence-maker has made a mistake. Could it be said that in correcting that mistake he broke the law by following a different

survey? Clearly not. Under the original fencing, part of his field was unprotected, but it was none the less his field, and it remained the same field when the new fence enclosed it. The survey, so to speak, of this invention, as contained in the original specification of descriptions was correct. It rightly described the territory covered by the invention, but the fence, the claim, whose office it was to bar out trespassers upon the patentee's exclusive rights in this territory, did not follow the survey, part of the territory which ought to have been enclosed was by mistake of the claim maker, left out to commons.

Take another illustration:

A man buys two pieces of land on opposite sides of the same highway. His deeds described A as being bounded north on highway, and B as being bounded south on the same highway. He puts up his barbed fences; the next year the highway is discontinued. Are his fee simple rights in the soil of the highway gone, because he put up his fences under the mistaken belief that the highway would remain?

And yet the argument of the defendants leads us to this result.

The recorded deeds, they say, were the muniments of his title. He put up his fences in precise accordance with the described limits and bounds noted in the deeds. They fully protected his exclusive rights as to every inch of land described in the deeds, and therefore they say the "*locus in quo*" of the old highway is open commons to any tramp who may choose to trespass upon it.

This is not good law. The tramp would be ejected.

But say our opponents the illustration does not hold. We are not arguing what the law ought to be, but we take for our premises what the law says.

In answer to your illustration, suppose we could find a statute law of the State in which the land is located, prescribing in express terms that if a highway is discontinued, the fee shall be divested from the adjoining proprietor who is bounded upon it, and forever remain open to tramp incursions.

We propose, they say, to show you just such a statute law of these United States in relation to patents which enacts that if the claim for exclusive rights of the original patent corresponds with the description of the invention—if the fence follows the deed—no matter what may be the true measure of the exclusive rights of the patentee in that invention, he is to be forever caged within the limits of his first statement of claim.

It is hardly to be supposed that any civilized State would make an enactment stripping the owner of land of his legal rights, as in the case supposed by our opponents: nor is there any occasion to consider the effect of such enactment if made. Our concern is with the enquiry whether Congress has enacted any such law as is here interposed to bar our right to a re-issue.

The barrier is supposed to be found in § 4916 of the revised statutes, which provides,

"Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention a discovery more than he had a right to claim as new, if the error has arisen from inadvertence, accident or mistake, and without any fraudulent

or deceptive intent, the Commissioner shall on surrender of such patent and his payment of the duty required by law cause a new patent for the same invention and in accordance with the *corrected specification* to be issued."

It is said that under this enactment, the Commissioner must find his jurisdiction to re-issue either by reason

1st, of a defective specification, or

2d, of a too broad claim.

We concede the premises: and the concession so narrows the contention, as to leave in controversy only a single point, and that is as to the meaning of the term "specification" in this statute.

The argument that it is restricted to the descriptive part of the invention, and excludes the claim, proves too much. It is conceded that one source from which the Commissioner derives his jurisdiction to re-issue is from a statement of claim that has been made too broad. But this argument forbids him to exercise his admitted jurisdiction over such a re-issue, because the language of the statute permits him only to issue a new patent "in accordance with the *corrected specification.*"

But the specification—as this argument construes that term,—needs no correction. It is correct as it is.

It is the *claim* that needs to be corrected and narrowed to make the patent operative.

But under the logic of this argument the Commissioner having confessed jurisdiction over the invalid

patent and its right to a re-issue to correct its invalidity, is impotent to grant the re-issue because the error to be corrected is not to be found in the specification, but must be looked for in the claim. For this, if for no other reason the word "specification" when used in this clause of the law, must be construed to include claims as well as description.

The "specification" is to be corrected whether its errors are to be found in the specification of description, or in the specification of claim.

Wilson vs. Coon, 19 O G 482.

JOHN S. BEACH,

Counsel for Appellants.

Supreme Court of the United States,

IN EQUITY.

OCTOBER TERM, 1880. No. 228.

APPEAL FROM THE U. S. CIRCUIT COURT,

FOR THE DISTRICT OF CONNECTICUT.

EDWARD MILLER & COMPANY,
Appellants,

vs.

THE BRIDGEPORT BRASS COMPANY.

BRIEF FOR APPELLEE.

By C. R. INGERSOLL,
of counsel.

NEW HAVEN:
HOGGSON & ROBINSON, LAW PRINTERS, 82 CHURCH STREET.
1880.

Hoggson & Robinson, Law Printers.

Supreme Court of the United States,

IN EQUITY.

EDWARD MILLER & COMPANY, APPELLANTS, *vs.* THE BRIDGEPORT BRASS CO.	APPEAL FROM THE CIRCUIT COURT OF THE U. S. FOR THE DISTRICT OF CONNECTICUT.

Brief in behalf of Defendant and Appellee.

This appeal is taken from a decree of the Circuit Court for the District of Connecticut dismissing the complainant's bill, for the reason that the reissued Letters Patent granted to Joshua E. Ambrose, January 11, 1876, for an improvement in lamps, upon which the bill was brought, were not for the same invention as that shown in the original Letters Patent granted to said Ambrose October 16, 1860.

In support of this decree of the Court below the appellee contends :

ine Co. vs Ladd
vs. Langles
t. J. 1880

I. The law on the subject of reissues has been so thoroughly considered by this Court in recent cases, especially in *Gill* vs. *Wells*, 22 Wall. 1. *Collar Co.* vs. *Van Dusen*, 23 Wall. 530. *Russell* vs. *Dodge*, 93 U. S. 460. *Powder Co.* vs. *Powder Works*, 98 U. S. 126, that a discussion of it here cannot be necessary.

That law is aptly summed up in the opinion of the Court in the last mentioned case. (p. 137.)

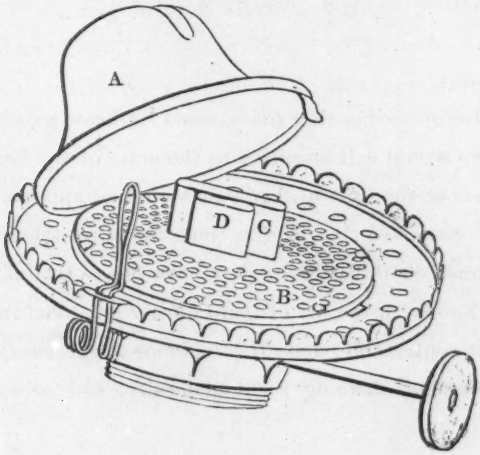
"It seems to us impossible to read the section carefully without coming to the conclusion that a reissue can only be granted for the same invention which *formed the subject* of the original patent of which it is a reissue * * * The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention *attempted* to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions which, *though they might be his*, had not been applied for by him or, if applied for, had been abandoned or waived."

In the present case, we shall undertake to show that the alleged invention which the defendant is claimed to have infringed, did not "form the subject" of the original patent, was not "attempted to be secured" by that patent and is, in fact, for a different combination of ingredients from that exhibited in the original patent—and different, not because it is a *sub*-combination of the ingredients originally claimed in combination, but because the ingredients of the new combination are not the same as those of which the old combination was composed. And, whether a sub-combination or not, no trace of it is to be found in the original specification nor can it be constructed out of the original drawings without their essential alteration.

The combination which the defendant is claimed to have infringed, is a combination of several elements which when united form a lamp-burner designed for burning coal or hydro-carbon oils in connection with a chimney.

It is described in the second claim of the reissued patent, and, taking the claim in its proper connection with the specification, is there declared to be for the combination of the four following elements, neither of which is claimed separately, viz.: 1, a deflector; 2, a perforated air distributor forming with the deflector a combustion chamber; 3, a wick tube; 4, a tube or passage to conduct the gas, from the fount to "near the upper end of the wick tube, so that the gas which is generated within the lamp * * will pass up through this tube or passage in such proximity to the flame that it is consumed."

The complainants claim that this combination is infringed by the defendant's burner. An illustration of the defendant's burner (Exhibit A) which is here given will therefore enable us to define the claim in question as it is construed by the complainant.



This burner shows in combination 1, the ordinary, well known, deflector (A); 2, an air distributor forming with such a deflector a combustion chamber (B); 3, a common wick tube (C); 4, a conductor (D), by the side of the wick tube, by which the vapor passes from the fount *to the flame*, the openings near its base allowing the ingress of the atmospheric air, as will appear by the exhibit.

This combination the complainant's expert finds to be described in the second claim of the reissued patent, *John E. Earle* (fol. 21); and this, it will be observed, whether atmospheric air is mixed with the vapor in its passage to the flame or not (fol. 45, 46; 18, 19 Cross Int. *et. seq.*)

Such a broad construction of this claim of the reissued patent, we contend, not only describes a different invention from that of the original patent, but it opens the patent to the defence of prior use set up in the answer.

And, without such a construction, the defendant cannot be held to infringe the claim.

II. Before comparing the reissued Ambrose patent with the original, we would call attention to the state of the lamp burner manufacture at the time of Ambrose's original application.

It is not contested that, at this time, the four several elements of the claimed combination, as they have been just defined, were each well known in the art of lamp burner manufacture.

Nor is it contestable, upon the evidence in this case, that these several elements, defining them generally, had been, prior to

1860, combined in the manufacture of lamp burners and were at that time well known, in such combination, to that art.

The following Exhibits :

"*Jones Burner*" (fol. 26, 28.)
"*Jones Burner with Merrill attachment*" (fol. 27.)
"*Wade & Burnham original*" (fol. 26.)
"*Wade & Burnham with Merrill attachment*" (fol. 28.)
"*R. S. Merrill patent*," June 14, 1859 (fol. 23.)
"*Jones Burner with Sargent attachment*" (fol. 28.)
"*Cradit Burner*," see model (fol. 25.)
"*Cradit patent*," Dec. 14, 1858 (fol. 24.)
"*Cheney patent*," Jan. 25, 1859 (fol. 23.)

all show the combination of some kind of a deflector; some kind of a perforated air distributor forming with the deflector a combustion chamber ; a wick tube ; and some kind of a passage for the vapor from the fount to the place of combustion.

1. The deflector in each of these burners is the old, well-known, dome-shaped deflector, except in the case of the Cradit burner where, it being a round wick burner, a deflecting plate was employed.

2. The air distributor in each case formed a combustion chamber with the deflector and was perforated in various ways, through its base or sides, or both, according to the fancy or judgment of the mechanic, as might be best for its purpose of supplying atmospheric air to the points of combustion.

3. The wick tube is the same in all.

4. The vapor passage in these exhibits is constructed variously, but with the same object, to provide for the escape and combustion of the heated vapor. Generally the vapor is mixed, in its passage, with the atmospheric air, as being desirable (see *R. S. Merrill patent*), but, when the base of the burner was constructed without holes, as in *Jones Burner* (fol. 28, 11th Int.) it passed to the chamber without any such admixture. In some of these burners the vapor is left to escape, by itself, through the passages provided. In others, as by the *Merrill* attachment, it was *directed* to the point of combustion. In the *Cradit* burner this direction was insured by a tight tube leading directly from the fount to the point of combustion.

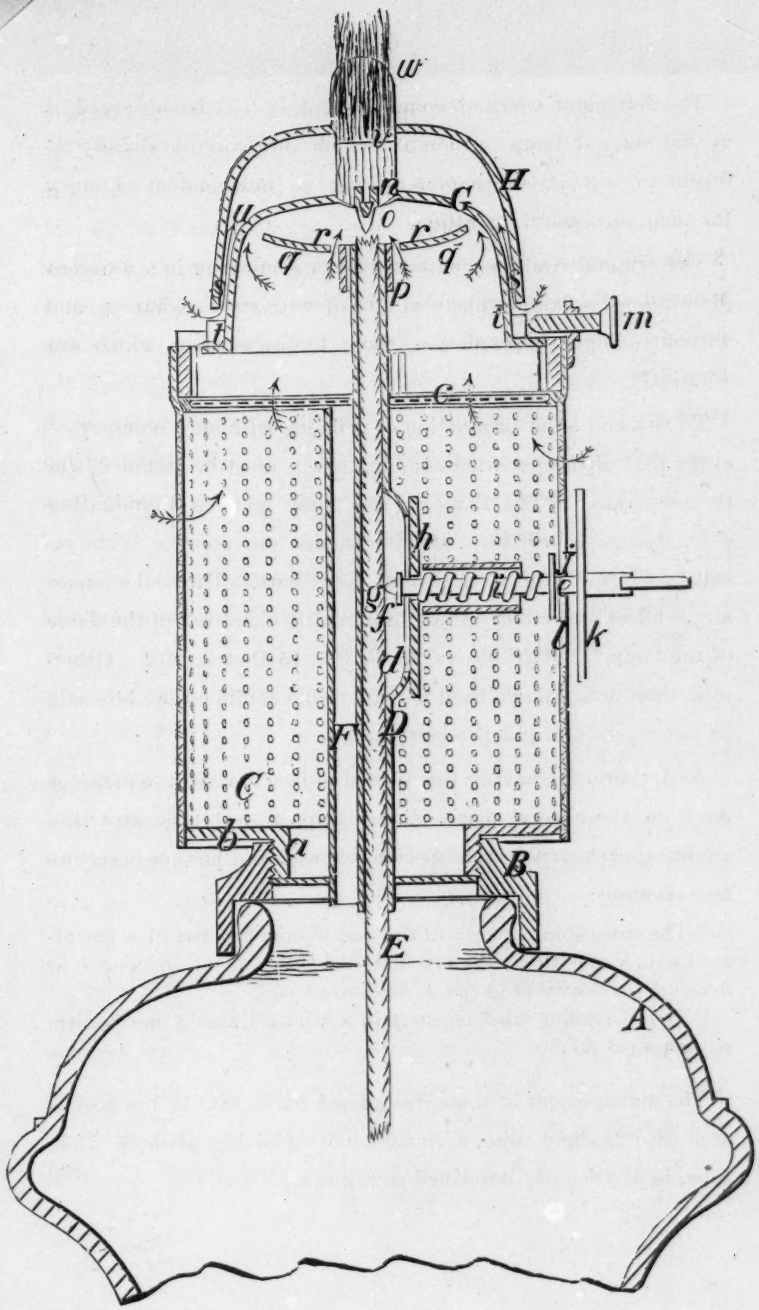
The evidence also shows that a tube, auxiliary to the wick-tube, for the purpose of carrying off the vapor, unmixed with the atmospheric air, directly *to the flame*, to be there consumed, was well known in the art of lamp-burner manufacture.

Pratt patent, Nov. 24, 1857 (fol. 24).

The construction of the burners here referred to is too obvious to require any aid from the ingenuity of an expert.

We append to this brief extracts from the patents referred to. And see also for history of the art *Carleton* vs. *Bokee*, 17 Wall, 463.

III. We will now compare the last reissued Ambrose patent with the original, and for that purpose exhibit here a copy of the original Ambrose drawing—the drawing of the reissued patent being much reduced in scale. And see also Exhibit "Ambrose original burner" (fol 24).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The defendant's burner complained of, it will be observed, is of that class of lamp burners to which the exhibits already referred to belong,—burners requiring an independent chimney for their successsful operation.

The original Ambrose patent was for something in a different direction—"a lamp which will burn without a chimney, and without danger of explosion, those hydro carbons which are volatile."

To this end--the production of a flame, without a chimney,--every part of the patented combination, it must be assumed, was to co-operate. "The flame of the lamp and its illuminating character as to brilliancy, steadiness, size and position is the result to which all the devices used contribute. They all co-operate to affect and modify such illuminating character of the flame of the lamp." *Williams* vs. *R. R. Co.*, 15 Blatch., 212. Otherwise there would have been no patentable combination, but only an aggregation of independent parts.

And, therefore, having this special object in view, the patentee gave to the several parts of his lamp a novel construction adapting each part to this special purpose; and he thus describes his invention:

"The invention consists in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate, *arranged as hereinafter described to effect the desired end.*

"The invention also consists in a wick-adjusting mechanism *so arranged* &c."

The arrangement of these designated parts, that is, 1, a perforated cap; 2, vapor tube; 3, heaters and deflecting plate; 4, wick-tube, is particularly described as follows:

1. "The cap C, is of *cylindrical* form and may be constructed of perforated sheet metal, the lower end having a plate, *b*, fitted in it, from which the flange, *a*, projects and the upper end having a perforated plate, *c*, fitted in it. Within the cap or *perforated cylinder*, C, there is secured centrally a wick tube D."

Manifestly the cap here described is an integral structure and is to be cylindrical in form, and perforated, with a perforated plate fitted in its upper end. This is the construction shown in the drawings and there is nothing anywhere to suggest any other construction of cap as practicable for the object in view or as being in the mind of the patentee.

2. The "vapor tube" is thus described:

"Adjoining the wick tube, D, there is a tube F, the lower end of which communicates with the interior of the body of the lamp, the upper end of said tube *being covered by the perforated plate c* * * The tube, F, admits of all vapor generated in the body, A, of the lamp, escaping up *into the heater*, G, and to the flame, *the perforated plate, c, preventing the ignition of the vapor below the orifice of the tube* * * And the vapor which passes up through the tube, F, is consumed without danger of being ignited *below the orifice of said tube.*"

The construction here specified evidently exhibits a feature of the invention which the patentee regarded as necessary to prevent the "danger of explosion." It was a vapor tube the *upper end or orifice of which should be covered by the perforated plate* of the cap, which would thus, upon the principle of the Davy lamp, prevent any ignition of gas, in the body of the lamp, "below the orifice of the tube." To enable this to be done the tube was necessarily constructed within and below the upper end of the perforated cylinder or cap, and not in any close proximity to the flame. And no other construction of the vapor passage is any-

where shown or intimated as possible in the combination proposed.

And this is made clear by the specification of claim.

"2. In combination with the parts aforesaid, the vapor tube F *placed within the cap C.*"

The patentee did not mean to provide his lamp with a vapor tube, like the Pratt tube, leading from the fount to the flame. His purpose was to stop the tube below the perforated plate so that the vapor could be emptied into the so called combustion chamber, where it would be mingled with the atmospheric air and produce what he calls his "gas generating flame." The "danger of explosion" was avoided, not by bringing the gas from the fount to the combustion chamber by a tight tube, but by covering the mouth of his tube, before it reached the point of combustion, by the wire gauze. Nor had his perforated plate anything whatever to do with avoiding this danger except in this particular. For he relied upon the plate covering the slot in his wick-raising mechanism to "prevent the escape of gas or vapor from the wick tube and chamber." And there was no other possible means of escape for the gas than that.

3. The "heaters and deflecting plate." This arrangement constitutes a chief feature of the patentee's invention. His minute description of it, each part being described as in close adaptation to the other parts in order to form the whole and accomplish the result which cannot be accomplished without the whole construction, completely excludes the idea of any other "deflector" or any other "combustion chamber" than that formed by the special construction. The specification states:

"On the upper end of the cap, C, there is placed a copper dome shaped heater, G, which is secured in proper position by a thumb screw, *m*. This heater is slotted at its upper end as shown at *n*, and at the center of the slot there is fitted a longitudinal bar *o*, the latter dividing the slot, *n*, into two equal longitudinal parts.

"The wick tube, E, extends some distance above the perforated plate, C, and on its upper end a collar, *b*, is fitted, said collar having plates, *q*, projecting from it, slightly inclined from a horizontal plane. Between the inner ends of the plates, *q*, and the collar, *p*, there are openings *r*.

"On the outer side of the heater G, there are vertical ribs, *s*, at the lower ends of which there are projections, *t*. These projections, *t*, serve as bearings for a heater, H, which is similiar to G, in form. The ribs and projections, *t*, admit of a space, *u*, being between the two heaters, and the upper end of the heater, H, is slotted, as shown at *v*, and has a plate, *w*, extending upward for each end of it, and inclined at an angle of about 45°. * * *

"The plates, *q*, of the collar, *q*, and the openings, *r*, cause a draught to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater, G, and becomes intensely heated, so as to supply the flame with warm oxygen. The bar, *o*, in the slot, *n*, of heater G, serves to divide the flame, and prevents it from ascending up through the slot, *n*, before the carbon is consumed. Between the two heaters, G, H, oxygen passes and becomes highly rarified, and unites with the carbon in the flame, insuring perfect combustion.

"The plates, *w*, at the ends of the slot, *v*, of heater, H, serve to spread the flame, and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot, *n*, in heater, G, is merely a gas-generating flame, the illuminating flame having its base at the slot, *v*, of heater H.

"By this arrangement the flame is supplied with sufficient oxygen without a chimney to support proper combustion, and produce a brilliant illuminating flame."

The result, which the patentee says he here accomplishes, is a supply of sufficient oxygen to the flame, so that combustion is supported without a chimney. And this is done by "intensely

heating" the atmostpheric air and thus producing "warm oxygen" which will become "highly rarefied *between the two heaters*" and in this condition unite with the carbon in the flame at the slot of the *upper* heater.

Therefore he appropriately designates the principal parts of this contrivance as "heaters." Their office is to rarefy the oxygen by the intense heat they serve to produce.

Manifestly they constitute "an integral structure." The result cannot be accomplished by any part of the arrangement. The patentee does not call this arrangement "a deflector" because he designed it for a different purpose and with other functions. The only deflector, as such, shown is the deflecting plates *q q*. The ordinary deflector could not accomplish what this contrivance of heaters was invented to accomplish, and the term does not anywhere appear in this patent.

The integral structure of the two heaters is also made clear by the specification of claim.

"1st. The arrangement of the heaters G H, *with a space between communicating directly with the external air*, in connection with the collar *p* and plates *q q*, &c."

And it should not escape attention that the patentee does not even claim this combination of heaters, or their combination with perforated caps, as of his invention. "I am aware that dome-shaped heaters have been previously used and also that perforated caps have been used in connection with said heaters." The novelty of his invention is, solely, in connecting such heaters "with the collar and plates fitted on the top of the wick tube," *for the purpose set forth.*

4. The wick-tube of the original patent was evidently, in the

opinion of the patentee, one of the chief merits of his lamp. Its special construction with "chamber" and "collar" is manifest, and there is no claim that the defendant's burner contains it.

But the special construction formed an important and essential part of the combination of the original patent.

The vapor tube was not claimed except in combination with this wick adjusting mechanism and it was by their combined operation—the perforated plate over the orifice of the tube and "the plate covering the slot in the side of the (wick-tube) chamber"—that the "danger from explosion" was prevented.

The examination thus made of the original Ambrose patent clearly shows, we think, that the patentee there limited himself to a special combination of certain special parts and that there was no suggestion, indication or intimation anywhere in the patent, that any other invention of any kind had been made by him.

We will now turn, for the comparison, to the last reissued Ambrose patent.

The second claim of this reissue is the claim the defendant is alleged to have infringed.

"The combination in a lamp *burner* of the following elements: first, a deflector; second, a perforated air distributor, which with the deflector, forms the combustion chamber; third, a wick-tube extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to said combustion chamber, substantially as described."

Obviously, if the parts of this combination are to be defined as the patentee defines the parts of the combination claimed in the

original patent, that is to say, if the deflector is to be construed as the "arrangement of heaters and deflecting plate" described in the original patent, the "combustion chamber" as the combustion chamber formed by such heaters, the "perforated air distributor" as the "perforated cylinder" of the original patent, the wick-tube as the special contrivance there shown, and the "tube or passage" the specially constructed tube terminating beneath the combustion chamber where its orifice is covered by the perforated plate, the defendant does not infringe the claim. For the defendant's burner does not contain any one of such parts, or any equivalent for any one of such parts.

But the complainants do not so construe the claim.

They contend that the "deflector" here intended is the ordinary, well known, deflector contained in the Exhibits referred to and such as the heater G might be if it was stripped of its vertical ribs and projections and made to serve the simple purpose of such a deflector in a lamp requiring a chimney:

That the "combustion chamber" meant is such a chamber as would be formed by the ordinary deflector with a perforated plate such as formed the upper end of the "perforated cylinder" of the original patent;

That the wick-tube is any wick-tube;

And that the vapor tube or passage intended is any passage that may conduct the gas, whether with or without atmospheric air, to any part of the combustion chamber and whether its orifice is covered by the Davy wire-guaze or not.

And this reissue was evidently taken out for the purpose of justifying such a combination. The specification was shaped to that end. And we confidently submit that an examination of

that specification will exhibit far wider differences between this reissue and the original than those which compelled this Court in *Gill* vs. *Wells* to say, "that it was a bold measure to grant, as well as to ask for, such a reissue."

We will examine the elements of this combination in their order.

1. The "deflector" is, in the sense contended by the complainants, a pure interpolation. The term does not appear in the original patent. Nor is there any verbal definition of it, or even any indication of it by letter, in the reissued patent. It is assumed to mean the heater G.

But to make a deflector out of the heater G, the "integral structure" of the original patent, constituting his "heater" system, has to be broken into pieces. The heater H, and the deflecting plates and the other connected parts must be discarded, and when the heater G is left by itself, it will still be found provided with the "vertical ribs and projections," fitting it only for use in connection with the discarded parts.

There is, therefore, not only "no suggestion, indication or intimation" in the specification of the original patent that the use of the heater G, separately and as a deflector, was contemplated by the patentee, but even the drawings forbid such an assumption to be made. They show conclusively by the construction of this heater that it is only to be used in connection with the other parts.

2. "A perforated air distributor, which, with the deflector, forms a combustion chamber."

This also is an interpolation of this reissue. Assuming the heater G to be the "deflector" here intended, the original patent shows that it did not in that construction form with the perforated plate the combustion chamber. The "perfect combustion" was obtained *between* the heaters and, of course, the so-called combustion chamber was not formed by the heater G except in its connection with the heater H.

"The perforated air distributor" as a base for this "combustion chamber" is also an interpolation of this reissue, where it appears for the first time. In the original patent it was a part of the cap C, "the upper end having a perforated plate *c* fitted in it." And to obtain it the reissue is compelled to break up the "perforated cylinder" of the original patent, and discard all but this perforated plate fitted in its upper end. To do this the specification of the reissue omits the requirement of the original patent, that this cap or perforated air distributor is to be of cyndrical form and makes the use of it optional only.

"The cap C is, *by preference*, of cylindrical form."

And this brings it directly within the condemnation of this Court in *Russell* vs. *Dodge*, 93 U. S., 460.

3. "A wick-tube extending from the fount to the combustion chamber."

Although the specification uses this term generally and seeks to divide the wick-tube of the original patent into a "tube" and an "adjuster,"—it nowhere describes and the drawings nowhere show any other construction of wick-tube than the special construction of the original patent—a wick-tube with its "collar and deflecting plates" and its "chamber" for the adjusting mechanism.

If any other kind of wick-tube is here intended it is an interpolation of a different element and makes a new combination of which there is not the faintest suggestion in any part of the original patent.

4. "A tube *or passage* to conduct the gas from the fount to said combustion chamber, *substantially as described.*"

The description in the specification is as follows:

"An auxiliary tube or passage F is formed, the lower end of which communicates with the interior of the body of the lamp, and the upper end opening *near the upper end of the wick tube*, so that the gas which is generated within the lamp, instead of passing out through the opening in the tube for the wick-adjuster, as it otherwise would, will pass up through this tube or passage in such proximity to the flame that it is consumed."

The "tube" of the original patent here becomes a "passage" and the draftsman of the specification, the complainant's expert, says that this passage is not necessarily a close passage, but may be so constructed as to allow the atmospheric air to mingle with the gas in the passage (fol. 45, *et. seq.*)

But, if a close passage or tube, the specification requires it to extend so near to the upper end of the wick tube that the gas will be there consumed. Such a tube would be the tube of the Pratt lamp. And it is a clear interpolation of the reissue—the tube of the original patent, as we have seen, being required to stop beneath the perforated plate by which its mouth was to be covered so as to prevent ignition below the orifice.

The interpolation is made still clearer by what follows:

"The termination of this tube is *here* represented as at the perforated plate *c*, the perforations of the plate being sufficient for the free passage of the gas to the flame."

That is to say, it is immaterial whether it is a close tube or an open-to-the-air passage, so long as it conducts the gas, and, if a tube, it is immaterial whether it stops, as shown in the drawing and required in the original patent, so as to be protected by the perforated plate, or not. But, on the whole, the mode indicated by the reissue is preferable. And this again brings the reissue within the decision in *Russell vs. Dodge.*

But further: not only are these several parts of the combination of the second claim interpolations of new matter not contained in the original patent, but the combination itself is also entirely new with this reissue

In the first reissue there was no claim, or suggestion of any claim, of this sort. The only new matter there ventured upon was the "auxiliary tube or passage leading from the lamp upward to conduct the gas from within the lamp *to the flame*" and this was substituted, in the specification of claims of that reissue, in the place of the "vapor tube *placed within* the cap" of the original patent.

And in closing this review of this reissued patent the language of this Court in *Carleton* vs. *Bokee*, 17 Wall, 471, forcibly applies.

"We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry and to cover antecedent inventions. Without deciding that a repetition of substantially the same claim in different words will vitiate a patent, we hold that where a specification by ambiguity and a needless multiplication of nebulous claims is calculated to deceive and mislead the public, the patent is void."

IV. We therefore submit that, upon this comparison of the last reissued patent of Ambrose with the original patent, it clearly appears, that the second claim of the reissue, as construed by the complainant, is for an alleged invention of which "patient search will be made *in vain* for any trace," either in the specification or drawings of the original patent, and that the judgment of the Court below declaring the reissued patent to be, therefore, void, was required by the decisions of this Court already cited, however liberally those decisions may be construed.

There is no question here of sub-combinations. The elements of the new combination are in form and purpose different from the elements of the old combination. They are not equivalents but substitutions, producing different results. In the most indulgent view that can be taken of them they are but parts of the "integral structure" claimed in the original patent, but not serving the same purpose or accomplishing the same result that they did when in the integral structure.

And, whether a sub-combination or not, the specification of the original patent cannot be made to describe it without the interpolation of new matter, nor can it be constructed out of the drawings of that patent, without essentially altering them.

The fact is, the Ambrose lamp as shown in his original patent and by the model in evidence, was a costly, impracticable and useless contrivance. It does not appear that a lamp of such construction was ever made for use. The complainant's expert never saw such a one (fol. 42.)

It remained among the rubbish of the Patent Office for thirteen years after the original patent was granted, before it was taken

up by these complainant manufacturers for the purposes of these reissues.

It is but another instance of those overreaching reissues which have been so pointedly condemned by the judgments of this Court.

But we also submit, upon the whole case, that, if this reissued patent could be held to be, upon its face, a valid patent, the decree of the Circuit Court dismissing this bill should, nevertheless, be affirmed because, either,

1. The patentee has so widened his claims by the second claim of the reissue that the claimed combination, viz.: of *a* deflector, *a* perforated air distributor forming with a deflector a combustion chamber, *a* wick tube, and *a* passage for the gas from the fount to the combustion chamber, is anticipated by the exhibits in evidence, or

2. If these parts, or any of them, are limited by the special description of the specification, the defendant, clearly, has not infringed.

C. R. Mynoll

Of counsel with defendant.

Extracts from Specifications of Patents in evidence referred to page 5.

Rufus S. Merrill patent, June 14, 1859.

"The nature of my invention consists, first, in the means I employ, or the equivalent thereof, by which the vapors arising from the fluid burned in the lamp are mingled with atmospheric air, and the mixture directed so as to impinge upon the flame, being heated in its passage thereunto by conduction from metallic walls of the directing passage."

N. Cradit's patent, Dec. 14, 1858.

"The air to supply the central draught enters through the lower screen B, and passes downward through the parts 3, into the reservoir D, where it mingles with the gases rising from the oil and with them is drawn upward through the perforated floor K, to the interior of the tube Q and is there by means of the button L deflected toward the flame."

"All the gases generated within the reservoir are drawn up through the central draught to the flame and there consumed; which results in a better light from a lamp of a given size, a saving of fuel and the avoidance of danger of explosion in case of the gases being entirely confined."

S. Cheney's patent, Jan. 25, 1859.

"The nature of my invention consists in such a construction and arrangement of tubes and caps that the gas generated in the combustion of the oil, is brought in a concentrated condition into

contact with a strong current of atmospheric air, whereby a much more vivid combustion is produced than can be obtained otherwise."

W. Pratt's patent, Nov. 24, 1857.

"To prevent the accumulation of gas in the top of the lamp without loss of the illuminating product, I make a small tube by the side of the wick tube, running through the cap and terminating at the flame of the wick."

"I do not claim to be the originator of a safety attachment to vessels using explosive and inflammable substances, for many devices to this end have already appeared. As Newell's safety wire guage tubes, Tubes of tin covered with wire gauze, chambers of perforated tin, and cylinders of the same. * * * * I am also aware that a perforation in the lamp cap for allowing the escape of the accumulating gas, has before been made."

Hoggson & Robinson, Law Printers.

Supreme Court of the United States,

IN EQUITY,

OCTOBER TERM, 1880: No. 228.

EDWARD MILLER & CO., *Appellants*, *vs.* THE BRIDGEPORT BRASS CO.	APPEAL FROM THE U. S. CIRCUIT COURT, FOR THE DSTRICT OF CONNECTICUT.

Supplement Brief for Defendant and Appellee.

The appellant's supplement brief begs the whole question.

It assumes that the claim in question of the reissued patent was left out of the original patent "by mistake"—even "by mistake of the scrivener"—and it ignores the fact that the original patent was, without any such claim, a valid and operative patent.

It is asserted that the invention described in the original specification was "two-fold"—that is to say, of two independent devices, one enabling the common glass chimney to be dispensed

with in an ordinary lamp, and the other rendering the ordinary lamp safe from the explosion of the oil gas. "It was his effort to combine in one patent these two independent features which has brought the patentee to grief."

And having assumed such a specification for the original patent the appellants then, as easily, conclude that it was "by a mistake" that the claims of that patent were not drawn in full accordance with it.

The premise and the conclusion are both erroneous.

In the first place, the patentee did not attempt to combine in one patent any such "independent" devices. If he had made any such effort he would, assuredly, have been "brought to grief." But he was not brought to grief. His effort was successful. It brought him a valid and operative patent. He secured just what he attempted to secure—a patent for his invention of a lamp that would burn safely hydro-carbon oils without a chimney. He was not concerning himself with ordinary lamps and their improvement. The Ambrose lamp was to be "a new and improved lamp." It contained several features doubtless, but they were not independent of each other. Thus, the new lamp required an "intense heat" for its "perfect combustion," and this was provided for by a system of "heaters." But such heat must necessarily increase the generation of the dangerous gas. And therefore the close vapor tube with the Davy wire gauze protection to its orifice is combined with the heaters to provide for its escape and render the use of the heaters safe.

There is nothing whatever in any part of the original patent

suggesting the use of this vapor-tube in any other combination. And there was the best of reasons why the patentee should not have claimed it separately, or as a part of the common lamp. For the Exhibit *Pratt's Patent*, of 1857, shows a close tube auxiliary to the wick tube of the common lamp, and it also shows that "tubes of tin covered with wire gauze," for the same purpose, were then well known in the arts.

In this connection the appellants insist that "the description of the thing claimed is the same in the original and in the reissue." This is not so. Nor does Judge Shipman mean to be so understood. The differences in the description of *the thing claimed* between the original and reissued patent are particularly stated in the appellee's principal brief. We note here one of those differances as sufficient to expose the dilemma in which the patentee is now placed.

The re-issued specification describes certain combinations of which "a deflector" is a part. The term does not appear in the original specification. What does it mean? Does it mean, as the appellants in their principal brief (p. 9) assume, the heater G? Then it must be admitted there is a description here of the thing claimed which cannot be found in the original patent. Or does it mean the *two* heaters as they are described in the original patent? Then the case is ended, for it must be admitted that the defendants have not used the thing claimed.

But, in the second place, suppose the original specification had disclosed, as the appellants assume it to have done, that this

vapor tube could be combined with the other well-known parts of an ordinary lamp. When the patentee came to specify his claim—to that part of his specification where the statute required him to "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery," Act of 1836, § 6, p. he makes no claim to any such combination as of his invention.

And now by what right do the appellants assume that this omission to make such a claim was "by a mistake"? What right had the Commissioner of Patents in 1876, to make any such assumption? Why not, as justifiably assume that the omission was in pursuance of a "fraudulent or deceptive intent" to entrap manufacturers of lamp burners into the use of such a combination, and then spring upon them a reissue with a demand of royalties?

If the original patent was "inoperative or invalid" such a mistake might, perhaps, be inferred—for every patentee may be presumed to intend an operative patent. But where an operative and valid patent is obtained, the presumption is clearly the other way, and that the patentee claimed all that he was entitled or desired to claim. And this presumption is certainly not weakened when the patentee sleeps out the life of his patent without discovering his mistake or even having it discovered for him by some sharp manufacturer.

The error of the appellant's argument, as we conceive it, is readily seen in the cases he supposes for its illustration.

"Take a combination invention with three elements A, B and C. The descriptive specification clearly describes them all. They

all appear in the drawings and model. The specification of claim is for A and B only. It was a mistake.

"Clearly a reissue with a specification of claim to the combination of A, B and C, being the exact thing described in the original description of specification and shown in the drawings and model, would not be for a different invention."

It clearly would be "for a different invention" unless there was a "mistake" in the original specification; and such a mistake the case assumes. If there was such an incongruity between the body of the specification and the specification of claim as to make the patent inoperative, the mistake would be apparent, and a case for the remedy of the statute would arise.

But suppose the combination of A and B only, to be a valid combination, of the applicant's invention, justified by the specification and entitling the applicant to a patent. If he sees fit to limit himself to that combination and does not "specify and point out" any other "combination as his own invention or discovery," why should it be assumed that he has made an error "by inadvertence, accident or mistake?"

And so of the "barbed fence" illustrations supposed by the appellants. They are all predicated upon an assumed ownership of the land as distinct from the evidence of title, and then "a mistake" in this evidence is still further assumed. And this is the conclusion drawn:

"The survey, so to speak, of this invention as contained in the original specification of descriptions is correct. It rightly described the territory covered by the invention, but the fence, the claim, whose office it was to bar out trespassers upon the patentee's exclusive rights in this territory, did not follow the survey; part of the territory which ought to have been enclosed was by mistake of the claim maker, left out to commons."

Now it seems to us that the appellant's definition of the office of the claim is more accurately stated in another part of the brief.

"The office and duty of the specification of claims are to limit and define the extent of the exclusive rights of the patentee in the thing patented." (p. 6.)

It is rather the "survey" than the "fence"—the legal survey, limiting and defining the extent of territory which the patentee intends to appropriate to himself out of the commons. But, in truth, no such fancied distinction can be made respecting a patent. The "survey" and the "fence" in a patent are one and the same. The patentee has no rights outside the invention which he specifically claims to be his own. And the claim is the foundation and declaration of his rights in severalty.

But however this may be, upon what evidence, in this fancied case, do the appellants assert that part of the territory which ought to have been enclosed was left out to commons "by mistake of the claim maker"? Simply upon the evidence that he might have claimed it and did not. A head of a family may, under the homestead law, enter a claim for one hundred and sixty acres or less of unappropriated lands. He enters for one hundred acres. Fourteen years after, he wants sixty acres contiguous that others have in mean time appropriated. "It is hardly to be supposed that a civilized state would make an enactment" allowing him to appropriate those sixty acres on the ground that he might have claimed them originally and did not, and, therefore, his original entry must be regarded as "a mistake."

And yet the argument of the appellant, it seems to us, leads to such a result.

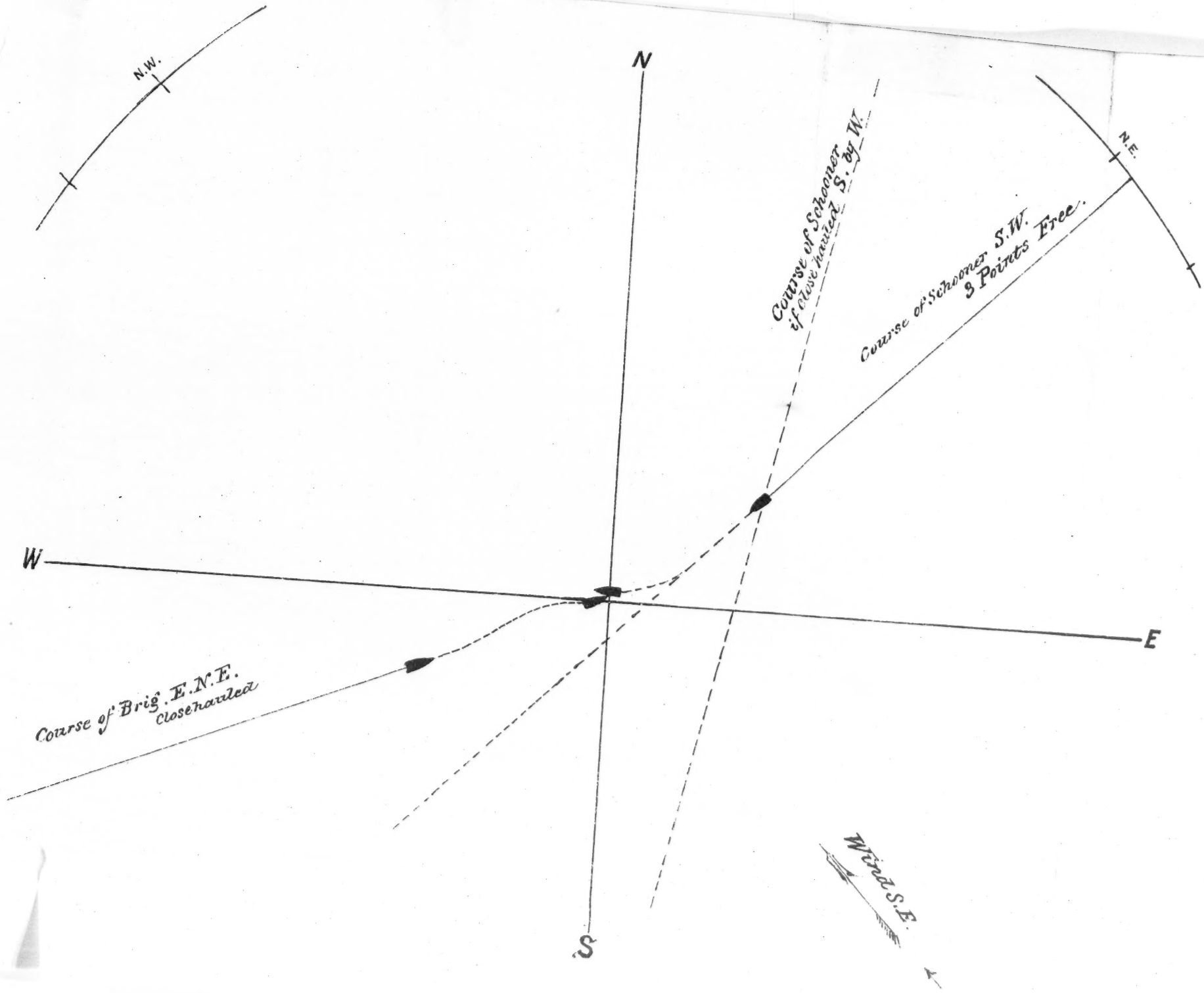
On the other hand, the statute providing for the reissue of patents for inventions presumes that a patentee is able to define the invention he seeks to secure. And when, in his application for a patent, he so defines it that the patent issued to secure the defined invention is an operative patent, and is not otherwise invalid, his rights under the patent must be measured by his definition of them.

In no such case is there any "error" to be "corrected." And to no such case does the statute apply.

The present case is such a case.

J. R. Munow

of counsel.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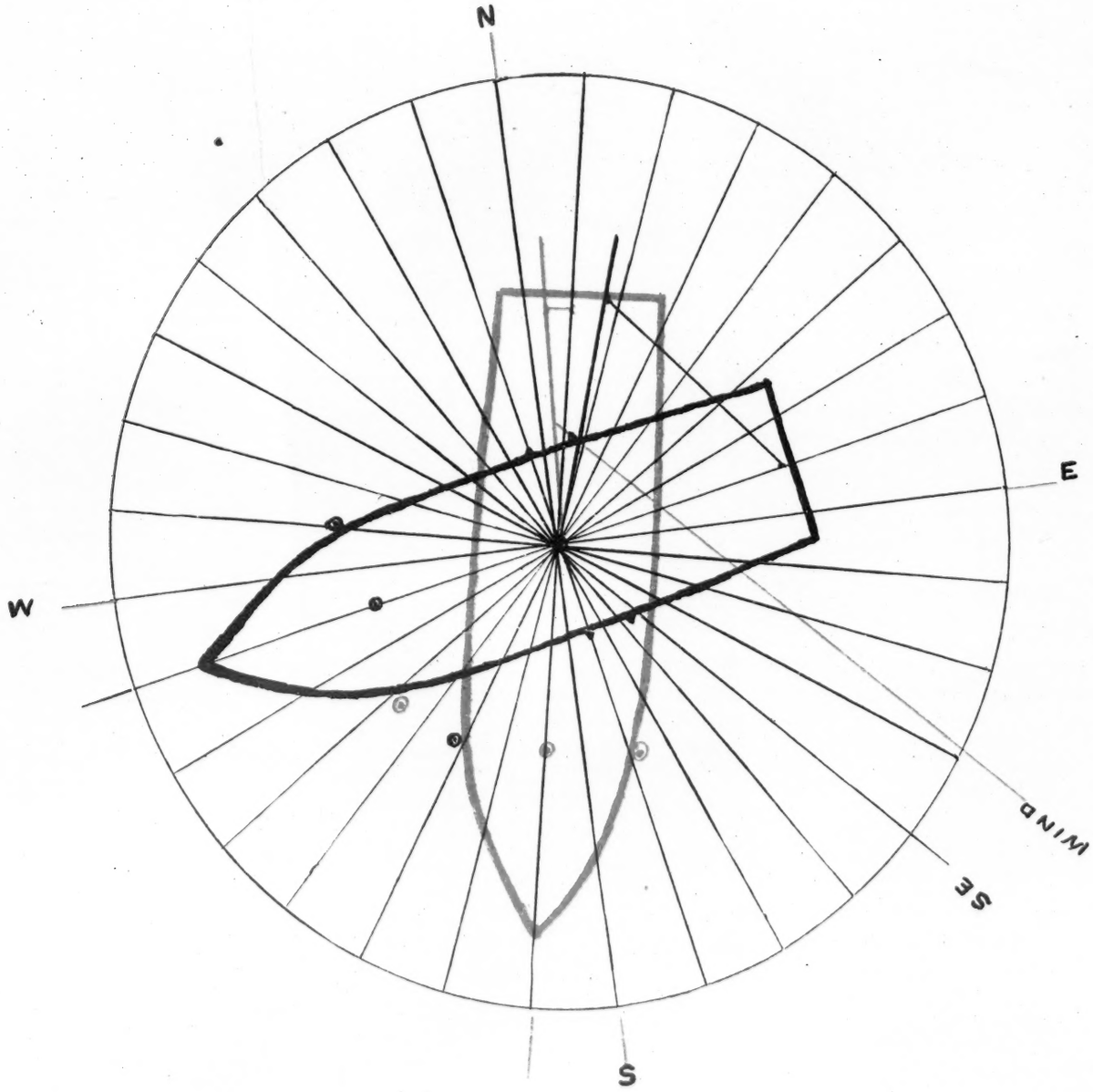
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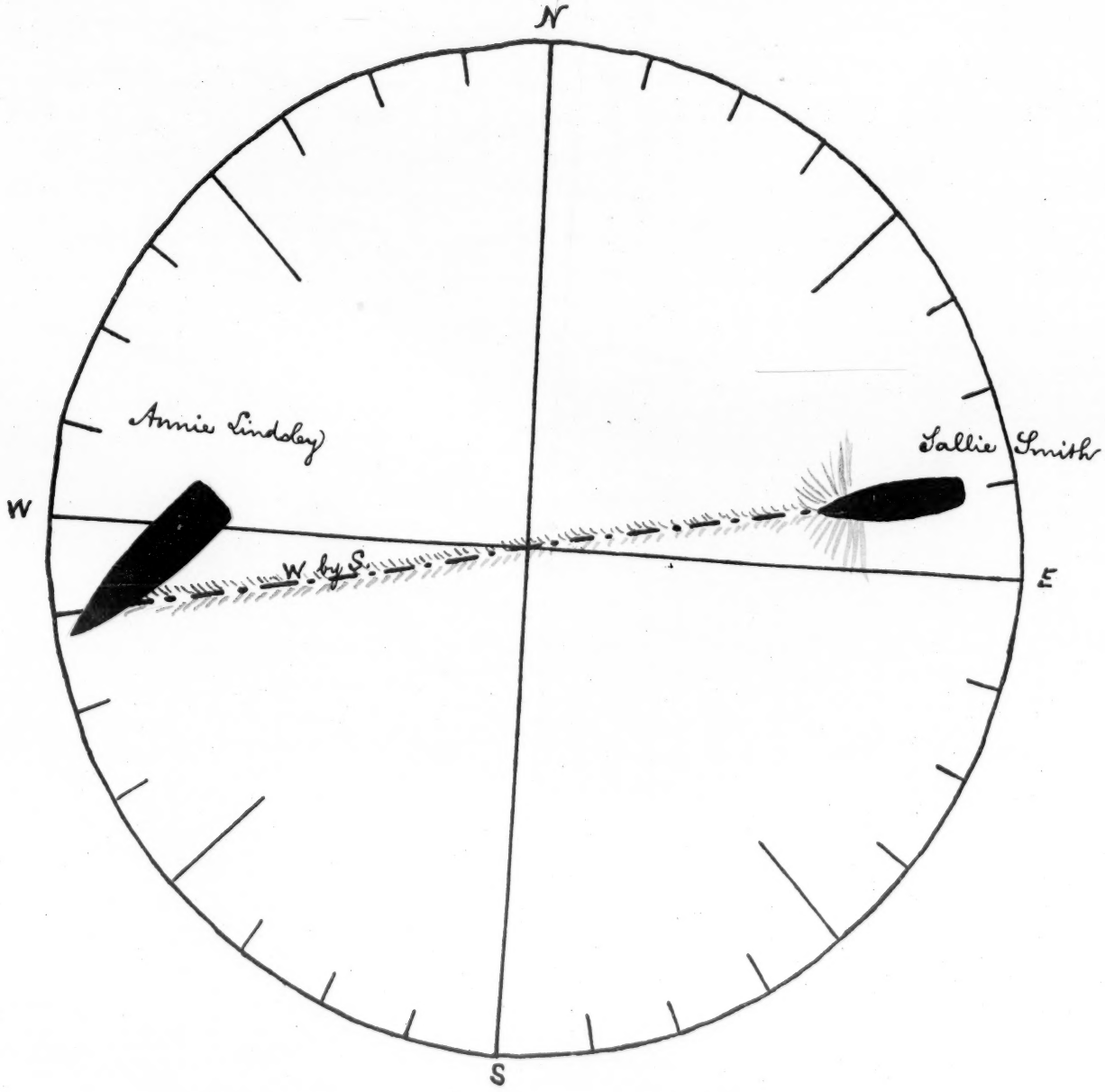
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Annie Lindsley
Sallie Smith
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G. NIMMO.

Molding-Crucibles.

No. 6,166. Reissued Dec. 8, 1874.

Fig. 1.

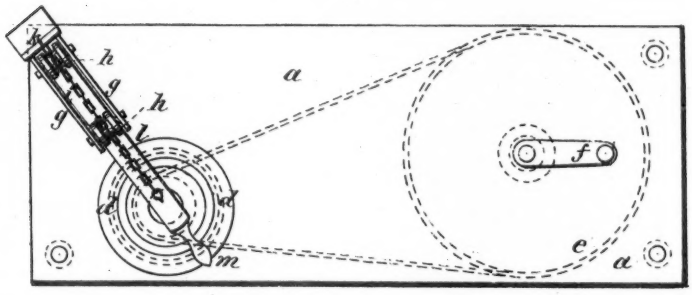
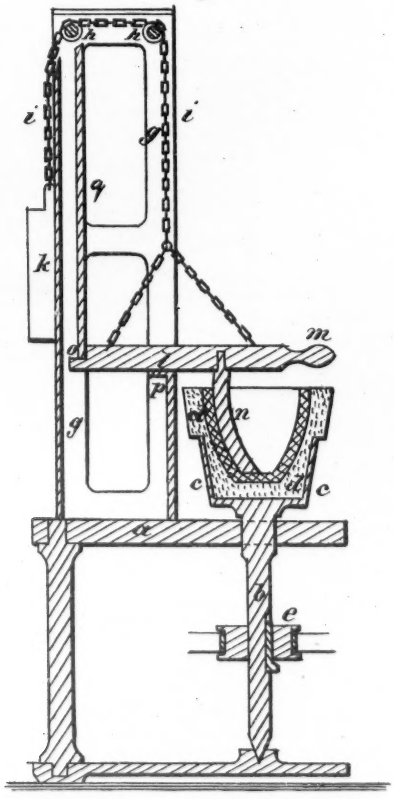


Fig. 2.



Witnesses

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Chas. H. Smith

Inventor

George Nimmo

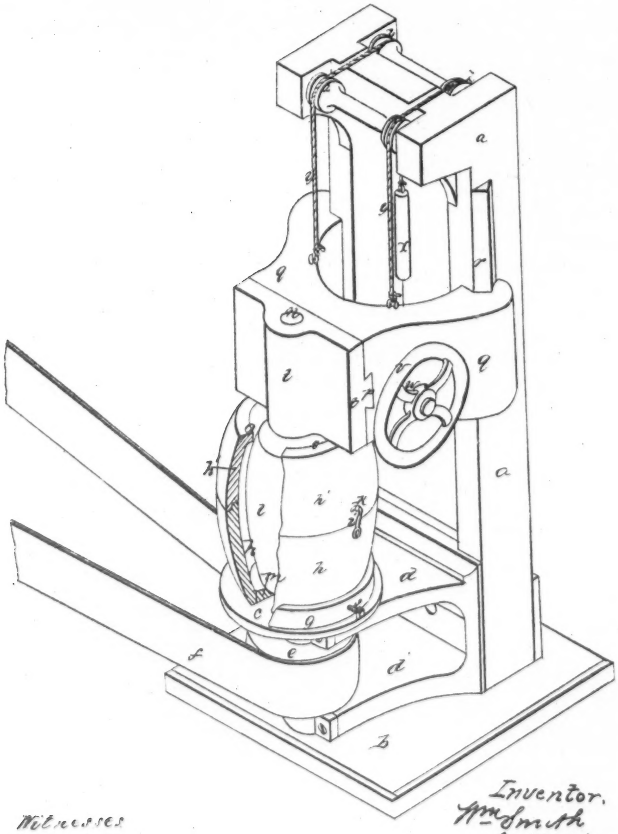
THE GRAPHIC CO. PHOTO-LITH. 39 & 41 PARK PLACE, N.Y.

No. 1067.
Pickering et al.,
vs.
McCullough et al.
Page 276.

W. Smith,

Making Plumbago Crucibles

No. 40,506. Patented Nov. 3, 1863.



Witnesses
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A. Buckmaster

Inventor.
Wm. Smith
by his Attorney
H. Bakewell

G. Nimmo.

Molding-Crucibles.

Patented Aug. 1. 1865.

No. 49140.

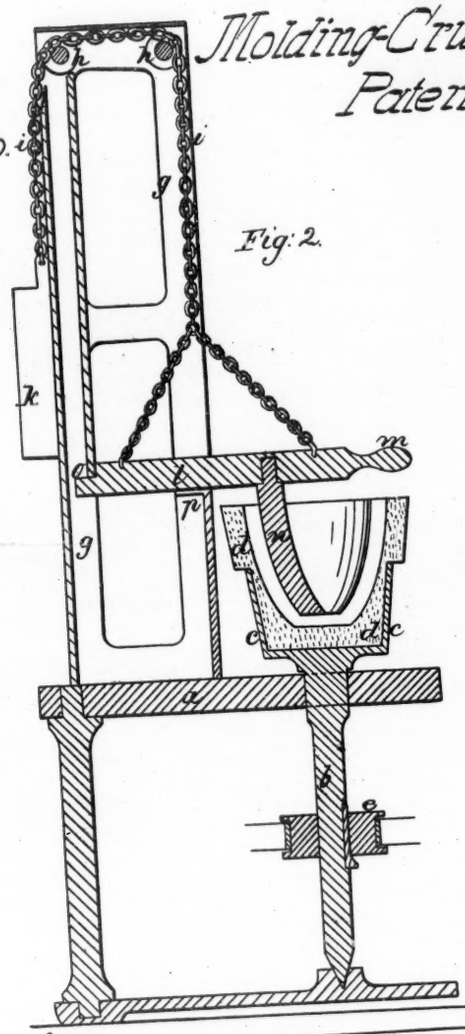
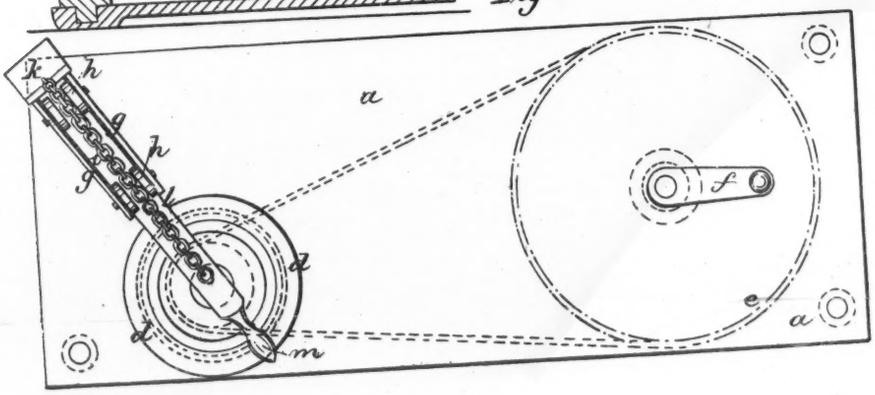


Fig: 2.

Fig: 1.



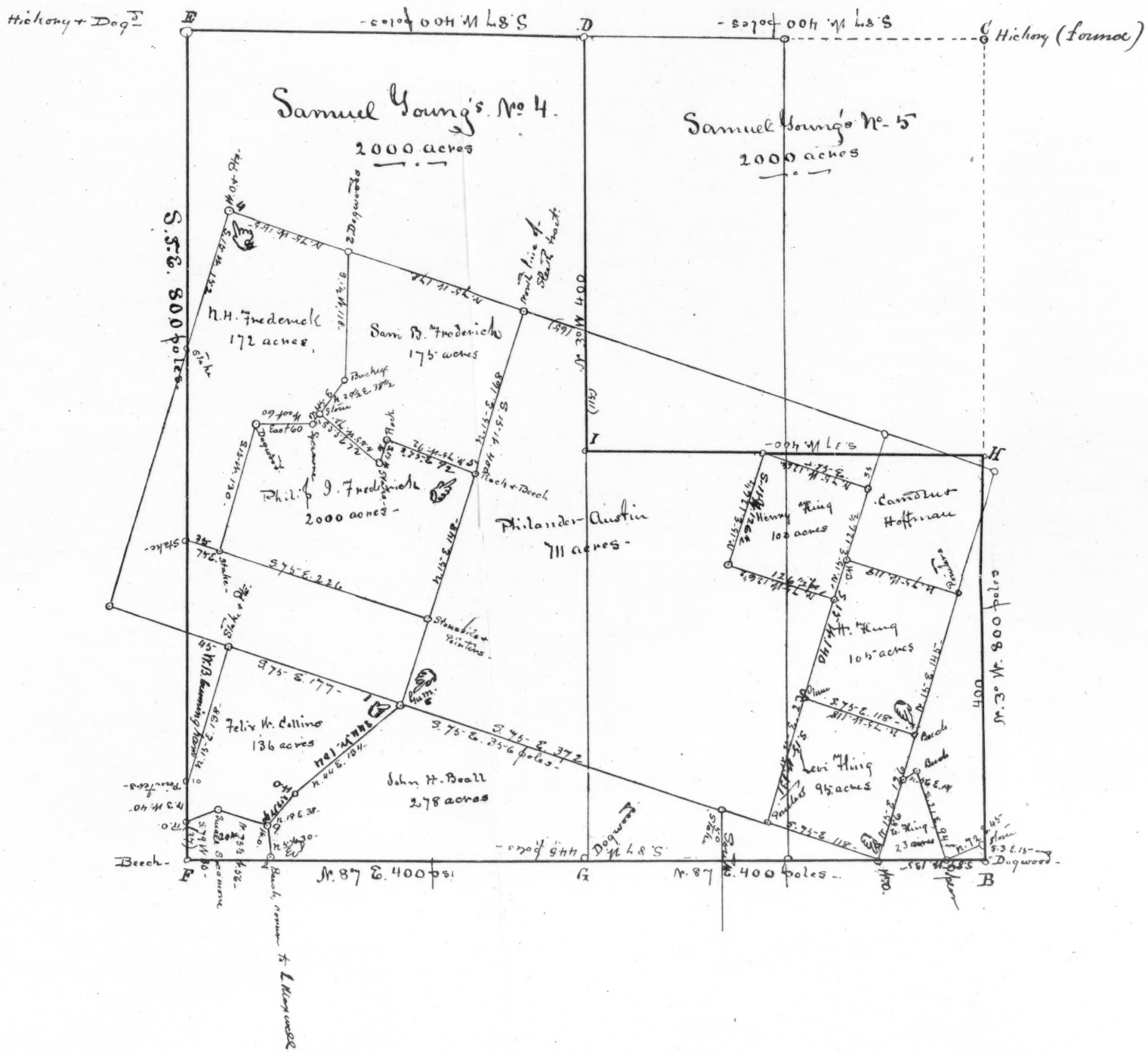
Witnesses;
Jas E. Serrell Jr
Chas H Smith

Inventor;
George Nimmo

No. 152.

Collins et al
vs.
Riley

page 37.



N. W. Riley
vs
Felix Collins
In Ejectment

Respectfully Submitted
John R. Boggess
S. C. Robinson

J. E. Ambrose.

LAMP.

Patented. Oct. 16. 1860.

No. 30,381.

Fig: 1.

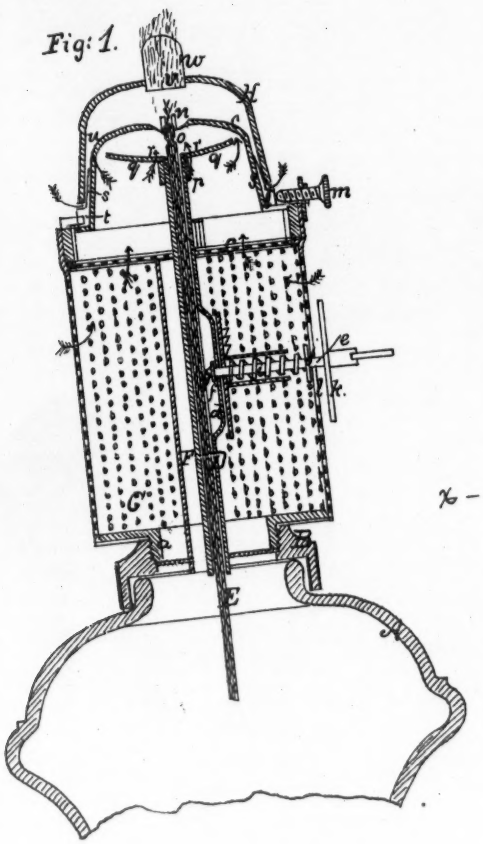
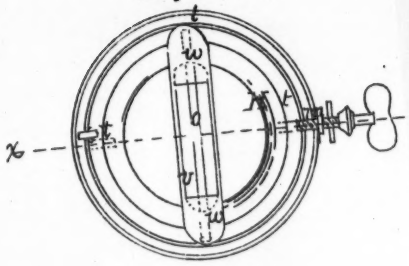


Fig: 2.



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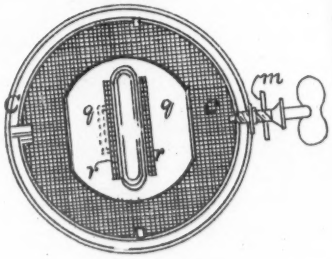

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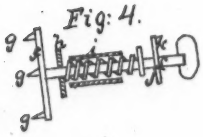

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